

CONTENT OF MOTION: (Continued)

Commissioner Taliaferro moved an amendment to the proposed order to strike Section 5.421(a).

Seconded by Chairman Shane

Commissioner Rhodes - Yes
Commissioner Fischl - Yes
Vice-Chairman Smith - Yes

Vice-Chairman Smith moved an amendment to the proposed order to amend Section 3.44 to require all filings, including requests for expedited hearing, to be filed with the Secretary's Office.

Seconded by Chairman Shane

Commissioner Taliaferro - Yes
Commissioner Rhodes - Yes
Commissioner Fischl - Yes

Chairman Shane moved that the Staff Recommendation, as amended by the previous motions, be adopted as the action of the Commission.

Seconded by Vice-Chairman Smith

Commissioner Taliaferro - Yes
Commissioner Rhodes - Yes
Commissioner Fischl - No

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. <u>REPORT DATE:</u>	June 2, 1988	:	2. <u>BUREAU AGENDA NO.</u>
3. <u>BUREAU:</u>	Law	:	JUN-88-L-20*
4. <u>SECTION(S):</u>	Office of Counsel	:	5. <u>PUBLIC MEETING DATE:</u>
6. <u>APPROVED BY:</u>		:	June 30, 1988
Director:	Delaney 7-5000	:	
Supervisor:	Pankiw 3-3190	:	
7. <u>MONITOR:</u>		:	
8. <u>PERSON IN CHARGE:</u>	Sophy 3-3190	:	
9. <u>DOCKET NO:</u>	L-840097	:	

10. (a) CAPTION (abbreviate if more than 4 lines)
 (b) Short summary of history & facts, documents & briefs
 (c) Recommendation
- (a) Comprehensive Rules of Practice and Procedure as set forth in 52 Pa. Code Chs. 1, 3, and 5.
- (b) The current Rules of Practice and Procedure became effective January 1, 1985. After their initial year of use, the Commission published a request for comments and suggestions regarding possible revisions. Many comments were received and formed the basis for preliminary revisions. Copies of the preliminary revisions and a request for further comments were sent directly to interested parties. Comments were received, reviewed and considered. As a result, the preliminary revisions were modified and the end product is the proposed final revisions to the Rules of Practice and Procedure.
- (c) The Law Bureau recommends that the Commission adopt the proposed Order and Opinion amending the Commission's Rules of Practice and Procedure.

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FOLDER

DOCKETED
JUL 18 1988

11. MOTION BY:	Commissioner Smith	Commissioner Chm. Shane - Yes
		Commissioner Rhodes - Yes
SECONDED:	Commissioner Taliaferro	Commissioner Fischl - Yes

CONTENT OF MOTION: Postponement to July 8, 1988 for further review by the Commission.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Uniform Cover and Calendar Sheet

1. <u>REPORT DATE:</u>	August 12, 1986	:	2. <u>BUREAU AGENDA NO.</u>
3. <u>BUREAU:</u>	Law	:	AUG-86-L-12
4. <u>SECTION(S):</u>	Office of Counsel	:	5. <u>PUBLIC MEETING DATE:</u>
6. <u>APPROVED BY:</u>		:	August 21, 1986
Director:	Hoffman 7-5000	:	
Supervisor:	Delaney 3-3190	:	
7. <u>MONITOR:</u>		:	
8. <u>PERSON IN CHARGE:</u>	Cocheres 3-3190	:	
9. <u>DOCKET NO:</u>	L-840097	:	

10. (a) **CAPTION** (abbreviate if more than 4 lines)
 (b) **Short summary of history & facts, documents & briefs**
 (c) **Recommendation**

(a) Amendment of Commission's Regulations 52 Pa. Code, Chapter 3, Subchapter A, Special Commission Actions, Emergency Relief.

(b) The proposed amendments would institute a procedure which permits consideration of petitions for emergency relief during the pendency of Commission proceedings. The amendments were written to reduce or avoid emergency circumstances by preserving the status quo or by preventing irreparable injury during Commission proceedings.

(c) The Law Bureau recommends that the Commission adopt the proposed regulations in final form.

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SEP 15 1986

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11. **MOTION BY:** CommissionerChm. Taliaferro Commissioner Fischl - Yes
 Commissioner
SECONDED: CommissionerShane. Commissioner

CONTENT OF MOTION: Staff recommendation adopted.

E. C. ...
7/21/88
JK

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120

Statement of Policy Regarding
Recovery of Take-Or-Pay Expense

Public Meeting - July 21, 1988
L-604

L-840097

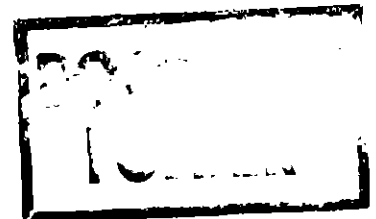
MOTION OF COMMISSIONER JOSEPH RHODES, JR.

Before the Commission is a Law Bureau recommendation to adopt a proposed Statement of Policy concerning the recovery of purchased gas take-or-pay expenses that are expected to be incurred by LDC's in Pennsylvania.

The documents which accompany this recommendation make it painfully clear that the potential liability for these costs represents hundreds of millions of dollars for utilities and ratepayers in the Commonwealth. On an issue of this magnitude, having the potential of such far reaching consequences upon the public, I am not comfortable with adopting the recommended policy, however well-constructed by our Staff, without first receiving the benefit of other opinions. I would anticipate that the Office of Consumer Advocate, other consumer and industry groups, individual ratepayers, and the utilities themselves would welcome an opportunity to be heard on this extremely important matter.

THEREFORE, I MOVE:

1. That an investigation be initiated into the matter of how best to address the potential take-or-pay liability in Pennsylvania.
2. That the proposed Statement of Policy regarding recovery of take-or-pay expense be published in the Pennsylvania Bulletin.
3. That a comment period of ^{SIXTY} ~~thirty~~ (30) ⁶⁰ days be provided, commencing with the date of publication in the Bulletin, whereby any person or party desiring to offer their views on the proposed policy may have the opportunity to do so.
4. That the Office of Special Assistants prepare the appropriate Order.



R-T-AK
S-no

DOCKETED

AUG 11 1988

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
HARRISBURG, PA 17120

Public Meeting Held July 21, 1988

Commissioners Present:

Bill Shane, Chairman
William H. Smith, Vice-Chairman
Linda C. Taliaferro
Joseph Rhodes, Jr.
Frank Fischl, Dissenting

**DOCUMENT
FOLDER**

Revision to Chapters 1, 3 and 5
of Title 52 of the Pennsylvania
Code Pertaining to Practice and
Procedure Before the Commission

Docket No. L-840097

ORDER

BY THE COMMISSION:

In 1984, Chapters 1, 3 and 5 of Title 52 of the Pa. Code were revised and amended in an effort to establish comprehensive practice and procedure rules applicable to Commission proceedings. The revised rules were placed into effect January 1, 1985, but practitioners and interested parties were encouraged to comment on the effectiveness and usefulness of the new rules throughout their initial year of application.

In December 1985, a Commission order requesting comments and suggestions from the general public was published in the Pennsylvania Bulletin. 15 Pa. B. 4589 (Dec. 28, 1985). The comments were solicited to reflect practical experience gained since the rules were implemented and to form the basis for possible revisions to the comprehensive Rules of Practice and Procedure at 52 Pa. Code Chapters 1, 3 and 5. In response to the publication, comments were received from Bell of Pennsylvania; the law offices of Louis J. Carter; the Office of the Consumer

Advocate; Craig A. Doll, Esquire; the law firm of Malatesta, Hawke, McKeon & Morris; the law firm of McNees, Wallace & Nurick; Pennsylvania Gas Association; the law firm of Ryan, Russell & McConaghy; the law firm of Thomas & Thomas; West Penn Power Company; and Commission Staff of the Bureaus of Administrative Law Judges, Law, Office of Special Assistants and Office of Trial Staff. Based on these comments, preliminary revisions to the current rules of practice and procedure were made. The comments were reviewed and considered by the Commission's Procedural Rules Committee (Committee).¹

In March 1988, a finalized version of the preliminary revisions was sent directly to past and present committee members, the Pennsylvania Electric Association, the Pennsylvania Gas Association, the Pennsylvania Telephone Association, the Pennsylvania Chapter of the National Association of Water Companies, the Consumer Advocate and all Commission Bureaus. Because these regulations relate to agency procedures, notice of proposed rulemaking was omitted pursuant to 45 P.S. §1204 (relating to Commonwealth documents). Those receiving the revised rules were asked to review the proposed revisions and submit his or her comments or suggestions. Comments were

¹The committee has been comprised of: Daniel P. Delaney, Chairman, Herbert R. Nurick, Esquire; David H. Radcliff, Esquire; Carroll Purdy; Joseph J. Malatesta, Esquire; Bohdan R. Pankiw, Esquire; Judge Louis G. Cocheres; Joseph Noel, Esquire; Daniel Clearfield, Esquire; Samuel B. Russell, Esquire; H. Kay Dailey, Esquire; David Dulick, Esquire; Charles D. Shields, Esquire; Kathryn G. Sophy, Esquire; Eric A. Rohrbaugh, Esquire; Esquire; and Judge Robert A. Christianson.

received from the Office of the Consumer Advocate; the law firm of Graf, Andrews & Radcliff; the law firm of McNeese, Wallace & Nurick; the law firm of Ryan, Russell & McConaghy; the Pennsylvania Electric Association (PEA); and Commission staff of the Bureaus of the Office of Administrative Law Judges, Law, Safety and Compliance, Transportation, and the Office of Trial Staff. Each and every comment received has been reviewed and considered. Many of the comments have been implemented; some conflicting comments sparked a compromise designed by the Committee. Unlike the sweeping changes of 1984, the current proposed revisions result in only minor changes to the existing rules and will be published as final. Under 45 P.S. §1204 (relating to Commonwealth documents), publication of proposed rulemaking for these revisions is unnecessary. However, the Commission has taken steps, as set forth above, to provide practitioners with adequate notice and to elicit input from those practitioners through two separate comment periods.

Summarized below is a section-by-section explanation of the comments received and the changes made to each section. The Commission wishes to thank all those providing comments and suggestions. The comments received reflected a great deal of time and effort in their preparation.

Chapter 1. Rules of Administrative Practice and Procedure
Subchapter A. General Provisions

§1.2. Liberal construction. A subsection (c) was added giving the Commission or presiding officer authority to waive the requirements of any rule, so long as no party is prejudiced. This subsection is intended to enhance subsection (a) which allows the Commission or presiding officer to disregard an error or defect in procedure, so long as no party is prejudiced.

§1.8. Definitions. A definition of "friendly cross-examination" was added to cover those situations where not all parties are adverse to each other. When a witness is initially examined by an adverse party, subsequent cross-examining parties could use their cross-examination to rehabilitate the witness and bolster or supplement their own position. Later rules provide guidance for the parties in situations where adverse cross-examiners are being double-teamed by the opposition. See Section 5.243.

Several comments addressing "friendly cross-examination" were received. Ryan, Russell & McConaghy, the Pennsylvania Electric Association, and the Consumer Advocate suggested that friendly cross-examination and its subsequent re-cross should be limited to particular issues. Graf, Andrews & Radcliff advocated that friendly cross-examination should be eliminated completely. A Commission staff comment recommended eliminating reference to friendly cross-examination in the rules so that the issue can be determined by the presiding officer on a case-by-case basis.

Traditionally, the Commission has permitted the use of friendly cross-examination in its proceedings. The issue has been addressed in several decisions, the most persuasive of which is Judge Turner's decision at Limerick Unit No. 2, Nuclear Generating Station Investigation, I-840381, July 12, 1985. Judge Turner acknowledged that friendly cross-examination can unnecessarily expand the record of the proceeding and can even subvert the true purpose of cross-examination which is to "confront or challenge evidence against one" Id. at 122 (emphasis in original). On the other hand, practice before the Commission is not as formal as a court proceeding. Administrative proceedings are permitted greater latitude in developing a full and fair evidentiary record. Id. The limits of cross-examination lie within the discretion of the presiding officer and may address matters relevant to direct examination. Id. at 122-23. Finally, by allowing re-cross after friendly cross-examination, both parties are given every opportunity to confront and challenge adverse testimony.

For the reasons stated above, friendly cross-examination will not be prohibited in the rules. Where friendly cross-examination does take place, re-cross may be permitted by the presiding officer. However, the language of §5.243(f) has been revised to limit re-cross to those issues on which there was friendly cross-examination.

The definition of "initial decision" was revised to

conform with current Commission practices and revisions to the Public Utility Code. See 66 Pa. C.S. §331(b) and §332(h).

The definition of "participant" was revised to include the Commission Staff under the Act even when it is not a party. The revised definition also recognizes the status of the newly created Office of Trial Staff. This revision was necessary to accommodate revisions to the Public Utility Code made by the Commission's sunset legislation. See 66 Pa. C.S. §306 and §308(b), (e), (g).

A comment received by Ryan, Russell & McConaghy and concurred in by Pennsylvania Electric Association recommends eliminating the distinction between "party" and "participant" because of the confusion resulting where the rules refer only to "party." Revisions were made which address that concern. Additionally, the term "party" has been replaced by "participant" throughout Chapters 1, 3 and 5. Another comment submitted by Commission staff suggested defining "active participant." This definition was not included in the rules because this term would be better defined by the presiding officer on a case-by-case basis.

The definition of "staff" was revised to recognize the existence of the newly created Office of Trial Staff. See "participants" above.

The definition of "trade secret" was added to protect utilities in an ever-growing competitive environment. This definition will be utilized in later regulations designed to deal

with protective orders and situations where they must be applied.
See Sections 5.362 and 5.423.

Subchapter B. Time

§1.11. Date of filing. This rule was amended to allow for the use of overnight express delivery services. Although one comment from Commission staff opposed the use of overnight delivery services, the Committee determined that the benefits of such services outweigh potential problems. The date of filing would operate in the same way as if using the Postal Form 3817, yet the documents would reach the Commission sooner. Another Commission staff member commented that the U.S. Postal Form 3817 is too cumbersome and should be eliminated as an alternative. The Committee determined that Form 3817 affords the same filing "extension" as with an overnight delivery service but without the expense. By allowing the use of Form 3817, smaller companies and private individuals would not be prejudiced because they cannot afford to send documents via an overnight express delivery service. Some language which had been included in §1.11(b) has been eliminated in response to one comment by a Commission staff member illustrating a conflict between that language and the language contained in §1.11(a)(2). Ryan, Russell & McConaghy and the Pennsylvania Electric Association (PEA) contended that parties should not be prejudiced by the Post Office or an express delivery carrier failing to provide a legible receipt. Whenever timely filing can be established in a manner other than actual

receipt, a risk of uncertainty in determining the actual filing date arises. It is only reasonable that the one to bear the risk of an untimely filing should be the party choosing to file by depositing with the U.S. Mail or an overnight delivery service and not the parties awaiting that filing.

§1.13. Issuance of Commission orders. Subsection (c) was revised to conform to the current Rules of Appellate Procedure.

No comments addressing this section were received.

§1.16 Issuance of decisions [or rulings on exceptions] by presiding officers. This section was revised to comply with recent changes to the Public Utility Code at 66 Pa. C.S. §332(h). Previously, Administrative Law Judges ruled on exceptions filed against initial decisions and appeals were then taken to the Commission. The statutory revisions modified the procedure by requiring the Commission to rule on exceptions to initial decisions.

No comments addressing this section were received.

Subchapter C. Representation Before the Commission

§1.24. Notice of appearance or withdrawal. Subsection (d) has been added to formalize a procedure whereby an attorney may withdraw his appearance in a case.

No comments addressing this section were received.

Subchapter D. Documentary Filings

§1.35. Execution. Derived from Rule 11 of the Federal Rules of Civil Procedure, subsection (c) was revised to emphasize and reinforce the responsibilities and obligations of one subscribing a document filed with the Commission. Experience has shown that the previous rule was less than effective in curbing abuse which ultimately resulted in unnecessary delays and increased costs. By strengthening the language of this subsection, anyone subscribing a document to be filed with the Commission will be held responsible for an inquiry into law and fact before he or she files the document. Through this prefiling inquiry, unnecessary delays and costs will be prevented.

A comment from Graf, Andrews & Radcliff urged imposing sanctions only if abuse of authority to subscribe the document occurs. Although the federal counterpart to this section requires the imposition of sanctions whenever any violation has occurred, the Committee, in response to the comment, softened the impact of this rule by providing that a presiding officer may impose sanctions whenever a violation occurs. Another comment, submitted by a Commission staff member, suggested that the Commission lacked the statutory authority to assess reasonable expenses and attorneys' fees, as originally proposed. Although 66 Pa. C.S. §332(f) supports the Commission's authority to impose fines, the language was changed to expressly conform to the statutory authority as set forth in 66 Pa. C.S. §3301.

Subchapter F. Service of Documents

§1.53 Service by the Commission. It is not uncommon that Commission documents cannot be served on a party because the address on file is not current. Subsection (b) makes it the duty of the parties to keep the Commission informed of all changes of address. Subsection (c) permits service by publication.

Comments received from Commission staff members suggested that the term "participant" should be used in order to apply to applicants as well as respondents. Another comment from a Commission staff member pointed out that the phrase "for this purpose" in subsection (a) is confusing and should be deleted. Both of these changes were made.

§1.56 Date of service. Subsection (a) was amended to permit the use of overnight express delivery systems. Subsection (b) was added as the "mail box" rule. Essentially, if a document which requires an answer or response is mailed to a party, the fact that the mail was used automatically gives the party a three-day extension of time in which to file the response.

As previously drafted, the date of service when using an overnight delivery service would be the date delivered by the carrier. The Office of Consumer Advocate commented that express delivery should be treated the same as U.S. Mail. In response, the wording of subsection (a) was changed to establish the date of service as the date deposited with the overnight delivery service. Another comment submitted by a member of Commission

staff expressed concern that subsection (b) would substantially lengthen the application process in motor carrier proceedings. Although it is conceded that such proceedings could be lengthened, a three-day extension is necessary to avoid prejudicing the responding party whose delivery time for service would drastically curtail the time available to prepare the document.

§1.58. Form of certificate of service. This rule has been amended to ensure that the parties list the names and addresses of all persons served on a certificate of service. The prior rule only required a certificate that service was made. The Office of Administrative Law Judges commented that it is important to list the names and addresses of the parties to whom the document was directed.

The only comment received regarding this rule was from Graf, Andrews & Radcliff praising the additions.

Subchapter G. Matters Before Other Tribunals

§1.61. Notice and filing of copies of pleadings before other tribunals. The revisions to subsection (a) have been designed to clarify the application of the regulations to those persons who are subject to the Public Utility Code.

No comments addressing this section were received.

Subchapter I. Amendments to Withdrawals of Submittals

§1.82 Withdrawal or termination of an uncontested proceeding. The revisions to subsection (a) attempt to clarify which bureau within the Commission is responsible for reviewing petitions for leave to withdraw a document. In situations where a presiding officer has been assigned to a case, it will be the responsibility of the Office of Administrative Law Judge to review the petition and make a decision. If no presiding officer has been assigned, the Office of Special Assistants will make the same evaluation.

A comment by Commission staff suggested that in order to avoid delays, the present language of §1.82 should remain unchanged. The Committee determined that a delay in a termination is not burdensome and the revision will stand. A comment submitted by another member of Commission staff suggested that some of the proposed language was confusing and unnecessary. As a result, this language was deleted without affecting the substance of the rule.

Chapter 3. Special Provisions

Subchapter A. Special Commission Action

§3.1. Definitions. The definition of "emergency" has been revised to accommodate situations where immediate action is necessary in an uncontested matter and no Commission public session has been scheduled. It should be emphasized that in

order to qualify for this standard, the matter must be uncontested and must require action prior to the next scheduled public meeting.

The definition of "interim emergency order" has been revised to dovetail with current procedures for bringing an interlocutory appeal before the Commission. In addition, the definition was broadened to include the denial of injunctive relief as a form of interim emergency order.

A comment by a Commission staff member observed that some of the language in the definition of "emergency order" was redundant. A second Commission staff comment pointed out that the Executive Assistant to the Director of Operations can issue emergency orders. The language of this rule was revised as recommended by both comments.

§3.2. Issuance of Emergency Order.

Subsection (a) had been revised to recognize the existence of the Office of Trial Staff and to ensure that the Office of Trial Staff and the Office of the Consumer Advocate are aware of utility emergencies as they arise. Subsection (c) was added to facilitate expeditious service of all emergency orders.

One comment from a Commission staff member pointed out that the Executive Assistant to the Director of Operations may issue an emergency order and the language of the rule was changed to reflect this. Another Commission staff comment claimed that service on the Consumer Advocate and the Office of Trial Staff

was unnecessary in transportation proceedings. After reviewing this comment, the Committee determined that service on the Office of Trial Staff and the Consumer Advocate was not necessary in all proceedings and hence eliminated the relevant language. Finally, it was suggested by Commission staff that this rule conflicts with Emergency Temporary Authority (ETA) regulations. After reviewing relevant provisions, the Committee determined that 52 Pa. Code §3.12 nullifies any possible conflicts with ETA regulations by expressly providing that Subchapter A does not preempt or modify Temporary Authority and ETA procedures set forth in §§3.383-3.385.

§3.3. Form of emergency order. Subsection (b) has been eliminated because the service provisions more properly belonged under Section 3.2, relating to the issuance of an emergency order.

No comments addressing this section were received.

§3.4. Hearing on emergency order. This rule has been revised to expedite the scheduling of a hearing on an emergency order. Because the Office of Administrative Law Judge sets the hearing schedules, a copy of the petition addressed to the Chief Administrative Law Judge will ensure the petition will be acted upon as quickly as possible. The time in which to hold the hearing has been increased to ten days; experience has shown that five days is an inadequate amount of time. The use of the recommended decision format, instead of an initial decision, will

ensure that the Commission reviews each opinion in the emergency order situation.

One comment submitted by a Commission staff member questioned petitioning the Chief Administrative Law Judge (ALJ) as opposed to the Secretary. As explained above, petitions directed to the Chief ALJ will receive prompt attention from the proper bureau and will be acted upon quicker than if the petition was channeled through multiple bureaus. Another Commission staff comment questioned the propriety of requiring the likelihood of ratification by the Commission to be considered by a presiding officer in a hearing on an emergency order. In response, the relevant language was deleted.

§3.6. Petitions for interim emergency orders.. Subsection (a) was revised to make the language uniform with §3.2(a). Subsection (c) was revised to remove superfluous language. Subsection (d) had been revised to recognize the Office of Trial Staff and to ensure that the Office of Trial Staff and the Consumer Advocate were aware of the issuance of interim emergency orders.

Comments received from Commission staff questioned the rationale behind service to the Office of Trial Staff and the Consumer Advocate and pointed out an inconsistency as to when service to these offices was required. The Committee agreed that service on the Consumer Advocate and the Office of Trial Staff was not necessary and eliminated the language thereby eliminating any inconsistencies as well.

§3.7. Issuance of interim emergency orders. Subsection (c) had been revised to recognize the existence of the Office of Trial Staff and to ensure that the Trial Staff and the Consumer Advocate were aware of the issuance of an interim emergency order.

A comment from a member of Commission staff suggested that in order for the rule to be consistent with §3.4, subsection (a) should include "the likelihood the emergency order will be ratified by the Commission." As stated above, this language was viewed as improper and was eliminated from §3.4, thus eliminating any inconsistency with this section. Another comment from Commission staff observed that some of the language of subsection (c) was superfluous. This language has been deleted.

§3.9. Hearings on petitions for interim emergency orders. This rule was revised to eliminate a redundancy.

No comments addressing this section were received.

§3.10. Commission review of interim emergency orders. The procedure for Commission review of interim emergency orders has proven to be somewhat awkward in the current format. Therefore, subsections (b) and (c) have been deleted in favor of substituting the standardized interlocutory review process. It should be noted that the reference in the proposed subsection (b) to Section 5.305 is actually a cross-reference to a new section of the regulations. Essentially, the new Section 5.305(b) is designed to permit the Administrative Law Judge to certify a

material question for interlocutory review to the Commission upon his own motion and outside the scope of discovery. The reasons for this change will be set forth in more detail for Section 5.305. There is one important point where Section 3.10 differs from Section 5.305; subsection 3.10(a) specifies that no stay will be permitted while the matter is being reviewed by the Commission. As will be noted below for Section 5.305, the question of whether a stay should be continued or revoked is an integral part of the interlocutory review process. Since Section 3.10(a) specifies that no stay of the interim emergency order will be permitted during Commission review, that issue is effectively removed from the procedures in Section 5.305 insofar as they are used in subsection 3.10(a). Therefore, the subsection (b) specifies that the procedures set forth in Section 5.305 will be followed only insofar as they are applicable.

No comments addressing this section were received.

Subchapter B. Informal Proceedings Generally

§3.112. Action on informal complaints. One comment submitted by a member of commission staff maintained that this rule is inconsistent with present practice within the Commission regarding informal complains. Although this rule had not been revised previously, the Committee determined that it should reflect actual Commission practice.

Subchapter H. Forms

§3.551. Official forms. Standard form J - Complaint. Apparently when the current rules were published, the standard form paragraph 4 for the complaint was accidentally omitted. The result has been that not all complaints have included this necessary information.

A comment received from McNeese, Wallace & Nurick pointed out an inconsistency between this rule and §5.22 in that there was no space provided for an explanation of the nature and character of respondent's business. The complaint form has been revised to correct this omission.

Chapter 5. Formal Proceedings.

Subchapter A. Pleadings and Other Preliminary Matters

§5.14. Applications requiring notice. This new section was designed to give guidance to practitioners in the processing of applications. It lists specific instances of when and where publication and a protest period are required. This list provided is not meant to be an exhaustive one, but merely lists some of the more common types of applications and their publication requirements.

Ryan, Russell & McConaghy & PEA commented that this section should clarify that publication in the Pennsylvania Bulletin is effected by the Secretary. Such a clarification is not really necessary because the Pennsylvania Bulletin will

publish for government entities only. Non-government entities will be unable to submit applications directly to the Pennsylvania Bulletin and hence, must go through the Secretary. Graf, Andrews & Radcliff expressed concern over subsection (a)(3) referring to "actual notice" and recommended that the section spell out the type of notice required in each and every type of application. "Actual notice" is used very seldom for applications requiring notice. Traditionally, it has been required only where the number of persons affected by the application is very few. Because of the vast variety of applications and the different factors which may affect the type of publication required, it is not practical to list each and every type of application, no matter how rarely used, and spell out the precise requirements of its publication or other notice requirements. The PEA submitted a separate comment proposing that the Secretary act under §1.51 for applications for exemption under the Pennsylvania Municipal Planning Code. Traditionally, the Secretary acted under §1.51 for all applications. This section was added to give some guidance to practitioners so they may have some certainty as to which applications require notice and what that notice may be. PEA also contends that the requirements of this section are unnecessary and burdensome for routine property transfers. However, routine property transfers, with very few exceptions, may not be made without application to and approval from the Commission under 66 Pa. C.S. §1102. PEA also recommends providing authority for the Secretary to impose a

protest period. Such authority is already provided for in §5.14. Subsection (b) lists exceptions to the rule in its first paragraph; included in these exceptions is the phrase "or as otherwise provided by the Secretary" which gives the Secretary ultimate authority over applications requiring notice.

In response to PEA and Ryan, Russell & McConaghy's request for clarification, a sale and lease-back of utility facility will require publication and a protest period. This is not unreasonable since most sale and lease-back transactions have a substantial financial impact on the utility and therefore the consumers. One recent sale and lease-back transaction involved assets valued at several hundred million dollars.

A comment from Commission staff suggested that each subsection be cross-referenced to applicable Public Utility Code sections. This suggestion was rejected as unnecessary. McNeese, Wallace & Nurick recommended that reference to 66 Pa. C.S. §2704 in subsection (a) be eliminated and that references to 66 Pa. C.S. §§1101, 2503 and 2505 be added. These changes have been made. A Commission staff member suggested that this section be expanded to apply to petitions, particularly petitions regarding the retirement of electric generating units. Petitions can be handled on an ad hoc basis under §1.51 of this title.

§5.22. Contents of formal complaint. The revision to subsection (a) (3) was made to clarify the rule and make it conform to the revision of §3.551 - Standard Form J - Complaint.

No comments were received regarding this rule.

§5.62. Answers seeking affirmative relief or raising new matter. This rule has been amended to make uniform a practice which has not been codified hitherto under the previous rules. The amended subsection is derived from the Civil Rules of Procedure.

By permitting new matter to be raised and a reply to be filed, the initiation of the proceeding is postponed for purposes of 66 Pa. C.S. §332(g). Because the new matter raises new issues which will be addressed in the reply, the proceeding is not deemed to be fully initiated until the reply has been filed or the time limit in which to file a reply has expired.

The only comment regarding this rule was submitted by McNees, Wallace & Nurick and stressed that a provision should be included allowing the filing of replies to any new matter. In response to this comment, subsection (c) was added.

§5.94. Withdrawal of pleadings in a contested proceeding. This rule applies to situations where there is a contested proceeding in progress. It is substantially parallel to the language found in Section 1.82. The revisions were designed to give interested parties the opportunity to object to a petition for withdrawal and to determine which bureau within the Commission, Office of Administrative Law Judge or the Office of Special Assistants, is responsible for reviewing the petition and ruling on its merits.

One comment by a member of Commission staff suggested that the presiding officer should be permitted to direct staff participation in order to protect the public interest. The

Committee determined that it is unnecessary to direct participation in this case because it involves withdrawal of pleadings in a contested proceeding. Another Commission staff comment opined that this rule should not apply to withdrawals of protests to motor carrier applications. Because there is no public interest involved in the withdrawal of protests, the real concern of this comment lies in requiring a petition to withdraw, which was seen as unnecessarily complicating the proceeding. Since it would unduly complicate the rule to exclude motor carrier pleadings, subsection (b) was added to permit an easier and faster filing method for protests only.

§5.101. Preliminary motions. Subsection (b) has been revised to make it clear that preliminary motions and an answer need not be filed where a party chooses to file a motion for more specific pleading instead. Subsection (c) was revised to specify the same time limit for filing motions for more specific pleadings as would be used for filing an answer or other preliminary motions. Subsection (e) was previously revised to eliminate a specific time requirement because the original twenty-day time frame created an unnecessary burden upon presiding officers for the resolution of preliminary motions. Subsection (f) was amended to clarify filing deadlines for amended pleadings subsequent to the granting of a motion to strike. This regulation was derived from Rules 1017 and 1028 of the Civil Rules of Procedure.

The Consumer Advocate and Commission staff submitted comments which expressed concerns over long delays created by

removing the twenty-day time limit of subsection (e). As a compromise, a time limit was again incorporated into the regulation but it was lengthened to thirty days. Another comment from Commission staff suggested that this regulation improperly precludes a participant from questioning jurisdiction later in a proceeding. Jurisdiction is one issue which may be raised at any time during the proceeding. The right to question jurisdiction is not waived by failure to raise the question at the time the answer is filed. Nothing in this section should be read as providing otherwise. Another Commission staff comment focused attention on some confusing language in subsection (a) (3). The language was changed to remove the confusion without affecting the substance of the regulation.

§5.102. Motions for summary judgment and judgment on the pleadings. This section has been amended to clarify the time in which answers to motions for judgment on the pleadings and a motion for summary judgment must be answered. In addition, more guidance has been supplied as to what can be included in an answer to a motion for summary judgment.

A Commission staff comment pointed out that the word "also" in subsection (b)(2) is superfluous and that subsection (c) should specify a written order. This section was revised accordingly.

§5.103. Hearing Motions. Subsection (c) was revised to clarify the time within which an answer or an objection could be filed.

A comment from Commission staff stressed that oral hearing motions should be included in the section. This suggestion was rejected because oral motions should receive an oral response at the time the motion was made. If additional time is needed, the presiding officer may request that the motion be submitted in writing.

Subchapter B. Hearings

§5.201. Notice of proceeding; hearing; waiver of hearing. Under the current system, a hearing is automatically scheduled without a request by the parties. Concern that this procedure has cost the Commission unnecessary time and money prompted revising subsection (a) to require a party to request a hearing or waive his or her right to one.

Graf, Andrews & Radcliff commented that protest periods should be twenty-one days to be consistent with present practice. The language of this section merely provides that protest periods may not be less than fifteen days. A twenty-one day protest period is not precluded. Furthermore, the fifteen-day minimum should not be lengthened because the regulation applies not only to protest periods but also to periods for filing petitions to intervene, complaints and other pleading. A Commission staff comment urged changing the fifteen-day minimum to twenty days. This suggestion was rejected for the reasons stated above. Comments by McNees, Wallace & Nurick and Commission staff pointed out a conflict between this section and §3.381(f) where hearings

are scheduled without a request. Several comments by Commission staff strongly objected to requiring parties to request hearings, claiming the practice would be unfair to billing dispute and termination complainants, would tremendously complicate internal administration and would impinge upon the Commission's statutory authority to decide whether to hold a hearing. In response to the Commission staff and McNeese, Wallace & Nurick comments, the proposed language was eliminated and §5.201 will remain unchanged.

§5.211. Notice of rulemaking proceedings. The current rules seem to require that the Commission hold hearings before adopting regulations. This procedure does not conform to current Commission practices. Hearings are not required. Subsection (c) has been added to clarify the Commission's discretion on whether or not to hold hearings in these matters.

A comment from a member of Commission staff suggested a few changes in the wording of subsections (b) and (c). The changes did not affect the substance of the section and were made to clarify ambiguities.

§5.212. Notice of non-rulemaking proceedings. The Commission has experienced some problems with the occasional protestant who fails to attend the prehearing conference or initial hearing. The result is an unnecessary delay in the application procedure. The addition of subsection (b) gives plain notice that a protestant must be willing to participate in the proceedings and

establish good faith reasons for its position or be subject to dismissal. See Section 1.35 as amended.

A comment received from Graf, Andrews & Radcliff advocated including a provision to permit the presiding officer to excuse attendance upon written request. Such a provision is unnecessary in light of the waiver provision of §1.2 and because failure to attend "may" result in dismissal, thereby giving the presiding officer flexibility.

§5.224. Prehearing conference in rate proceedings. Subsection (2) of the current rules was deleted because it seemed to require a second prehearing conference in all rate cases. The real intent of the rule was to give the presiding officer the flexibility in scheduling any number of conferences which could expedite the proceeding.

No comments addressing this section were received.

§5.242. Order of procedure. The change made to subsection (a) is less strict than that originally considered. Initially, it was contemplated that the rule should be rewritten to limit the parties in their presentation of successive rounds of evidence. However, upon reflection, it was determined that in many cases, the major issues contested do not develop until later sequential rounds of evidence. As a result, the proposed revision is simply a clarification of the current rule.

No comments addressing this section were received.

§5.243. Presentation by [parties and staff counsel] participants. Subsection (a) has been clarified to recognize that limitations may be imposed upon intervenors. Subsection (e) is designed to streamline the hearing procedures somewhat by providing a regulatory basis for excluding repetitive information offered as evidence in this record. Subparagraph (f) has been provided to ensure uniformity in the friendly cross-examination situation. In addition, the Commission wishes to protect the due process rights of those parties who are truly hostile to the position of the witness and has provided a second opportunity to cross-examine the witness after friendly cross-examination has been completed. In those situations, the presiding officer has the flexibility to allow hostile cross-examination to continue on subjects raised during friendly cross-examination and to more adequately protect the rights of the parties.

The PEA commented that the phrase "case-in-chief" as used in subsection (e) is subjective and could cause problems. The term "case-in-chief" is not uncommon and not so subjective as to create any real problems. A comment by a Commission staff member remarked that this section is unduly restrictive by not providing for situations where all participants agree to a change. In such situations, the presiding officer may use the waiver provision of §1.2.

§5.244. [Supporting data for future test year] Reserved. Section 5.244 has been deleted from the procedural regulations. As indicated, the section serves a good purpose but was

mistakenly placed in Chapter 5 of 52 Pa. Code. The section has been moved to Chapter 53 and designated Section 53.56. This will also serve to clarify the fact that the requirements of this subsection, pertaining to the submission of historic test year data in addition to future test year data, apply to all of the supporting data that public utilities are obligated to provide pursuant to Sections 53.51 through 53.55.

No comments regarding this section were received.

§5.252. Transcript corrections. The time limits for correcting testimony transcripts have been lengthened to thirty days. Under the current rules, the existing 15 and 20-day time limits were found to be too restrictive for parties engaged in active litigation.

No comments regarding this section were received.

Subchapter C. Interlocutory Review

§5.301. Interlocutory review generally. The subject of interlocutory appeals has been reviewed closely. The change in subsection (a) of 5.301 is to conform with the Public Utility Code.

No comments regarding this section were received.

§5.303. Commission action on petition for review and answer. Subsection (a) was revised to clarify the various actions the Commission would take in response to a petition for interlocutory review.

A comment from Commission staff suggested applying this section to interlocutory review of discovery matters and certified questions in addition to petition for review and answer, thereby permitting §5.304(d) and 5.305(e) to be deleted. Provisions regarding Commission action is better left in the section governing the specific type of interlocutory review. McNeese, Wallace & Nurick questioned whether the Commission legally can have inaction be a denial when 66 Pa. C.S. §331(e) seems to require the Commission to answer a material question "forthwith." 66 Pa. C.S. §331(e) does not preclude the Commission from interpreting inaction as a denial because the statute is directory in nature and not mandatory.

§5.304. Interlocutory review of discovery matters. Generally, there are two ways in which the Commission reviews interlocutory questions: the first is by petition of the parties, as noted in Section 5.303. The second is by certification of the question by the presiding officer for discovery matters or in situations where the presiding officer has a question to pose for the Commission. Under the current rules, there is no provision for permitting the presiding officer to certify his own question to the Commission. Indeed, although the right exists by statute, it had not been formalized in the regulations. Subsection (d) of §5.304 was revised to clarify the various actions the Commission would take in response to a certified question. Revisions to §5.304 previously included revising its title to apply to all

certified questions. This revision was removed and the title remains unchanged.

Returning the title to its original form was in response to a Commission staff comment that indicated that §5.304 should expressly provide for discovery matters.

§5.305. Interlocutory review of a material question submitted by a presiding officer. Section 5.305 is a new section in the rules. Essentially, it is designed to implement that section of the Public Utility Code which allows interlocutory review of a material question certified by a presiding officer upon his own motion. 66 Pa. C.S. §333(h). The rule was specifically designed to parallel the prior two sections in terms of interlocutory review procedures. In addition, Section 3.10 -- Commission Review of Interim Emergency Orders -- specifically cross-references new Section 5.305 in order to establish the appropriate procedure for reviewing interim emergency orders. It should be emphasized that the interlocutory review of an interim emergency order will not concern the question of whether a stay of the proceedings is necessary because Section 3.10(a) specifies that no stay of an interim emergency order will be permitted while the matter is being reviewed by the Commission. The net result is that the parties need only brief the issues regarding the interim emergency order and not the question of whether a stay should or should not have been placed in the instant proceeding.

McNees, Wallace & Nurick recommended subsection (c) be clarified to read "within 7 days of service of the certification." This change has been made.

[\$5.305] §5.306. Notification by telephone. Section 5.306 formerly had been Section 5.305. On its face, it seemed far broader than the subchapter in which it was found. In addition, other rules had already given presiding officers the discretion to notify parties by telephone when it was absolutely necessary. Finally, assuming that the rule was intended to be applicable in the interlocutory situations only, it failed to direct written confirmation of telephonic notification.

No comments regarding this section were received.

Subchapter D. Discovery

§5.331 Sequence and timing of discovery. Initially, serious consideration was given to changing this rule so that all discovery would be required within the first sixty days of the initiation of a rate proceeding. However, upon reflection, it was determined that many important issues in rate proceedings do not become evident until after the hearings are in progress. Therefore, the revisions have been designed to encourage all counsel to initiate discovery at the earliest possible time. If discovery can be initiated at an earlier stage of the proceedings, hopefully the issues will be identified sooner. The end result should be both better preparation on the part of all participating counsel and either (1) serious consideration of

settlement of a proceeding or (2) expeditious presentation of the evidence.

Commission staff requested clarification as to the applicability of these rules to Office of Trial Staff discovery prior to Commission action on a filing. It is our intention that the time limits set forth in §5.342(d) shall apply to staff data requests and other discovery prior to the initiation of a formal investigation. Moreover, these revised rules shall provide that, unless a presiding officer has been designated, the Chief Administrative Law Judge shall rule on all objections and motions to compel. This will insure that utilities will file timely responses to the data requests made by Commission staff prior to the initiation of a formal Commission proceeding.

It should be noted, however, that the procedure set forth in §5.331(c) applies only to discovery conducted by Commission staff acting in a prosecutory role. Requests for reports, accounting data and other information made by the Commission and its advisory staff shall be responded to as promptly as practicable pursuant to the utility's duty to supply information pursuant to 66 Pa. C.S. §504 and 505.

§5.341. Written interrogatories to a party. The practice of sending a copy of interrogatories to all participants in a case is expensive and unduly cumbersome. This is especially true where many of the participants are not interested in active participation, do not intend to conduct discovery, do not intend to present evidence, and do not intend to present briefs. Most

cases involving multiple parties quickly pare down to a handful of active participants. Those people should receive copies of interrogatories and their answers.

Past practice has demonstrated that the parties have not been uniform in numbering their interrogatories. The systems used by various parties are confusing at best. This section had been amended to require successive, sequential arabic numerals for all interrogatories from each participant. In the vast majority of Commission cases, interrogatories are the preferred method of discovery. The confusing systems utilized by some participants in the past do not lend themselves to easy identification and retrieval of the subject documents. A uniform system is necessary.

Graf, Andrews & Radcliff commented that interrogatories are much abused and should be barred from use in private complaint proceedings. Abuse of the discovery process is a matter that can be addressed and controlled by the presiding officer.

Ryan, Russell & McConaghy praised the new numbering system and recommended that each interrogatory be limited to a single question or request for information. This suggestion was adopted and is now under subsection (d).

The Consumer Advocate and some Commission staff expressed a great deal of dissatisfaction with the new numbering system that had been proposed. Both offices use non-sequential numbering systems, want to continue using such systems and stress

that it is a matter between the parties and should be handled as such. As a compromise, the provision requiring successive, sequential arabic numerals has been replaced by a provision urging participants to use a logical and sequential numbering system.

§5.342. Answers or objections to written interrogatories. As noted above, interrogatories are the most commonly used form of discovery in Commission proceedings. Subsection (a) had been revised in an effort to make it easier to provide the information requested by interrogatories.

Subsection (c) has been revised to reflect the fact that too often parties failed to restate the interrogatory to which their objection is made. The result is that the presiding officer often does not have a copy of the interrogatory which is the subject of the dispute. (This is because there is no requirement that interrogatories be served upon the presiding officer unless directed by the presiding officer.) The revisions to subsection (c) should correct that problem.

With respect to subsection (d), initially, some consideration was given to the idea of changing the time period in which to file objections to interrogatories and to make it uniform with the time period for filing answers to same. Upon reflection, it was determined that, particularly since many of our cases are litigated within tight statutory time frames, there was an important need to know what interrogatories would not be answered without filing a motion to compel. Because

interrogatories are used so frequently, some priority must be given to the resolution of problems which develop between the parties. The Commission notes that the parties have the flexibility to agree to extend the time limit without action from the presiding officer. In addition, the revisions to subsection (d) require that only the active participants need to be served with the responses to interrogatories. Finally, since the presiding officer is not normally served with the interrogatories or their answers, it was necessary to provide that a copy of the restated interrogatories and objections thereto also be served upon the presiding officer.

Subsection (e)(1) was added to clarify the options available to a participant against whom a motion to compel has been filed. The options have been stated in the alternative. Either the participant may file an answer, or they may respond orally, but they may not do both. Subsection (e)(2) recognizes that the previous time restraints were too restrictive upon the presiding officer. The new time restraints will provide the presiding officer with sufficient time in which to address the more complex and novel issues which may be presented.

The Consumer Advocate and Commission staff expressed concern over the proposed changes to subsection (a). Both envisioned long delays where parties would refuse to answer interrogatories or data requests until a prehearing conference is held. As a result, the proposed revision to subsection (a) has been removed and the subsection remains unchanged.

Ryan, Russell & McConaghy and PEA suggested that answers to interrogatories should be admissible if identified by sworn testimony of either the person providing the answer or another qualified witness. This suggestion was rejected because such a rule would be contrary to the general principles of evidence.

McNees, Wallace & Nurick suggested some wording changes in subsection (e)(1) which clarified its meaning. These changes have been made. Commission staff commented that the ten-day limit for ruling on motions should remain unchanged. Because ten days was too restrictive a time frame in many instances, a compromise was fashioned calling for a ruling on motions "as soon as practicable." Another comment submitted by Commission staff claimed the terms "complex" and "novel" in subsection (e)(2) are too nebulous and the rule should provide a twenty-day limit for all issues. The terms "complex" and "novel" are not so nebulous as to create any real problems but are flexible enough to permit a case-by-case determination of whether the issues require more time for a ruling. However, twenty days is a more reasonable time limit than the twenty five days previously proposed and hence was incorporated into the subsection.

§5.343. Procedures in deposition by oral examination. Subsection (a) was revised to allow the parties more time to prepare for depositions or to prepare objections to the same. In addition, service of notice of depositions has been restricted to active participants within the case. Subsection (b) has been

revised to more accurately direct the parties' attention to the appropriate rule subsections. The revision to subsection (e) places a specified time limit upon an organization for serving its designation of deponent names. Subsection (f) has been added to specify the appropriate procedure for objecting to a notice of deposition and to make certain that a non-participant has been made aware of his rights to object to the notice.

No comments regarding this section were received.

§5.344. Approval by presiding officer. Subsection (a) has been revised to reflect the statutory requirements found in the Public Code. 66 Pa. C.S. §333(b)(2). Subsection (b) has been revised to more accurately describe the requirements for granting and denying an application to serve a deposition.

The Consumer Advocate suggested this rule be clarified to insure the ALJ's signed order of disposition be filed with the Commission and served on participants. Such a clarification is unnecessary because in the course of routine internal procedure, the signed order is automatically sent to the Commission's file room and served on the participants.

§5.361. Limitation of scope of discovery and deposition. Subsection (b) was revised to correct a typographical error. Subsection (c) was added to recognize the voluminous quantity of information which is exchanged in the discovery process. There should be no question that it is not helpful to simply specify that the information requested by the interrogatory has been

previously provided. The revision makes it clear that the answering participant must specify where the information can be found.

Graf, Andrews & Radcliff suggested expanding subsection (c) to include information, such as tariffs and annual reports, which has previously been placed on file with the Commission. Subsection (c) refers to information previously supplied to a participant in the discovery process for that particular case and not to information previously supplied to the Commission. To expand this rule would be to invite abuse of the discovery process and to turn Commission files into a discovery warehouse for all individuals and corporations who have submitted documents.

§5.362. Protective orders. Subsection (a)(7) was revised to cross-reference it to the appropriate protective order sections of these regulations.

No comments regarding this section were received.

Subchapter E. Evidence and Witnesses

§5.405. Effect of pleadings. Subsection (c) has been added to streamline Commission proceedings. Subsection (c) permits an uncontested fact to be entered into the record without further action by the parties.

No comments regarding this section were received.

§5.412. Written testimony. Subsection (d) has been revised to correct a typographical error and to clarify the necessary time limits for serving written testimony. Subsection (e) was amended to encourage participants to use a sequential identification system. Subsection (f) has been added to prevent participants from filing their testimony with the Secretary. The new rule requires only a certificate of service to the effect that the testimony has been served upon the parties. It is improper to file the testimony with the Secretary's office. Testimony is meant to be received into evidence during the hearings in the proceedings. No other action will be necessary to insure the acceptance of the testimony, other than a ruling by the presiding officer. Subparagraph (g) has been added to formalize the requirement that two copies of written testimony be given to the court reporter on the day of hearing.

No comments regarding this section were received.

§5.421. Subpoenas. Subsection (b) has been revised to give appropriate notice to a person not a party to the proceedings that a request for subpoena has been made. Persons who are not parties should have the same rights to notice and an opportunity to object as those who are participating in the proceedings. Subsection (c) has been revised to allow service of subpoenas upon participants or their attorneys by mail. After a participant has submitted to the jurisdiction of this Commission, a subpoena is no different than any other pleading which may be utilized during the proceedings.

McNees, Wallace & Nurick and Commission staff suggested minor wording changes that more accurately conveyed the meaning of the rule without affecting it substantively. The suggested changes have been made.

§5.423. Orders to limit availability of proprietary information.

The introduction of competition in the provision of services once provided exclusively by regulated public utilities has given rise to claims that certain supporting data required by the Commission is proprietary or otherwise of a confidential nature. These claims are based on the theory that disclosure to persons outside the Commission could allow a participant's competitors to obtain an unfair and unearned competitive advantage. To deal with this new environment, public utilities have sought and the Commission has granted a series of protective orders on an ad hoc basis to telephone, gas and electric utilities. These protective orders have provided for the disclosure of proprietary information under strict limitations that balance the utility's legitimate interest in non-disclosure with the public's right to examine the basis for a utility's rate increase request or other application. The Commission has also established special procedures in its file room to protect the confidentiality of information subject to a protective order. At this juncture, based upon several years' experience in dealing with claims of confidentiality, regulations have been drafted to regularize the standards and procedures to be followed in granting protective orders and in dealing with the underlying proprietary information. Subsection (a) sets forth

the general standards to be followed in determining whether or not to grant a protective order. The restrictions applicable to information deemed proprietary and subject to a protective order are described in subsection (b). The restrictions, however, specify that prior to issuance of a protective order, the public utility may not refuse to disclose proprietary information to any participant who agrees to treat the information as if it were covered by a protective order. The remaining subsections deal with access to proprietary information by representatives of participants, special restrictions on the release of proprietary information over and above those specified in subsections (b) and (c); and return of the proprietary information at the conclusion of the proceeding.

The Consumer Advocate suggested adding a provision explaining what is not proprietary information. As contained in the rule, proprietary information relates to trade secrets and other confidential information. It is unnecessary and impractical to attempt to include a provision listing everything proprietary information is not. Traditionally, earnings, income and embarrassing information has not achieved proprietary status, and it is the responsibility of the Commission or the presiding officer to determine which information does achieve such status. The Consumer Advocate also contends that a participant should not be permitted to claim data proprietary without an order from the Commission or ALJ. This is the very concern that this section

was meant to address. Subsection (b)(4) has been revised to better address this issue.

Comments were received from Commission staff, Graf, Andrews & Radcliff, and McNeese, Wallace & Nurick vehemently opposing the previously drafted subsection which had required information to be given to any participant until a protective order issues. The pertinent provision, new subsection (b)(4) has been revised to allow the withholding of information so long as the holder files a petition for a protective order.

Graf, Andrews & Radcliff suggested that the party seeking disclosure should be required to demonstrate relevance and materiality in the proceeding. Such requirements are not applicable to discovery where information sought need only be expected to lead to relevant evidence.

A Commission staff member observed that, as previously drafted, subsection (b)(2) seemed to prohibit the use of information covered by a protective order for judicial review. In response, the subsection has been revised. Other comments by Commission staff suggested wording changes, most of which have been made.

A new subsection (b)(3) was added to cover references made about the proprietary information and to ensure the information remains as part of the record.

Subchapter F. Presiding Officers

§5.483. Authority of presiding officers. Subsection (a) has been revised to encourage the presiding officers to limit repetitive evidence on the record.

Ryan, Russell & McConaghy and PEA objected to the partial listing of powers as previously proposed. They suggested the use of the general provisions of 66 Pa. C.S. §331 (b) and §332 (a)(b)(c) and (f). The section has been changed accordingly.

Subchapter H. Exceptions, Appeals and Oral Argument

§5.533. Procedure to except to initial, tentative and recommended decisions. Subsection (a) of the current rule has been deleted to reflect the fact that exceptions are no longer filed with or ruled upon by a presiding officer. This change was codified at 66 Pa. C.S. §332(h). The new subsection (a) has been modified to reflect current Commission practices that exceptions can only be filed to final orders, not to interlocutory decisions. Since the time to rule on exceptions is usually limited, it is important that the parties clearly specify those parts of the record and decisions which form the basis of their exception. Subsection (b) and (c) have been revised to clarify this need for accuracy.

A comment from a Commission staff member suggested that to clarify the desired format for supporting reasons, new subsection (b) should provide that the reason should follow each

specific exception as opposed to placing all reasons at the end of the document. This suggested change was made.

§5.534. [Appeal to the Commission.] Reserved. This section has been deleted in its entirety. Since presiding officers no longer rule on exceptions to their own decisions, the appeal procedure is no longer necessary. These changes have been necessitated by 66 Pa. C.S. §332(h).

No comments regarding this section were received.

§5.535. Replies. Subsection (a) has been amended to delete all passages which referred to the now obsolete appeal procedure. In addition, the Commission has standardized the ten-day reply period except for those cases where the presiding officer or the Commission direct otherwise. It should be noted that the ten-day reply period is often outside the purview of the three-day extension afforded by the mailbox rule. Thus, even if exceptions are served by mail, the replies are still due on the date specified by the presiding officer or the Commission.

A comment from a Commission staff member recommended that exclusion of the mailbox rule to subsection (a) should be stated. In response, a new subsection (b) was added making it clear that the mailbox rule extension may not apply if specific due dates are established by the presiding officer or the Commission. A comment received from McNeese, Wallace & Nurick claimed that this section is unfair to participants at a distance

from the Commission and urged that the mailbox rule be applicable. Under this provision, the presiding officer has the authority to determine when replies must be filed. In situations where a participant is at such a distance as to be prejudiced by the ten-day rule, the presiding officer may lengthen the time frame.

Subchapter J. Reports of Compliance.

§5.592. Compliance with orders prescribing rates. In the recent past, the Commission has experienced various problems associated with the filing of tariffs inconsistent with its final determination in the rate case. See Pa. P.U.C. v. Peoples Natural Gas Co., No. 10 Miscellaneous Docket 1987 (June 30, 1987) (reversed Commonwealth Court stay of PUC order directing that compliance tariffs be filed). So as to minimize such difficulties, the rule has been revised to eliminate any doubt as to the utility's responsibility to comply with the final order. Further, subsection (c) was added to allow the participants the limited opportunity to file exceptions to the new tariff. The exceptions can only deal with the issue of whether or not the tariffs comply with the Commission's final order. Indeed, compliance with the final order is the only issue remaining before the Commission. These exceptions are not to be used as a vehicle to relitigate the issues in the case. Those issues would have been entirely resolved by the Commission's final order. No further pleadings will be permitted. Subsection (d) was added to

the rule to specify that the newly adjudicated rates could not be put into effect until the Commission approved them. It may well occur that, if exceptions are filed, the Commission will allow the rates to go into effect subject to refund pending resolution of the issues raised in the exceptions. However, the Commission must have the opportunity to determine whether or not the new tariffs in fact conform to the Commission's final order. In the process of reviewing the tariff revisions, any pending exceptions will be considered. Also, the term "tariff revision" is intended to cover whatever filing the utility makes to accomplish the rate change, i.e., new tariff, tariff revisions, tariff supplement, etc.

The Consumer Advocate suggested that tariff compliance and supporting data be served on participants at the same time the information is submitted to the Commission. This revision has been made. Commission staff observed that subsection (a) presents some possible conflicts with motor and rail carrier proceedings. The possible conflicts were so minor that no changes were made to address this concern. Commission staff maintained that applicability of this section should not be limited to "general" rate cases or to "increases." Both terms have been removed from subsection (a). Commission staff expressed concern that the rule should provide that a utility is entitled to its rate increase as of the date of the Commission's order, regardless of a delay in approving compliance filing. Such a provision is unnecessary because it addresses substantive

law. Such an entitlement is provided for by statute, as a matter of law. A few minor wording changes were suggested by Commission staff and this section was revised accordingly.

Subchapter K. Appeals to Court

§5.633. Certifications of interlocutory orders. Subsection (a) has been revised to specify procedural compliance with Section 5.103 of these regulations.

No comments regarding this section were received.

Subpart C. Fixed Service Utilities

Chapter 53. Tariffs for Noncommon Carriers

§53.56. Supporting data for future test year. As noted above, Section 5.244 has been moved to Chapter 53 at §53.56.

Unlike the order adopting the current rules, this order provides that the revisions will become effective 30 days after publication in the Pennsylvania Bulletin and will apply to all cases, unless prejudice would occur. The Commission has the authority to promulgate these regulations pursuant to Sections 309-11, 315, 331-35, 501, 701-03 and 1101-03 of the Public Utility Code, 66 Pa. C.S. §§309-11, 315, 331-35, 501, 701-03 and 1101-03 and Sections 201-05 of the Commonwealth Documents Law, 45 P.S. §§1201-05; THEREFORE,

IT IS ORDERED:

1. That the regulations of the Pennsylvania Public Utility Commission, 52 Pa. Code, are amended by:

Adding §§5.14, 5.305, 5.423 and 53.56;

Deleting §§5.244 and 5.534; and

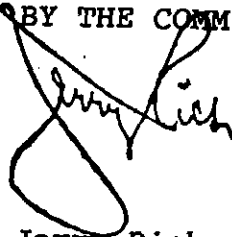
Amending §§1.2, 1.8, 1.11, 1.13, 1.16, 1.24, 1.35, 1.53, 1.56, 1.58, 1.61, 1.82, 3.1, 3.2, 3.3, 3.4, 3.6, 3.7, 3.9, 3.10, 3.112, 3.551, 5.22, 5.62, 5.94, 5.101, 5.102, 5.103, 5.211, 5.212, 5.224, 5.242, 5.243, 5.252, 5.301, 5.303, 5.304, 5.305, 5.331, 5.341, 5.342, 5.343, 5.344, 5.361, 5.362, 5.405, 5.412, 5.421, 5.483, 5.533, 5.535, 5.592, and 5.633, to read as set forth in Annex A.

2. That the Secretary shall submit this order and Annex A to the Office of Attorney General for approval as to form and legality.

3. That the Secretary shall deposit the original certified order and Annex A with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin as final rules pursuant to 45 P.S. §1204 (relating to Commonwealth documents).

4. These rules shall become effective 30 days after publication in the Pennsylvania Bulletin.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Jerry Rich", written over the printed name below.

Jerry Rich,
Secretary

(SEAL)

ORDER ADOPTED: July 21, 1988

ORDER ENTERED: August 5, 1988

ANNEX A

REVISION TO CHAPTERS 1, 3, AND 5
OF TITLE 52 OF THE PENNSYLVANIA
CODE PERTAINING TO PRACTICE
AND PROCEDURE BEFORE THE COMMISSION

Procedural Rules

§1.2. Liberal construction.

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

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

(c) The Commission or presiding officer at any stage of any action or proceeding may waive any requirements of this subpart when necessary or appropriate, provided that such waiver does not adversely affect any substantive right of a participant.

[(c)] (d) Subsection (a) supersedes 1 Pa. Code §31.2 (relating to liberal construction).

§1.8. Definitions.

* * * *

Friendly cross-examination -- Cross-examination of a witness by a participant who does not disagree with the witness' position on an issue.

* * * *

Initial decision -- A decision by a presiding officer which becomes final unless timely exceptions are filed by a [party within a time period specified by statute or set forth in the order] participant, the Commission requests review upon its own motion or otherwise established by the Act.

* * * *

Participant -- A party, Office of Trial Staff prosecutor, Law Bureau staff counsel, [and] or any other person admitted by the Commission to limited participation in a proceeding. Except as otherwise provided in specific provisions of this part, all participants shall have the same rights granted to parties by this part.

Staff -- The [Commission prosecutory] Commission's Office of Trial Staff prosecutor or Law Bureau staff counsel

and other Commission employes participating in a proceeding before the agency.

* * * *

Trade Secret -- Any private formula, pattern, device, cost study or compilation of information which is used in a business and which, if disclosed, would provide the opportunity to obtain an advantage over competitors who do not know or use it.

§1.11. Date of filing.

(a) [Pleadings, submittals or other documents -- including 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) --] Whenever documents (e.g. pleadings, exceptions, etc.) are required or permitted to be filed under this title or by statute , they will be deemed filed:

(1) [o] On the date actually received in the office of the [Commission or] Secretary;

(2) On the date deposited with an overnight express package delivery service as shown on the express delivery receipt attached to or included within the envelope containing the document; or

(3) [o] 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.

U.S. POSTAL SERVICE CERTIFICATE OF MAILING	
Received From:	<small>Affix postage and postmark. Inquire of Postmaster for postage</small>

One piece of ordinary mail addressed to:	

<small>MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE - POSTMASTER</small>	
<small>PS FORM MAY 1976</small> 3817	<small>U.S. Government Printing Office: 489-224</small>

(b) Failure to include a legible delivery receipt with the document may result in an untimely filing.

[(b)] (c) Subsection (a) supersedes 1 Pa. Code §31.11 (relating to timely filing required).

§1.13. Issuance of Commission orders.

(a) In computing a period of time involving the date of the issuance of an order by the Commission, the day of issuance of an order will be the date the Secretary enters the order. An order will not be made public prior to its entry except where, in the Commission's judgment, the public interest so requires. The date of entry of an order may or

may not be the day of its adoption by the Commission. The Secretary will clearly indicate on each order the date of its adoption by the Commission and the date of its entry.

(b) At the time a decision of a presiding officer becomes effective as an adjudication of the Commission in the absence of Commission review as provided for in section 332(h) of the act (relating to procedures in general) the Secretary will issue and serve upon the parties of record an appropriate notice of the date the adjudication became effective as a Commission order.

(c) The date of entry of an order which is subject to review by the Commonwealth Court is governed by [210 Pa. Code Rule 108 (relating to date of entry of orders)] Rule 108 of the Pennsylvania Rules of Appellate Procedure. The date of issuance of [another] any other order shall be deemed to be the date of entry thereof for the purposes of computing the time for appeal under an applicable statute relating to judicial review of Commission action.

(d) Subsections (a) -- (c) are identical to 1 Pa. Code §31.13 (relating to issuance of agency orders).

§1.16. Issuance of decisions [or rulings on exceptions] by presiding officers.

In computing a period involving the issuance of a decision [or ruling on exceptions] by a presiding officer, the day of the issuance [or ruling] shall be the date on which the Secretary mails copies of the decision to the

participants. The Secretary shall clearly indicate on each decision and ruling the date of the mailing.

§1.24. Notice of appearance or withdrawal.

* * * *

(d) An attorney who wishes to withdraw an appearance shall file with the Secretary a written notice of withdrawal. The notice shall be served on all participants and the presiding officer, if one has been designated.

[(d)] (e) Subsections (a)--[(c)] (d) supersede 1 Pa. Code §31.24 (relating to notice of appearance).

§1.35. Execution.

* * * *

(c) Effect. The signature of the person subscribing a document filed with the Commission constitutes a certificate by the individual that he has read the document being subscribed and filed, and knows the contents thereof; that if executed in a representative capacity, the document has been subscribed and executed in the capacity specified upon the document with full power and authority to do so; that [the contents are true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true]

to the best of his knowledge, information, and belief formed after reasonable inquiry the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a document is signed in violation of this rule, the presiding officer or the Commission, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include striking the document, dismissal of the proceeding, and/or the imposition of civil penalties pursuant to 66 Pa. C.S. §3301.

§1.53. Service by the Commission.

(a) Orders, notices, and other documents originating with the Commission, including forms of Commission action and similar process, and other documents designated by the Commission [for this purpose], shall be served by the Commission by mail, except when service by another method shall be specifically required by the Commission, by mailing a copy thereof to the person to be served, addressed to the person designated in the initial pleading, submittal, or notice of appearance at his principal office or place of business. When service is not accomplished by mail, it may be effected by anyone authorized by the Commission.

(b) It is the duty of each Participant to apprise the Commission of all changes in his or her current address.

(c) In the event the Commission is unable to serve a Participant by mail at Participant's last known address, the Commission may at its discretion serve the Participant by publication in a newspaper of general circulation in the same area as the Participant's last known address. In the alternative, service may also be accomplished by publication in the Pennsylvania Bulletin or by service on the Secretary of the Commonwealth, if appropriate.

[(b)] (d) Subsection (a) is identical to 1 Pa. Code §33.31 (relating to service by the agency).

§1.56. Date of service.

(a) The date of service shall be the day when the document served is deposited in the United States mail or with an overnight express package delivery service, or is delivered in person.

(b) Unless otherwise prescribed by the Commission or presiding officer, whenever a participant is required or permitted to do an act within a prescribed period after service of a document upon him and the document is served by mail, three days shall be added to the prescribed period.

[(b)] (c) Subsection (a) [is identical to] supersedes 1 Pa. Code §33.34 (relating to date of service).

§1.58. Form of certificate of service.

(a) The form of certificate of service shall be as follows:

I hereby certify that I have this day served a true copy of the foregoing document upon [parties of record in this proceeding] the participants, listed below, in accordance with the requirements of §1.54 (relating to service by a participant).

(List names and addresses of participants served.)

Dated this _____ day of _____,
19__

(Signature)

Counsel for

(b) Subsection (a) supersedes 1 Pa. Code §33.36 (relating to form of certificate of service).

§1.61. Notice and filing of copies of pleadings before other tribunals.

(a) When [proceedings relating to] matters over which the Commission may have jurisdiction under the act are raised in proceedings filed with a [Federal or State] court or other [public utility] regulatory body by a [party]

person subject to the act, either an appropriate application or petition, or notice of the proceedings and copies of the material pleadings filed therein, shall be filed simultaneously with the Commission in order that it may have sufficient notice and time for proper consideration of the matters within its jurisdiction.

§1.82. Withdrawal or termination of an uncontested proceeding.

(a) A party which desires to terminate an uncontested matter or proceeding before final decision by the Commission or otherwise desires to withdraw a submittal or pleading shall file a [motion] petition for leave to withdraw the appropriate document. If no participant objects to the [motion] petition within 10 days, the matter [will] may be stricken by the Commission or by the presiding officer. If upon review the presiding officer or the Commission determines that the public interest requires continuation of the proceedings, the petition shall be denied and Staff may be directed to participate.

(b) Withdrawal of pleadings in contested proceedings shall be governed by §5.94 (relating to withdrawal of pleadings).

(c) Subsections (a) and (b) supersede 1 Pa. Code §33.42 (relating to withdrawal or termination).

§3.1. Definitions.

The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

Emergency -- A situation which presents a clear and present danger to life or property or which is uncontested and requires action prior to the next scheduled public meeting.

Emergency order -- An ex parte order issued by a single commissioner, the Commission, [or] the Commission's Director of Operations or his Executive Assistant [directly affecting the personal or property rights of a person or corporation and issued] in response to an emergency.

Interim emergency order -- An interlocutory order issued by [an administrative law judge or] a presiding officer which is immediately effective and grants or denies injunctive relief during the pendency of a proceeding.

§3.2. Issuance of emergency order.

(a) To the extent practicable, [an application] petitions for emergency relief shall be in the form of a petition as set forth in §5.41 (relating to petitions generally), shall be supported by an affidavit verifying facts which establish the existence of an emergency and shall be served on all persons directly affected by the application.

(b) In a situation where there is an actual or declared emergency the Chairman, a commissioner, [and] the Commission's Director of Operations and his Executive Assistant have the authority to issue an emergency order.

(c) Emergency orders shall be served as expeditiously as practicable upon all persons directly affected by the order.

§3.3. Form of emergency order.

[(a)] An emergency order shall be issued in writing with copies to commissioners, to the Director of Operations and to the Secretary of the Commission.

[(b) An emergency order shall be served on persons or corporations directly affected by the order.]

§3.4. Hearing on emergency order.

Upon [application] petition by a person [or corporation] against whom an emergency order is issued, an expedited hearing before a presiding officer will be conducted within [5] 10 days to determine whether or not the emergency order will remain in effect. All such petitions shall be served upon the Commission with a copy to the Chief Administrative Law Judge. The presiding officer will take into account the irreparable harm, if any, which staying or continuing the emergency order would cause the public interest or the person [or corporation] directly affected [and the likelihood that the emergency order will be

ratified by the Commission]. If the emergency order is issued by a single Commissioner or the Director of Operations, the presiding officer will have the authority to stay the effect of the order until the next scheduled public meeting. If the emergency order is issued by the Commission, the decision of the presiding officer will constitute [an initial] a recommended decision to be acted upon by the Commission at its next scheduled public meeting.

§3.6. Petitions for interim emergency orders.

(a) [A petition] To the extent practicable, petitions for interim emergency orders shall be in the form of a petition as set forth in §5.41 (relating to petitions generally). Petitions for [an] interim emergency orders may be submitted by a [party] participant at any time during the pendency of a proceeding[. To] and, to the extent practicable, [the petition] shall be supported by affidavits verifying facts which establish the existence of the need for interim emergency relief.

(b) The allegations contained in the petition shall be deemed to have been denied by the opposing parties, and an answer is not required. If a [party] participant desires, an answer in the form set forth in §5.61 (relating to answers to complaints and petitions) may be filed no later than 5 days after receipt of a copy of the petition.

(c) No other pleadings, memoranda or briefs related to a petition for interim emergency orders are permitted unless

specifically requested by the [administrative law judge or] presiding officer.

(d) A copy of the petition shall be served on the chief administrative law judge at the same time the petition is filed with the Secretary and served on the participants.

§3.7. Issuance of interim emergency orders.

(a) [An administrative law judge or] A presiding officer may issue an interim emergency order upon finding that all of the following exist:

- (1) The petitioner's right to relief is clear.
- (2) The need for relief is immediate.
- (3) The injury would be irreparable if relief is not granted.
- (4) The relief requested is not injurious to the public interest.

(b) An order granting or denying interim emergency relief shall be issued within 15 days of receipt of the petition.

(c) An interim emergency order or an order denying interim emergency relief shall be served as expeditiously as practicable on the [parties to the proceeding], participants.

§3.9 Hearings on petitions for interim emergency orders.

No interim emergency order may be issued until the [administrative law judge or] presiding officer holds a

hearing on the merits of the petition. The hearing shall be held within 10 days of the receipt of the petition.

§3.10. Commission review of interim emergency orders.

(a) An order granting or denying interim emergency relief is immediately effective upon issuance by the [administrative law judge] presiding officer. No stay of the order will be permitted while the matter is being reviewed by the Commission.

[(b) The parties may file exceptions in the form set forth in §5.533 (relating to procedure to except to initial, tentative and recommended decisions) to an order granting or denying interim emergency relief within 5 days after the order is issued. No reply exceptions may be filed.

(c) An order granting or denying emergency relief shall be affirmed, modified or reversed by the Commission at the next regularly scheduled public meeting which is more than 13 days after the order was issued by the administrative law judge.]

(b) When the presiding officer issues an interim emergency order, the presiding officer shall also certify the question of the granting or denial of relief to the Commission as a material question in the form set forth in §5.305 (relating to interlocutory review of a material question submitted by a presiding officer). Thereafter, the participants and the Commission shall follow the procedures set forth in §5.305 insofar as they are applicable.

§3.112. Action on informal complaints.

(a) Upon receipt of an informal complaint, except as set forth in Chapter 56 (relating to standards and billing practices for residential utility service), the Commission staff will [transmit a copy or a statement of the substance thereof to each person regarding whom the complaint is made in an endeavor to have it satisfied. The filing or withdrawal of an informal complaint is without prejudice to the right of complainant to file and prosecute a formal complaint.] review the material submitted, and if the matter complained of appears to lie within the jurisdiction of the Commission, perform such additional investigation as may be necessary or proper to corroborate the allegations of the complaint. Upon completion of such review and investigation, the Commission staff may, in its discretion, recommend to the Commission that a complaint upon Commission motion, or other formal action, be taken with respect to the subject matter of the informal complaint.

(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 Chapter 1, Subchapter H (relating to public access to Commission records).] the Commission staff will notify the informal complainant of the results of its review and investigation and of the staff recommendation, if any, to the Commission. The filing or a

withdrawl of an informal complaint is without prejudice to
the right to the complainant to file and prosecute a formal
complaint.

§3.551

J. COMPLAINT

BEFORE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

_____ vs. _____

Complaint
Docket No. _____, 19__

_____ To Pennsylvania Public Utility Commission:

1. The name and address of complainant are _____

2. The name and address of complainant's attorney are _____

3. Respondent utility is _____ providing _____ service to the public.

4. (This paragraph to contain a concise statement of the interest of the complainant in the subject matter, e.g. customer, competitor, etc.)

[4.] 5. (This paragraph to contain a [succinct] concise statement of the subject matter of the complaint.)

[5.] 6. (This paragraph to contain a [succinct] concise statement of the relief sought.)

Wherefore, Complainant prays that respondent may be required to answer the above allegations and that upon a final hearing the Commission will make such order in the premises as may [seem meet] be required.

(Signature of complainant)

(To be attested by affidavit in form prescribed by 52 Pa. Code §§1.35 and 1.36 (relating to execution and verification).)

§5.14. Applications requiring notice.

(a) All applications to the Commission for authority pursuant to 66 Pa. C.S. §§1101, 1102, 2503, and 2505, or as otherwise provided by the act, shall be subject to any one or a combination of the following notice requirements as directed by the Secretary pursuant to Section 1.51:

(1) Publication in the Pennsylvania Bulletin;

(2) Publication in a newspaper of general circulation serving the geographical territory affected by the application;

(3) Actual notification to all parties affected by the application; and/or

(4) Any other form of actual or constructive notification as may be required by the Secretary.

(b) Except as set forth in Sections 3.381 (relating to transportation of property and persons), 3.361 - 3.363 (relating to crossing proceedings), 3.501 (relating to water supply proceedings), and 57.71 - 57.77 (relating to electric transmission lines) or as otherwise provided by the Secretary, application to the Commission for the following types of authority shall be published in the Pennsylvania Bulletin and, as directed by the Secretary, in a newspaper of general circulation serving the geographical territory affected by the application and shall be subject to a 15-day protest period:

(1) To initiate fixed utility service, including but not limited to electric, gas, telephone, water, sewer,

pipeline and radio-telephone common carrier service; to the public;

(2) To initiate in a different nature or to a different territory than is currently authorized, fixed utility service, including but not limited to electric, gas, telephone, water, sewer, pipeline and radio-telephone common carrier service, to the public;

(3) To abandon, in whole or in part, fixed utility service, including but not limited to electric, gas, telephone, water, sewer, pipeline and radio-telephone common carrier service, to the public;

(4) To initiate rail utility service to the public;

(5) To initiate in a different nature or to a different territory than is currently authorized, rail utility service to the public;

(6) To abandon, in whole or in part, rail utility service to the public;

(7) To acquire or transfer tangible or intangible utility property through sale, merger, consolidation, lease or transfer of stock;

(8) To acquire 5% or more of the voting stock of another corporation;

(9) To secure exemption under Article VI, Section 619, of the Pennsylvania Municipalities Planning Code, 53 Pa. C.S. §10619;

(10) To construct, alter or abandon, in whole or in part, or to change the status of any rail utility agency station or team track.

§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, e.g. customer, competitor, etc.

(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, of a statute which the Commission has jurisdiction to administer, or of any regulation or order of the Commission.

(5) A clear statement of the relief sought.

§5.62. Answers seeking affirmative relief or raising new matter.

* * * *

(b) All affirmative defenses shall be pleaded in an Answer or other responsive pleading under the heading of "New Matter." A party may set forth as new matter any other material facts which are not merely denials of the averments of the preceding pleading.

(c) Replies to new matter shall be filed within 10 days of the date of service of the answer or other pleading raising the new matter.

[(b)] (d) Subsection (a) supersedes 1 Pa. Code §35.38 (relating to respondents seeking affirmative relief).

§5.94. Withdrawal of pleadings in a contested proceeding.

(a) Except as provided in subpart (b), [A] a participant desiring to withdraw a pleading in a contested proceeding may file a [notice of withdrawal thereof] petition for leave to withdraw the appropriate document with the Commission and [with all parties to the proceeding] serve it upon participants. The [notice] petition shall set forth the reasons for the withdrawal. [Unless otherwise ordered by the Commission for good cause, the notice shall, 30 days after the filing thereof, be deemed to have effected the withdrawal of the pleading, including amendment.]
Participants may object to the petition within 10 days of

service. After considering the petition, any objections thereto, and the public interest, the presiding officer or the Commission shall determine whether the withdrawal will be permitted.

(b) A protest to an application may be withdrawn by filing a letter directed to the Commission or the presiding officer. The letter shall state that the protest is withdrawn and shall provide the reasons for the withdrawal.

(c) Withdrawal or termination of an uncontested proceeding shall be governed by §1.82 (relating to withdrawal or termination).

[(b)] (d) Subsections (a) - (c) supersede[s] 1 Pa. Code §35.51 (relating to withdrawal of pleadings).

§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 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] that fails to join an indispensable party.

(4) A motion for a more specific pleading.

(b) Except where a motion for a more specific pleading is filed, p [P]reliminary motions shall be filed along with an answer[,] within the time period prescribed by §5.61 (relating to answers to complaints and petitions). All preliminary motions shall be raised at the same time.

(c) [Except where a motion for more specific pleading is filed, answers shall be filed along with preliminary motions.] Where a motion for more specific pleading is filed, no answer need be filed until further directed by the presiding officer or the Commission. A motion for more specific pleading shall be filed within the time period prescribed by §5.61 (relating to answers to complaints and petitions).

(d) An answer to a preliminary motion may be filed within 10 days of date of service.

(e) Preliminary motions shall be decided by the presiding officer or the Commission within [20] 30 days of the filing of the motion.

(f) If a preliminary motion to strike is granted, the [complaining] participant, who submitted the stricken pleading, shall have the right to file an amended pleading within 10 days of service of the order.

(g) Subsections (a) -- (f) supersede 1 Pa. Code §§35.54 (relating to motions as to complaint) and 35.55 (relating to motions as to answer).

§5.102. Motions for summary judgment and judgment on the pleadings.

(a) Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the hearing, a participant may move for judgment on the pleadings. [The opposing participant shall have the opportunity to respond.] An answer to a motion for judgment on the pleadings may be filed within 20 days of date of service of the motion.

(b) Motion for summary judgment. After the pleadings are closed, but within such time as not to delay the hearing, a participant may move for summary judgment based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits. Those documents not already filed with the Commission shall be filed with the motion.

(1) [The opposing party shall have the opportunity to respond within 20 days of service and may present affidavits in response.] An answer including opposing affidavits to a motion for summary judgment may be filed within 20 days of date of service of the motion.

(2) [Affidavits] The answer may be supplemented [or opposed] by pleadings and depositions, answers to interrogatories or further affidavits and admissions.

(c) Decisions on motions. The presiding officer will grant or deny a motion for judgment on the pleadings or a motion for summary judgment, as appropriate. The judgment sought will be rendered[,] if the pleadings, depositions, answers to interrogatories[,] and admissions, together with affidavits, if any, show that there is no genuine issue as to a material fact and that the moving participant is entitled to a judgment as a matter of law. If such a motion is granted, the presiding officer shall do so in the form of an initial decision. As in the case of other initial decisions, the procedures regarding exceptions [and appeal] to the Commission shall apply. If the motion is denied, the presiding officer shall do so in the form of [an] a written order.

§5.103. Hearing motions.

* * * *

(c) Response to motions. A participant shall have 10 days from the date of service within which to answer or object to a motion, unless the period of time is otherwise fixed by the Commission or the presiding officer.

* * * *

(e) Supersession. Subsection (a) is identical to 1 Pa. Code §35.177 (relating to scope and contents of motions). Subsection (b) is identical to 1 Pa. Code §35.178 (relating to presentation of motions), subsection (c) [is identical to] supersedes 1 Pa. Code §35.179 (relating to objections to motions), and subsection (d) supersedes 1 Pa. Code §35.180 (relating to action on motions).

§5.211. Notice of rulemaking proceedings.

(a) Before the adoption of a regulation, the Commission will publish a general notice as provided in 1 Pa. Code Chapter 7 (relating to procedure for adoption or change of regulations).

(b) The order or notice will [state the time and place of the proposed hearing, the nature of the proceeding,] recite the statutory or other authority under which the regulation is proposed to be adopted, and include either the terms of the proposed regulation, or a description of the subjects and issues involved to inform interested persons of the nature of the proceeding, so as to permit interested persons to submit [data, views or proposals] comments relative thereto within the time period required by the act.

(c) The Commission may, upon petition by a person having an interest in the proposed regulations, hold public hearings on the regulations. The petition for hearing shall be in the form as set forth in §5.41 (relating to petitions generally), shall be filed concurrently with the comments,

and shall state the reasons for having a hearing and the person's interest in the proposed regulations.

[(c)] (d) Subsections (a) and (b) supersede 1 Pa. Code §35.104 (relating to notice of rulemaking proceedings).

§5.212. Notice of nonrulemaking proceedings.

(a) The presiding officer, the Office of Administrative Law Judge, or the Commission are authorized to schedule prehearing conferences and hearings. Participants shall be given reasonable notice of the time and place of the prehearing conference or hearing. In fixing the time and place of conferences and hearings, regard will be given to the convenience and necessity of the participants or their attorneys so far as time and the proper execution of the functions of the Commission permit.

(b) Protestants in motor carrier cases must attend the initial hearing or prehearing conference, if one has been scheduled. Failure to attend may result in the dismissal of the protest by the Commission or presiding officer.

[(b)] (c) Subsection (a) supersedes 1 Pa. Code §§35.105 (relating to notice of nonrulemaking proceedings) and 35.106 (relating to contents of notice of nonrulemaking proceedings).

§5.224. Prehearing conference in rate proceedings.

(a) In rate proceedings the presiding officer may schedule all of the following:

(1) A first prehearing conference to establish a schedule for discovery and tentative hearing dates, as well as the matters enumerated in §5.222 (relating to initiation of prehearing conferences in nonrate proceedings).

[(2) A second prehearing conference to consider the possibilities of settlement and the status of discovery.]

[(3)] (2) Other conferences as are deemed necessary.

[(4)] (3) Upon agreement of all the parties, the conferences may be held telephonically.

§5.242. Order of procedure.

(a) In [hearings upon applications, formal complaints, or petitions] proceedings, the complainant, petitioner, or other participant having the burden of proof, as the case may be, shall open and close[,] unless otherwise directed by the presiding officer. In hearings on investigations and in proceedings which have been consolidated for hearing, the presiding officer may direct who shall open and close.

§5.243. Presentation by [parties and staff counsel] participants.

(a) [Parties and staff counsel] Participants , subject to the limitations set forth in §§5.75 and 5.76 (relating to limitations upon intervenors), shall have the right of presentation of evidence, cross-examination, objection, motion, and argument. The taking of evidence and subsequent proceedings shall proceed with all reasonable diligence and with the least practicable delay.

(b) When objections to the admission or exclusion of evidence before the Commission or the presiding officer are made, the ground relied upon shall be stated briefly. Formal exceptions are unnecessary and shall not be taken to rulings thereon.

(c) The presiding officer may require or allow a factual statement of the scope of a pleading or the position of a participant in the proceeding. Facts admitted of record by a participant or by testimony, exhibits, or in writing, need not be further proved.

(d) The Commission or the presiding officer may limit appropriately the number of witnesses who may be heard upon any issue.

(e) No participant will be permitted to introduce evidence during a rebuttal phase which is repetitive or which should have been included in the participant's case-in-chief or which substantially varies from the

participant's case-in-chief unless the evidence is introduced in support of a proposed settlement.

(f) Where a participant conducts friendly cross-examination of a witness, the presiding officer may permit the other participants a second opportunity to cross-examine after friendly cross-examination is completed. Such re-cross shall be limited to the issues on which there was friendly cross-examination.

[(e)] (g) Subsections (a) [and (b) are identical to] - (f) supersede 1 Pa. Code §35.126 (relating to presentation by the parties). [Subsections (c) and (d) supplement 1 Pa. Code §35.126.]

§5.244. [Supporting data for future test year] Reserved.

[(a) In discharging its burden of proof under section 315 of the act (relating to burden of proof), a public utility may submit and use data for a future test year. The submission shall be in addition to, and not in lieu of, 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 the required experienced 12-month period. Estimates for a future test year 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) Where a public utility submits and uses data for a future test year, it shall, during the course of the proceeding, submit for the record the results of its actual experience in the future test year for each quarter starting with the day following the end of the required experienced 12-month period. The results shall be submitted within 30 days of the end of the quarter or as soon thereafter as available.]

NOTE: The above section has been moved to Chapter 53, section 53.56.

§5.252. Transcript corrections.

(a) Corrections in the official transcript may be made only to make it conform to the evidence presented at the hearing and to speak the truth.

(b) No correction of a transcript of testimony will be made except upon either written request within [15] 30 days after the transcript has been filed with the Commission, or upon written stipulation by all participants of record filed within [20] 30 days after the transcript has been filed with the Commission, unless the correction is made at another time upon permission of the presiding officer granted prior to the closing of the record.

(c) Subsections (a) and (b) supersede 1 Pa. Code §35.132 (relating to transcript corrections).

§5.301. Interlocutory review generally.

(a) The Commission will not permit interlocutory review of rulings of presiding officers, made during the course of proceedings, except [upon petition alleging extraordinary circumstances] as permitted by the act and as specified in this subchapter.

(b) Subsection (a) supersedes 1 Pa. Code §35.190 (relating to appeals to agency head from rulings of presiding officers).

§5.303. Commission action on petition for review and answer.

(a) Within 30 days of receipt of the petition by the Secretary, the Commission will, without permitting oral argument, do [one of] the following:

(1) Continue, revoke, or grant a stay of proceedings if necessary to protect the substantial rights of the participants[.] ;

(2) Determine that the petition was improper and return the matter to the presiding officer[.] ; or

[(3) Decline to answer the question.

(4)] (3) Answer the question.

(b) The Commission will act promptly on petitions. Petitions for Commission review and answer which are not

granted within 30 days of filing shall be deemed to be denied.

§5.304. Interlocutory review of discovery matters.

* * * *

(d) Within 30 days of receipt of the certified question by the Secretary, the Commission will, without permitting oral argument, do [one of] the following:

- (1) Continue, revoke, or grant a stay of proceedings[.] ;
- (2) Determine that the certification was improper and return the matter to the presiding officer for resolution[.] ; or
- (3) Answer the question.

§5.305. Interlocutory review of a material question submitted by a presiding officer.

(a) During the course of a proceeding, a presiding officer may certify to the Commission for review and answer a material question which has arisen or is likely to arise. The question shall be accompanied by the following:

- (1) An explanation of the compelling reasons why interlocutory review will prevent prejudice or expedite the conduct of the proceeding.
- (2) A statement as to whether a stay of the proceedings has been placed in effect.

(3) Extracts from the record as will assist the Commission.

(b) A copy of the question certified and the accompanying information shall be sent to all participants at the same time it is submitted to the Commission.

(c) Within 7 days of service of the certification, each participant may submit a brief to the Secretary addressing the merits of the question for which an answer is requested and whether a stay of proceedings is required to protect the substantial rights of a participant. The brief shall not exceed 15 pages.

(d) No additional briefs are permitted unless directed by the Commission.

(e) Within 30 days of receipt of the certified question, the Commission will, without permitting oral argument, do the following:

(1) Continue, revoke, or grant a stay of proceedings;

(2) Determine that the certification was improper and return the matter to the presiding officer for resolution; or

(3) Answer the certified question.

[\$5.305.] \$5.306. Notification by telephone.

Presiding officers may order notification of participants by telephone when [appropriate. Because] time periods [provided in this chapter, Chapters 1 and 3

(relating to rules of administrative practice and procedure and special provisions)] are short and delivery by mail may not prove adequate [in all situations]. Any telephone notification will be confirmed by the presiding officer in writing by giving copies of the subject document to the Secretary for service upon the participants.

§5.331. Sequence and timing of discovery.

(a) A participant or a person who has formally applied to the Commission for participant status may conduct discovery. [Commission staff may initiate discovery at an earlier time but it is subject to the limitation of subsection (b).]

(b) Participants shall endeavor to initiate discovery as early in the proceedings as reasonably possible. In all proceedings the right to discovery commences when a complaint, protest or other adverse pleading is filed or when the Commission institutes an investigation or on the record proceeding, whichever is earlier.

(c) Commission staff may initiate discovery at an earlier time. Commission staff discovery prior to formal Commission action to initiate a proceeding shall be designated as "data requests" and shall be answered fully and completely by the utility within the time periods specified at §5.342(d) (pertaining to interrogatories). Unless a presiding officer has been designated, objections

and motions to compel shall be ruled upon by the Chief Administrative Law Judge.

(d) 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 utility no later than the first day of evidentiary hearings in the proceeding. Discovery directed to other matters shall be available until the close of evidentiary hearings. In all other proceedings, the presiding officer, upon motion of a participant, may establish reasonable limitations upon the timing of discovery.

[(c)] (e) Unless the presiding officer upon motion, for the convenience of participants and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a participant is conducting a discovery shall not operate to delay another participant's 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), a participant may serve upon another participant written interrogatories to be answered by the participant served or, if the participant served is a public or private corporation, similar entity or a partnership or association, by an officer or agent, who shall furnish such information as is available to the participant.

(b) Interrogatories shall not be filed with the Commission. A copy of interrogatories shall be served on all active 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, and 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 under §5.349 (relating to requests for documents, entry for inspection and other purposes).

(d) Each interrogatory should be limited to a single question or request for information.

(e) Participants should use a logical and sequential numbering system for interrogatories.

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

(a) Answers to an interrogatory shall be in writing and each answer shall identify the name and position of the person who provided the answer. Answers shall be submitted as answers and shall not be submitted as exhibits or in another form. Interrogatories shall be answered fully and completely unless an objection is made. The answer shall first restate the interrogatory which is being answered.

(b) Answers may be used by a participant for an appropriate purpose, so far as admissible under the applicable rules of evidence. Answers shall not be offered into

evidence by the participant who provided them, except through the sworn oral testimony of the person who provided the answer.

(c) If objected to, the reasons for the objection to an interrogatory shall be stated in lieu of an answer. Objections shall be prepared, filed and served in the same manner provided for answers, except that objections shall be contained in a document separate from answers as required by the time provisions of subsection (d). Objections shall [identify] restate the interrogatory or part thereof deemed objectionable and the specific ground for the 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 is related to a fact or the application of law to fact. The statement of an objection shall not excuse the answering participant from answering the remaining interrogatories or subparts of interrogatories to which no objection is stated.

(d) The answering participant shall serve the interrogatories and answers within 15 days for rate proceedings, and 20 days after service of the interrogatories for other cases. Time periods may be modified by the presiding officer, on motion or by agreement of the participants. Objections shall be served within 10 days of service of the interrogatories, except as agreed

by the participants or as ordered by the presiding officer. Within the time periods prescribed in this subsection, the answering or objecting participant shall serve copies of the answers [or] and objections, if any, on [other] the active participants and shall file with the Secretary a certificate of service, which shall identify specifically the interrogatories to which answers [or] and objections have been provided. A copy of the objections shall also be served upon the presiding officer. The participant against whom the interrogatories are directed shall remain under a duty to meet the time requirements for answering or objecting to interrogatories or subparts of interrogatories for which the time period for response has not been modified specifically.

(e) The participant submitting the interrogatories may move that the presiding officer dismiss an objection and direct that the interrogatory be answered.

(1) The participant against whom the motion to compel is directed may file an answer within 5 days of service of the motion or, in the alternative, respond orally at the hearing if a timely hearing has been scheduled within the same 5 day period.

(2) The presiding officer shall rule on the motion as soon as practicable; however, the motion should be decided within [10] 15 days of its presentation, unless the [presiding officer proposes and the moving party agrees that the time period be extended.] motion presents complex or novel issues. Then the presiding officer shall, upon notice

to the participants, rule in no more than 20 days of its presentation.

§5.343. Procedures in deposition by oral examination.

(a) A participant desiring to take the deposition of a person upon oral examination shall give [15] 20 days notice in writing to every [other] active participant [to the action] and to the presiding officer. A participant, or witness within the control of a participant, noticed to be deposed shall be required to appear without subpoena. A nonparticipant shall not be required to appear unless subpoenaed.

(b) The notice shall conform with the requirements of the subsections [(c) and (f)] below and of §5.344 (relating to approval by presiding officer) and shall state the time and place of taking the deposition and the name and address of each person to be examined if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(c) The notice shall include a brief statement of the matters to be inquired into.

(d) If the person to be examined is a participant, the notice may include a request made in compliance with §5.349 (relating to requests for documents, entry for inspection and other purposes) for the production of documents and tangible things at the taking of the deposition. If the person to be examined is not a participant, and is to be

served with a subpoena duces tecum to provide designated materials, the notice shall specify the materials to be produced.

(e) A participant may in his notice and in a subpoena, if issued, name as the deponent a public or private corporation, a partnership or association, or a governmental agency. In that event, the organization named shall file within 10 days of service a designation of one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparticipant organization of its duty to make a designation. The person designated shall testify as to matters known^o or reasonably available to the organization. This subsection does not preclude taking a deposition by other procedures authorized in this chapter.

(f) Objections to the notice of deposition may be filed within 10 days of service of the notice. A copy of the objections shall be served upon the presiding officer and the active participants. A notice of deposition which is served upon a nonparticipant must state that the nonparticipant may file objections within 10 days of service and identify the persons (names and addresses) to whom the objections must be sent.

~~[(f)]~~ (g) Subsections (a) - ~~[(e)]~~ (f) supersede 1 Pa. Code §§35.142, 35.145 and 35.146 (relating to subpoenas, depositions and notice and application).

§5.344. Approval by presiding officer.

(a) Notice of the deposition served upon the presiding officer, under §5.343(a) (relating to procedures in deposition by oral examination), shall constitute an application for an order to take a deposition under section 333(b) of the act (relating to prehearing procedures). The copy served on the presiding officer shall have attached a proposed order ~~[contain]~~ containing the following ~~[addendum]~~ language: "Application granted. So Ordered this ____ day of ____." and shall bear a signature line for the presiding officer.

(b) The application shall be granted by the presiding officer, except as provided in ~~[\$]~~§5.324(a)(3) (relating to discovery of expert testimony), or for failure to comply with the requirements of § 5.343~~[(f)]~~ (relating to procedures in deposition by oral examination) or subsection (c), ~~[unless]~~ or if objected to within 10 days ~~[by a participant]~~. The presiding officer will consider timely filed objections and §§5.324(a)(3), 5.343~~[(f)]~~ and subsection (c) before ~~[granting]~~ ruling upon the application.

(c) If a participant provides notice scheduling the taking of a deposition prior to an expiration of 20 days

after initiation of the proceedings, he shall set forth the facts requiring the expedited discovery, and the presiding officer shall consider whether expedited discovery is warranted:

(d) Subsections (a) - (c) supersede 1 Pa. Code §35.147 (relating to authorization of taking deposition).

§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, a person or participant.

(3) Relates to matter which is privileged.

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

(b) In rate proceedings, discovery shall not be limited under subsection (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, or because the discovery request requires that the answering participant make a special study or analysis, [it] if the study or analysis cannot reasonably be conducted by the participant making the request.

(c) If the information requested has been previously provided, the answering participant shall specify the location of the information.

§5.362 Protective orders.

(a) Upon motion by a participant or by the person from whom discovery or deposition is sought, and for good cause shown, the presiding officer may make an order which justice requires to protect a participant or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

* * * *

(7) That a trade secret or other confidential research, development or commercial information shall not be disclosed or be disclosed only in a designated way. Protective Orders to protect or limit this type of information shall be issued in accordance with the procedures in §5.423 (relating to proprietary information protection).

§5.405. Effect of pleadings.

(a) Applications, complaints, orders to show cause, answers and similar formal documents upon which hearings are fixed shall, without further action, be considered as part of the record as pleadings.

(b) [In no event e] Except as provided in subsection (c) and in the case of a non-contested proceeding, [shall the] pleadings, or any part thereof[,] shall not be considered as evidence of a fact other than that of filing thereof unless offered and received into evidence.

(c) Any fact admitted by a participant in an answer, filed under oath, to a numbered allegation in a pleading may be considered as evidence of the fact without the pleading and answer being offered and received into evidence.

[(c)] (d) Subsections (a) and (b) [are identical to] supersede 1 Pa. Code §35.125(d) (relating to order of procedure).

§5.412. Written testimony.

(a) Use of written testimony in Commission proceedings is encouraged, especially in connection with the testimony of expert witnesses. Written direct testimony is required of expert witnesses testifying in rate cases.

(b) Whenever in the circumstances of a particular case it is deemed necessary or desirable, the presiding officer may direct that expert testimony to be given upon direct examination shall be reduced to the form of prepared written testimony. A reasonable period of time will be allowed for the preparation of written testimony.

(c) Written testimony shall be subject to the same rules of admissibility and cross-examination of the

sponsoring witness as if it were presented orally in the usual manner.

(d) [Expect] Except in rate proceedings, cross-examination of the witness presenting written testimony shall proceed at the hearing at which testimony is authenticated if, not less than 20 days prior to the hearing, service of the written testimony is made upon each participant of record, unless the presiding officer for good cause otherwise directs. Unless the Commission by rule or order establishes otherwise, in rate proceedings, the presiding officer will establish the schedule for the filing and authentication of written testimony, and for cross-examination by other participants.

(e) Written testimony shall normally be prepared in question and answer form, shall include a statement of the qualifications of the witness, and shall be accompanied by exhibits to which it relates. Participants offering prepared written testimony shall insert line numbers in the left-hand margin on each page[, in the left-hand margin]. Participants should also use a logical and sequential numbering system to identify the written testimony of each witness.

(f) Written testimony shall be served upon the presiding officer and active participants in the proceeding in accordance with the schedule established by this regulation. At the same time the testimony is served, a

certificate of service for the testimony shall be filed with the Secretary.

(g) At the hearing at which the testimony is authenticated, counsel for the witness shall provide two copies of the testimony to the court reporter.

[f](h) Subsections (a) - [(e)] (g) supersede 1 Pa. Code §35.138 (relating to expert witnesses), §35.150 (relating to scope and conduct of examination) and §35.166 (relating to prepared expert testimony).

§5.421. Subpoenas.

(a) Issuance. Subpoenas for the attendance of witnesses or for the production of documentary evidence, unless directed by the Commission upon its own motion, will issue only upon application in writing to the presiding officer, except that during a hearing in a proceeding, the application may be made orally on the record before the presiding officer, who will determine the necessity of issuing the subpoena. The written application shall specify as nearly as possible the general relevance, materiality, and scope of the testimony or documentary evidence sought, including, as to documentary evidence, specification as nearly as possible of the documents desired and the facts to be proved by them in sufficient detail to indicate the necessity of the documents.

(b) Notice [to adverse counsel]. Each application for a subpoena shall be filed with the Secretary and copies

served by the petitioner upon the [adverse party, with copies to] affected participant, the presiding officer, and all [parties] active participants of record [and the Commission]. The application shall contain a notice that an answer or objection thereto shall be filed [with] by the Secretary and presiding officer within [5] 10 days of service of the application. When the person for whom a subpoena is sought is not a participant to the case, a copy of the subpoena application must be served on the person. When the person for whom a subpoena is sought is not a party to the case, the application shall identify the persons (names and addresses), including the Commission Secretary and presiding officer, to whom the answer or objection must be sent.

(c) Service and return. If service of the subpoena is made by a sheriff, like officer or his deputy, service shall be evidenced by his return thereof. If made by another person, the person shall make affidavit thereof, describing the manner in which service was made, and shall return the affidavit on or with the original subpoena. In case of failure to make service, the reasons for the failure shall be stated on the original subpoena. In making service, a copy of the subpoena shall be exhibited to and left with the person to be served. The original subpoena, bearing or accompanied by the authorized return, affidavit, or statement, shall be returned to the Secretary, or, if so directed on the subpoena, to the presiding officer before

whom the person named in the subpoena is required to appear. Service of a subpoena upon a participant may also be accomplished by mail in accordance with §§1.54 (relating to service by a participant) and 1.55 (relating to service on attorneys).

(d) Fees of witnesses. Witnesses who are subpoenaed shall be paid fees as provided in §5.413 (relating to fees of witnesses).

(e) Supersession. Subsections (a) - (d) [are identical to] supersede 1 Pa. Code §35.142 (relating to subpoenas).

PROPRIETARY INFORMATION PROTECTION

§5.423. Orders to limit availability of proprietary information.

(a) General rule. A protective order to limit the disclosure of a trade secret or other confidential information on the public record shall be issued only when a participant demonstrates that the potential harm to the participant of providing the information would be substantial and that the harm to the participant if the information is disclosed without restriction outweighs the public's interest in free and open access to the administrative hearing process. A protective order to protect trade secrets or other confidential information shall apply the least restrictive means of limitation which will provide the necessary protections from disclosure. In considering whether a protective order to limit the availability of proprietary information should issue, the Commission or the presiding officer should consider, along with any other relevant factors, the following:

(1) the extent to which the disclosure would cause unfair economic or competitive damage;

(2) the extent to which the information is known by others and used in similar activities;

(3) the worth or value of the information to the participant and to the participant's competitors;

(4) the degree of difficulty and cost of developing the information; and

(5) other statutes or regulations dealing specifically with disclosure of the information.

(b) Restrictions.

(1) A protective order to restrict disclosure of proprietary information may require that a participant receive, use or disclose proprietary information only for the purposes of preparing or presenting evidence, cross-examination or argument in the proceeding, or may restrict its inclusion in the public record.

(2) A protective order may require that any part of the record of a proceeding which contains proprietary information including, but not limited to all exhibits, writings, direct testimony, cross-examination, argument, and responses to discovery, shall be sealed and shall remain sealed unless such proprietary information is released from the restrictions of the protective order by agreement of the parties, or pursuant to an order of the presiding officer or the Commission.

(3) Any public reference to proprietary information by the Commission or by a participant afforded access thereto shall be to the title or exhibit reference in sufficient detail to permit persons with access to the proprietary information to fully understand the reference and not more. The proprietary information shall remain a

part of the record, to the extent admitted, for all purposes of administrative or judicial review.

(4) Prior to the issuance of a protective order, a participant may not refuse to provide information which the participant reasonably believes to be proprietary to any participant who agrees to treat the information as if it were covered by a protective order until the presiding officer or the Commission issues such an order or determines that issuance of such an order would not be appropriate. The participant claiming the privilege, however, shall file a petition for protective order pursuant to subsection (a) within 14 days of the date the request for information was received.

(5) Participants receiving proprietary information pursuant to this section retain the right, either before or after receipt of the information, to challenge the legitimacy of the claim that the information is proprietary, to challenge the admissibility of the proprietary information, and to object to the production of proprietary information on any proper ground.

(c) Access to representatives of participants. Proprietary information provided to a participant pursuant to this section shall be released to the counsel and eligible outside expert(s) of the receiving participant unless the participant who is releasing the information demonstrates that said expert(s) or counsel previously has violated the terms of a recent protective order issued by

the Commission. To be eligible to receive proprietary information, said expert(s), subject to the following exception, may not be an officer, director, stockholder, partner, owner or employee of any competitor of the producing participant. An expert shall not be ineligible on account of being a stockholder, partner or owner of a competitor or affiliate unless his/her ownership interest is valued at more than \$10,000 and/or constitutes a more than 1% interest. No other persons shall have access to the proprietary information except as authorized by order of the Commission or of the presiding officer.

(d) Special restrictions. A protective order which totally prohibits the disclosure of a trade secret or other confidential information, limits the disclosure to particular participants or representatives of participants (except as permitted by section (c)) or which provides for more restrictive rules than those permitted in sections (b) and (c) shall be issued only in extraordinary circumstances and only when the participant from whom the information is sought demonstrates that a greater restriction is necessary to avoid severe and extreme prejudice.

(e) Return of proprietary information. A participant providing proprietary information pursuant to this section may request that all participants receiving such information return the information and all copies thereof to the participant at the conclusion of the proceeding, including any appeals taken.

§5.483. Authority of presiding officers.

(a) Presiding officers will have the authority specified in the act, subject to this title. This authority includes, but is not limited to, the power to exclude irrelevant, immaterial or unduly repetitive evidence and to prevent excessive examination of witnesses.

§5.533. Procedure to except to initial, tentative and recommended decisions.

[(a) A participant to a proceeding referred to an administrative law judge under section 331(b) of the act (relating to powers of Commission and administrative law judges) may file exceptions to the initial decision of the administrative law judge within 15 days after the decision is issued. Exceptions shall be served on the administrative law judge, as well as on the participants.

(b)] (a) In proceedings, [not included within subsection (a)] exceptions may be filed by a participant and served within [15] 20 days after the initial, tentative or recommended decision is issued unless some other exception period is provided. No exceptions may be filed with respect to any interlocutory decision.

[(c)] (b) Exceptions shall be stated in specific, numbered paragraphs, shall identify the finding of fact or conclusion of law to which exception is taken and shall cite relevant pages of the decision. Supporting reasons for the exceptions shall follow [the] each specific exception[s].

[(d)] (c) Exceptions shall be concise. The exceptions and supporting reasons shall be limited to 40 pages in length. Statements of reasons supporting exceptions shall, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs. No separate brief in support of or in reply to exceptions shall be filed.

[(e)] (d) An original and nine copies of the exceptions shall be filed with the Commission [under] Secretary pursuant to §1.4 (relating to filing generally) [and in care of the New Filing Section].

[(f)] (e) Subsections (a) - [(e)] (d) supersede 1 Pa. Code §§35.211 (relating to procedure to except to proposed report) and 35.212 (relating to content and form of briefs on exceptions).

§5.534. [Appeal to the Commission.] Reserved.

[(a)] A participant to a proceeding referred to an administrative law judge under section 331(b) of the act (relating to powers of Commission and administrative law judges) may appeal to the Commission, from the ruling of the administrative law judge on the exceptions, within 15 days after the ruling is issued. Except where the presiding officer grants any or all of the exceptions, an appeal shall be limited to a single page. Where the presiding officer has granted any or all exceptions, the appeal shall be in the form required by §5.533(c) and (d) (relating to

procedure to except to initial, tentative and recommended decisions). Issues raised on appeal shall be limited to issues raised by the exceptions and the ruling on exceptions.

(b) In other proceedings, Commission review shall be obtained by the filing of exceptions under §5.533(b) (relating to procedure to except to initial, tentative and recommended decisions).

(c) An original and three copies of the appeal shall be filed with the Commission in accordance with §1.4 (relating to filing generally) and to the attention of the New Filing Section, Room B-18.]

§5.535. Replies.

(a) Each participant shall have the right to file replies to exceptions in all proceedings before the Commission. [Each participant shall have the right to file replies to appeals from rulings on exceptions in which the presiding officer has granted some or all of the exceptions. Replies] Unless otherwise directed by the presiding officer or Commission, replies shall be filed within 10 days of the date [of service of the] that exceptions [or appeal] are due and shall be limited to 25 pages in length and shall be in paragraph form. Replies shall be concise and shall incorporate by reference relevant passages in previously filed briefs.

(b) In proceedings where time is of the essence, the Commission may direct that the provisions of §§1.11(a)(2) and 1.11(a)(3) (pertaining to date of filing) and §1.56(b) (pertaining to date of service) shall not be available to extend the time periods for filing replies to exceptions.

(c) Subsection (a) supersedes 1 Pa. Code §35.211 (relating to replies to exceptions).

§5.592. Compliance with orders prescribing rates.

(a) When the Commission[, after having held hearings,] makes a final decision concerning a [general] rate [increase] filing, as defined at [section 1308 of the act] 66 Pa. C.S. §1308 (relating to voluntary changes in rates), and permits or requires the adoption of rates other than the rates originally filed, the public utility affected shall file, [detailed calculations along with] within 20 days of entry of the final order, tariff revisions [filed under] consistent with the Commission's decision together with a proof of revenues and supporting calculations. The utility shall [also] simultaneously serve copies of the tariff revisions, along with the proof of revenues and supporting calculations, on all [other parties who participated] active participants in the [hearings] proceeding.

[(b) When rates are prescribed by the Commission they shall be promulgated by the public utility affected in published, filed, and posted tariffs, or supplements to

tariffs, and a notice shall be sent to the Commission in the following form:

The order of Pennsylvania Public Utility Commission issued at _____ has been complied with in item _____, page _____, of Tariff _____ Pa. P.U.C. No. _____ or Supplement No. _____ to Tariff _____ Pa. P.U.C. No. _____.]

[(c)] (b) Unless otherwise specified in the order, the tariff [or supplement] revisions shall be effective upon statutory notice to the Commission and to the public and, whether made effective on statutory notice [or less than statutory notice,] or under authority granted in the order, shall bear under the effective date on the title page the following notation:

[Items _____, pages _____, f] Filed in compliance with the order of Pennsylvania Public Utility Commission, [of] entered _____, 19____, at _____.

[(d) When the tariff or supplement contains only the rates ordered, the words "Items _____, page _____" may be omitted.]

(c) Exceptions to tariff revisions pursuant to this section may be filed by any participant to the proceeding within 10 days of the date of service of the compliance filing, and shall be strictly limited in scope to the factual issue of alleged deviation from requirements of the Commission order. The utility making the compliance filing

may respond to exceptions within five days. No further pleadings shall be permitted.

(d) No rates contained in a tariff revision filed in compliance with a Commission order shall be imposed prior to entry of a subsequent order by the Commission approving the compliance filing. Notwithstanding the filing of exceptions, the Commission may allow the compliance rates to become effective.

§5.633. Certification of interlocutory orders.

(a) When the Commission has made an order which is not a final order, a participant may by motion request that the Commission find, and include the findings in the order by amendment, that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal to Commonwealth Court from the order may materially advance the ultimate termination of the matter. The motion shall be filed within 10 days after service of the order, and shall be [subject to] procedurally governed by §5.103 (a) - (c) (relating to hearing motions). Unless the Commission acts within 30 days after the filing of the motion, the motion shall be deemed denied.

(b) Neither the filing of a motion under subsection (a), nor the adoption of an amended order containing the requested finding, shall stay a proceeding

unless otherwise ordered by the Commission or Commonwealth Court.

(c) Subsections (a) and (b) [are identical to] supersede 1 Pa. Code §35.225 (relating to interlocutory orders).

NOTE: The following section shall be added to Chapter 53:

§53.56. Supporting data for future test year.

(a) In discharging its burden of proof under section 315 of the act (relating to burden of proof), a public utility may submit and use data for a future test year. The submission shall be in addition to, and not in lieu of, 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 the required experienced 12-month period. Estimates for a future test year 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) Where a public utility submits and uses data for a future test year, it shall, during the course of the proceeding, submit for the record the results of its actual

experience in the future test year for each quarter starting
with the day following the end of the required experienced
12-month period. The results shall be submitted within
30 days of the end of the quarter or as soon thereafter as
available.