

# RULES AND REGULATIONS

## Title 52—PUBLIC UTILITIES

### PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CHS. 1, 3 AND 5]

[L-00020156]

#### Practice and Procedure Before the Commission

The Pennsylvania Public Utility Commission, on December 15, 2005, adopted a final rulemaking order revising and updating the Commission's rules of practice and procedure.

##### *Executive Summary*

Periodically the Commission reevaluates its procedural rules to ensure that they reflect the Commission's current policies and the current state of the law.

On September 12, 2002, the Commission issued an Advance Notice of Proposed Rulemaking to solicit comments from interested persons regarding possible changes and development of the Commission's procedural rules.

On October 30, 2004, the *Pennsylvania Bulletin* published the Commission's Order and Annex of proposed amendments at 34 Pa.B 5895. The Order established a 60-day deadline for Comments following publication in the *Pennsylvania Bulletin*. The Comment period expired on December 28, 2004. The Commission received nine sets of comments and additionally incorporated the views of individual Commission Bureaus in evaluating possible changes.

From December 2004 through December 2005, the Commission reviewed the proposed amendments and comments. On December 15, 2005, the Commission adopted an Order and Annex establishing final regulations. The Commission entered a final Order and Annex on January 4, 2006.

The final regulations accomplish a number of Commission objectives. First, the final rules abandon the proposal to allow electronic filing until development of an electronic filing capability at the Commission. Second, the final rules develop or expand definitions in response to comments of the parties and the Independent Regulatory Commission (IRRC). The final rules reorganize the procedural requirements to be more reader friendly and easier to navigate. Fourth, the final rules make a number of ministerial changes, such as shortening or lengthening time periods for filing various documents and changing terminology, to be more consistent with modern practice and the Pennsylvania Rules of Civil Procedure. Finally, the Commission abandoned proposals to use forms in lieu of regulatory requirements, particularly with regard to water applications and security transactions, in response to comments. Taken together, the combination of changes and continuation of existing practices provide for more efficient practice and procedure before the Commission.

##### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on October 15, 2004, the Commission submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 5895 to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Consumer Affairs and the Senate Committee on Consumer Protection and Professional Licensure for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on March 20, 2006, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 21, 2006, and approved the final-form rulemaking.

Public Meeting held  
December 15, 2005

*Commissioners Present:* Wendell F. Holland, Chairperson; James H. Cawley, Vice Chairperson; Bill Shane; Kim Pizzingrilli; Terrance J. Fitzpatrick

*Final Rulemaking for the Revision of Chapters 1, 3 and 5 of Title 52 of the Pennsylvania Code Pertaining to Practice and Procedure Before the Commission;*  
Docket No. L-00020156

#### Final Rulemaking Order

*By the Commission:*

On September 12, 2002, the Commission adopted an Advance Notice of Proposed Rulemaking Order announcing our intention to revise the Commission's rules of practice and procedure, 52 Pa. Code Chapters 1, 3 and 5. We noted that the rules were last revised in 1996, and that since then the Commission's jurisdiction and responsibilities have changed significantly. We stated our intention to solicit input regarding proposed revisions and our commitment to carefully consider the views of all interested persons prior to taking any formal action.

On May 10, 2004, we entered an Order and Annex A. The Order contained an explanation for the proposed revisions. Annex A contained the proposed regulations.

On October 30, 2004, the *Pennsylvania Bulletin* published our Order and Annex A at 34 Pa.B. 5895. The Order established a 60-day Comment period following publication in the *Pennsylvania Bulletin*. The Comment period expired on December 28, 2004.

We thank the following for their comments to our proposed revisions: The Office of Consumer Advocate (OCA comment), the Office of Small Business Advocate (OSBA comment), Ryan, Russell, Ogden & Seltzer on behalf of Metropolitan Edison Company, Pennsylvania Electric Company, and Pennsylvania Power Company (Ryan comment), the Department of Environmental Protection (DEP comment), and Saul Ewing on behalf of the Practitioners' Group, a group of seasoned, respected, and experienced attorneys appearing before the Commission on multiple utility matters (the Utility Bar comment). On January 15, 2005, Thomas, Thomas, Armstrong, and Niessen submitted a comment (Thomas comment). The Independent Regulatory Review Commission (IRRC) submitted comments on January 28, 2005 (IRRC comment).

The language of the final regulations contained in Annex A reflects our resolution of these varied comments. The Order explains the reasoning for the final regulations.

The first part of the Order contains a general summary of the important changes to the regulations. The second part contains a regulation by regulation summary of the proposed regulation, the comments, and the Commission's reasoning and disposition reflected in the final regulation. Annex A reflects the final regulations.

A number of important general considerations guided the Commission when considering the merits of each comment. While recognizing that the final rules should be thorough and comprehensive, we seek to avoid making them unnecessarily lengthy and have therefore elected not to create a particular, narrowly-focused rule to address every possible situation that might arise in a proceeding.

Other considerations include an intention to avoid unduly restricting a presiding officer's ability to conduct hearings, to make rulings that resolve factual circumstances, and to make credibility determinations on a case-by-case basis. The Commission also wanted to ensure that the final rules are not unduly burdensome and strike the appropriate balance between the interests of pro se individual complainants, statutory parties, intervenors and involved utilities, jurisdictional or otherwise.

### Summary of Changes

#### *Summary of Major Ministerial Changes*

The term participant is replaced with the term party throughout the regulation. This change ensures that those who wish to appear before the Commission do so consistent with Pennsylvania law and Commission procedure based on standing as a party. This final change eliminates any uncertainty associated with the term participant. Each Section in which this is the only change is noted in the Annex below.

The word Prothonotary is changed to Secretary wherever it appears. This change reflects the absence of a Prothonotary at the Commission. The duties assigned to the Prothonotary are now assigned to the Secretary. This change aligns the Commission's rules with our structural practice and enabling statute set forth at Section 305(b) of the Public Utility Code, 66 Pa.C.S. § 305(b).

Executive Director is changed to Director of Operations throughout the Commission's rules. This change reflects the statutory language set forth in Section 305(a) of the Public Utility Code, 66 Pa.C.S. § 305(a). The Director of Operations has the responsibilities of the former Executive Director. This change aligns our practice with the enabling statute.

#### *Summary of Major Substantive Changes*

In addition to the ministerial changes set forth above, the Commission made some adjustments on important issues between the version set forth in the Proposed Regulations and our Final Regulations. These major changes, set forth in Annex A, are briefly presented here given their importance as reflected in the comments.

*Electronic Filing.* The Proposed Regulations added language that would permit electronic filing in the future. IRRRC questions the wisdom of developing electronic filing requirements in advance of securing the funding and implementing an electronic system. The IRRRC suggested addressing those requirements at a later date. The General Assembly subsequently approved funding for the Commission's electronic network. That system is under development.

We agree with IRRRC that adoption of regulations governing electronic filing is inadvisable at this time. The

final regulations delete any detailed reference or discussion of electronic filing. The final regulations do allow the parties, as opposed to the Commission, an option to use electronic service among themselves when they agree it is appropriate. The Commission does not permit electronic filing even as an option because the Commission is not presently equipped to accept electronic filing.

*Section 1.8 Definitions.* The Proposed Regulations contained no detailed definitions for many terms in the proposed rules. IRRRC urged the Commission to develop definitions for adversarial proceedings, nonadversarial proceedings, informal proceedings, agency, political subdivision, and government entity. In response to these comments, the Commission has developed definitions and rules for many additional terms.

However, some terms are governed by statutes and court precedent. Reliance on a statute or reference for a definition requires revision of the definition if the statute or caselaw change. For that reason, the Commission did not develop definitions for terms that depended on a statute or caselaw. The Commission has, and will continue to, incorporate statutory or judicial changes in undefined terms using incorporation by adoption instead of amendment given the cost differential.

The Commission did, however, develop many of the definitions IRRRC requests. This includes definitions for non-adversarial proceedings and informal proceedings.

*Section 1.24. Notice of Appearance or Withdrawal and Telefacsimile Transmittals.* The proposed regulation did not allow multiple appearances by a party represented by more than one attorney. The comments suggest that all attorneys listed on an initial pleading be considered attorneys of record and that parties be allowed to file using telefacsimile transmittals.

The Commission rejected the suggestion for multiple service on more than one attorney. The vast majority of proceedings before the Commission involve pro se litigants without counsel. Multiple appearances by a party represented by more than one attorney typically occur in high-profile or costly proceedings like rate cases. Multiple service requirements will increase the cost and burden of service on the Commission. This invites the submission of more pleadings raising, and resources devoted to deciding, claims of defective or imperfect service. This also requires more staff and resources than is the case today when the only apparent benefit seems to be the private litigant's ability to shift the cost and burden of duplication and service to the Commission even though those costs are recovered in assessments and rates.

*Section 3.501 Application Requirements for a Certificate of Public Convenience for a Water Supplier or Wastewater collection, treatment or disposal provider.* The Proposed Regulation eliminated the requirements imposed on an applicant seeking a Certificate of Public Convenience as a new or existing but uncertificated water supplier or wastewater collection, treatment, or disposal provider. The final regulation restores the existing requirements and meshes our enabling statute and regulations with those of the DEP.

The final regulation also formalizes the Commission's authority to reject nonconforming filings. The final regulation includes existing but uncertificated utilities. The final regulation in § 3.501(a)(2)(vi) requires an applicant to provide a Map of Service Area including the County Comprehensive Plan, Municipal Comprehensive Plan, and Zoning Designations if requested. An applicant letter is required to address compliance with the applicable re-

quirements of these plans pursuant to § 3.501(a)(7) regardless of whether the Commission requests a copy of these voluminous documents. Section 3.501(b) provides additional considerations that the Commission will consider and may rely on. This includes Comprehensive Plans, Multimunicipal Plans, Zoning Ordinances and Joint Zoning Ordinances reflecting the Municipalities Planning Code. This reflects our agreement with IRRC and DEP about important considerations that should be considered when evaluating an application.

Sections 3.501(c) through (f) expand and retain the Commission's existing notice and publication requirements. Section 3.501(d) restores the existing 60-day notice and protest period as well as the requirement of daily publication for two weeks in a newspaper of general circulation located in the territory covered by the application. Section 3.501(f) restores service on the Office of Consumer Advocate and expands notice or service to include the statutory advocates, the central and regional office of the DEP, any utility or municipality within one mile or abutting an application's service territory, and customers of an initial or existing utility without a certificate.

Finally, the Commission retains an option to develop forms for purposes of § 3.501. The Commission believes this will make it easier for an applicant to obtain Commission authority although the final regulation establishes a process for development of any forms. This reflects comments asking the Commission to provide notice and an opportunity to provide input.

*Sections 5.14 and 5.53. Applications Requiring Notice and Protest Period.* The proposed regulation eliminated the list of applications subject to notice and publication in the existing regulation. The final regulation retains the existing list in response to comment. The final regulation at § 5.14(a) also requires publication of applications in the *Pennsylvania Bulletin*. The final regulation at § 5.14(b) details additional publication requirements.

The final regulation in § 5.14(c) provides that protest periods are governed by § 5.53, which, in turn, states that the protest period is governed by publication of the application. Sections 5.14(c) and 5.53 together establish a 60-day default period for those situations where publication inadvertently fails to establish a protest period. This default rule is tantamount to the general rule suggested in the IRRC comments.

The final regulation at § 5.14(d) restores and reinstates the list of applications subject to notice and publication in § 5.14(b) of the existing regulation. This responds to comments, particularly those of the Utility Bar, about retaining the list for certainty, clarity, and predictability. The final regulation at § 5.14(d) retains the existing protest periods. These are 15-days for the applications set forth in the list and 30-days for more complex applications. The Commission does so because applications range from basic transportation applications of small businesses seeking market entry to the complex applications of multiple service providers in other utility industries.

*Section 5.24: Satisfaction of Formal Complaints.* The proposed regulation established procedures allowing a complainant or respondent to submit proof of the satisfaction of formal complaints. The comments were concerned about a regulation that allowed a party to claim satisfaction without proof such as a written statement.

The final regulation for § 5.24(a) requires a complainant to file a certified statement of satisfaction. In the alternative, § 5.24(b) allows the respondent to file a

certified writing of satisfaction provided the complainant acknowledges satisfaction to the respondent or the complainant acknowledges that they are not pursuing the matter. If the alternative satisfaction of § 5.24(b) is taken, the respondent must simultaneously serve the complainant a copy of the certified writing filed with the Commission. The complainant must also be provided a statement informing the complainant of their right to object in writing within 10 days. The docket is closed after 10 days unless the complainant objects in writing under § 5.24(c).

*Sections 5.62 and 5.63: Answers seeking affirmative relief or raising new matter.* The proposed regulation contains no requirement that answers raising new matter contain a notice to plead. The comments suggest that a notice to plead be specified in a new matter given that failure to file a timely reply is deemed a default and facts stated may be deemed to be admitted. The § 5.63(b) ramifications of not responding within the time period set forth in § 5.63(a) provide sufficient notice.

The Commission disagrees with this suggestion. A Notice to Plead requirement may be appealing because it might better inform the recipient of an obligation to file and answer. However, this well-intentioned procedural suggestion actually erects another procedural hurdle for dismissing otherwise valid pro se matters on grounds unrelated to the substantive issue. Dismissal of pro se complaints for failure to comply with a Notice to Plead undermines the value these complaints play in warning the Commission about possible utility service problems. Moreover, a disgruntled complainant can always file another complaint and that would require the expenditure of resources addressing a matter that could have been just as easily addressed in the first complaint. Finally, large respondents with seasoned or multiple numbers of attorneys need not be advised of the well-appreciated ramifications of failing to respond. Given these considerations, the Commission declines to require a Notice to Plead.

*Sections 5.74: Filing of Petitions to Intervene.* The proposed regulation established a uniform deadline for a private party's Petition to Intervene as well as a Notice of Intervention filed by the OTS, OCA, and OSBA.

In response to the comments, the final regulation distinguishes between a private party's Petition to Intervene and a statutory advocate's Notice of Intervention or Right of Participation. A Petition to Intervene is subject to express time limits although they can be set aside for good cause shown. A Notice of Intervention or Right of Participation, on the other hand, are not subject to an express time limit although a party making such a filing after expiration of the time period takes the record as the party finds it absent extraordinary circumstances. This approach reconciles the need for reasonable intervention limits with the statutory advocate's rights.

*Section 5.101. Preliminary Objections.* The proposed regulation substituted the phrase "preliminary objection" for the existing "preliminary motion" and deletes the requirement that all preliminary objections be filed at once.

The final regulation uses preliminary objection in place of preliminary motion. The final regulation also requires a party to serve all preliminary objections at one time. The final regulation retains the Commission's existing prohibition against the filing of a motion or preliminary objection in response to a preliminary objection. The final regulation requires a response to a preliminary objection within 10 days.

The response time period, the requirement to raise all preliminary objections at once, and a prohibition against preliminary objections in response to a preliminary objection should discourage dilatory pleading. This also reduces administrative costs for all parties given that such costs are, in the end, reflected in assessments and rates.

*Section 5.342: Answers or objections to written interrogatories by a party.* Section 5.342(a) imposes verification of answers in accord with Section 1.36. Section 5.342(c) governs objections. Section 5.342(d) imposes a 15-day period for answers in rate cases and a 20-day period for nonrate cases. This facilitates compliance with the statutory requirement in section 332(g) of the Public Utility Code. This also addresses concerns about an inconsistency between the general rule in § 5.342(d) and the additional rule in § 5.342(d)(1) of the proposed regulation. Section 5.342(e) of the final regulation establishes a 10-day period for filing objections regardless of the nature of the proceeding.

### Detailed Discussion of Regulatory Changes

#### Chapter 1. Rules of Administrative Practice and Procedures

##### Sections 1.2, 1.3, 1.4, and 1.7.

The proposed regulation makes ministerial changes concerning the name Secretary, the Commission's address, the location of the Commission's normal meeting place, and the use of the Commission's website. There were no objections to these ministerial changes. The final regulation makes the changes consistent with Commission practice and provides a liberal construction of the rules for pro se litigants.

##### Section 1.8 Definitions.

The proposed regulation updated definitions in Section 1.8. There are updated definitions for "individual" to distinguish between the legal term "person" and a human being. "Mediation" was defined given the important role it plays at the Commission. The proposed regulation also defined "verification" while "party" replaced "participant" throughout the regulation.

There were several comments. IRRC expressed concern about using undefined terms. These terms are "adversarial proceedings," "nonadversarial proceedings," "informal proceedings," "agency," "political subdivision," and "government entity." IRRC believes the regulation would be improved by defining these terms. IRRC suggests cross-referencing definitions used elsewhere in the statute or regulations.

The final regulation reflects agreement with IRRC that a definition for nonadversarial proceedings is appropriate. The final regulation defines "nonadversarial proceedings" in order to distinguish those proceedings and other proceedings that may be subject to the prohibition against ex parte communications for contested "on the record" proceedings in 66 Pa.C.S. § 334(c). In this regard, the Commission may, in its discretion, designate a particular proceeding as adversarial and subject to ex parte prohibitions if warranted by the circumstances. The final regulation also reflects agreement with IRRC that a definition for informal proceeding is needed.

The final regulation does not define "agency" or "political subdivision" or "government entity" as suggested by IRRC. Defining these terms beyond the definition already provided by the regulations would require the Commission to amend the regulations whenever the cross-referenced definition is amended, revised, or addressed in the courts. The Commission prefers to incorporate legisla-

tive or judicial changes in practice instead of regulatory amendments. Other comments asked the Commission to distinguish between "active" and "inactive" parties in the regulations. The Commission declines to do that given the fact that this determination is better made on a case-by-case basis and not in a general regulation. The final regulation deletes the attempt to differentiate between "active" and "inactive" parties by referring only to parties in the final regulation.

The Commission agrees with other comments seeking clarification of terms. The final regulation adopts definitions for the terms "electronic mail," "formal complaint," "formal investigation," "formal proceeding," "friendly cross-examination," "informal complaint," "informal investigation," "informal proceeding," "mediation," "mediator," "person," "pleading," "Secretary," "Statutory Advocate," "submittal," "telefacsimile transmittal" and "verification."

The definitions respond to other comments about the need for definitions. A definition for electronic mail is necessary to clarify when the parties can use electronic service among themselves as opposed to the prohibition against electronic filing with the Commission. This approach reflects comments suggesting that the Commission avoid electronic filing requirements due to the current unavailability of the system. The final rulemaking also defines formal and informal complaints, investigations, and proceedings. These definitions respond to comments suggesting the need to explain the difference between informal and formal matters at the Commission.

A revised definition of "mediation" and a definition of "mediator" respond to the Utility Bar comment on the need to distinguish between dispute resolution and litigation. However, the Commission denies the Ryan comment seeking the development of formal dispute resolution regulations in this rulemaking.

Revised definitions of friendly cross-examination, party, person, and pleading are developed. A definition of statutory advocate is developed to differentiate the service and intervention rights of public advocates and private parties. A revised definition of transmittal is developed in response to an IRRC suggestion. There is a revised definition of the term verification to ensure compliance with the requirement.

#### Subchapter B. Time

##### Section 1.11 Date of filing

The proposed regulation at § 1.11(a)(4) established how an electronic filing occurs at the Commission. The proposed regulation specified that it must: (1) enter the information processing system, (2) be designated by the Commission for the purpose of receiving documentary filings, (3) be in a form which the Commission is capable of retrieving, and (4) be in a form readable by the system. The revision did not permit electronic filing but specified how electronic filing may be permitted by the Commission.

The proposed regulation at § 1.11(a)(3) eliminated the use of a United States postage stamp on an envelope as postal proof of the date of filing. The proposed regulation limits postal proof of filing to United States Postal Service Form 3817. The proposed regulation at § 1.11(c) retained the prohibition against document filing by telefacsimile as well.

IRRC questions the wisdom of electronic filing when there is no system or funding for a system. IRRC is also concerned that elimination of proof of postal filing based on the date "shown on the United States Postal Service

(USPS) stamp on the envelope” could be significant for individual pro se litigants unfamiliar with the intricacies of Postal Form 3817. IRRC further questions the reasonableness of precluding parties from filing documents by telefacsimile given that this is allowed in other agencies so long as an original is filed within a reasonable time thereafter. IRRC also identifies the inconsistent use of “local time” and “Eastern Standard Time” in the proposed regulation.

The Utility Bar encourages the Commission to adopt electronic filing for greater transparency. The Utility Bar shares IRRC’s concerns about the wisdom of developing regulations for a non-existent system.

The Commission agrees with IRRC that electronic filing is premature. The Commission eliminates all regulations addressing electronic filing with the Commission in §§ 1.24(b)(2)(i)(A), 1.25(a), 1.32(d), 1.35(a)(2), 1.37(c), 1.53(b)(3), 1.54(b)(3), 1.56(a)(5), 1.59(b)(1)(ii), and 5.306. The final regulations at §§ 1.11(a)(4), 1.32(d), 1.35(a)(2), and 1.37(c) also prohibit the use of electronic filing by private parties.

The final regulations in §§ 1.24(b)(2)(i)(A), 1.25(a), 1.54(b)(3), 1.56(a)(5), and 1.59(b)(1)(ii) do allow the parties to use electronic communications to service documents or communicate among themselves when they deem it appropriate. Even in those cases, however, the parties must comply with traditional Commission filing requirements based on our decision to not incorporate electronic filing at this time due to the current unavailability of the system.

The final regulation for § 1.54(b)(3) allows the parties to voluntarily use electronic service among themselves. However, even in such cases, the party must file a hard copy of the final version with the Secretary stamped on the due date. A party can file a corrected version so long as the version is not substantive and the presiding officer approves the filing.

The Commission rejects the Utility Group suggestion that we rewrite subsection (a)(1)–(4) by inserting semicolons with “or” after (3) since the proposal does not reflect the correct format used by the *Pennsylvania Bulletin* in the publication of regulations.

The Commission agrees with IRRC that retention of the existing postal proof rule is advisable given the potential for confusion among parties unfamiliar with the intricacies of Form 3817. The Commission adopts many of the Utility Bar’s ministerial corrections, including a suggestion that the Commission resolve an inconsistency between references to “local time” and “Eastern Standard Time” in the regulations. The Commission adopts “pre-vailing local time” to address this issue.

The Commission disagrees with IRRC’s suggestion that the Commission approve the use of telefacsimile transmittals as do other Pennsylvania agencies. The Commission previously considered telefacsimile filing and rejected it for several reasons.

A telefacsimile transmittal contains no legal signature and, even if it did, the Commission’s regulations require a party to file an original. A telefacsimile copy is not an original under traditional filing. We also agree with IRRC that electronic filing is not appropriate in this rule-making. Given that telefacsimile transmittals are a form of electronic filing, we also reject the use of telefacsimile transmittals for filing with the Commission.

Another important consideration is cost. The Commission receives a voluminous amount of pleadings, petitions,

complaints, answers, applications, and other documents numbering in the thousands on a monthly basis. This volume is what motivated the Commission, in part, to propose electronic filing in the proposed regulation. At the current time, the Commission’s telefacsimile facilities are limited generally and even more so in the Secretary’s Bureau.

The Secretary’s Bureau is already challenged to accept, process, and identify the hard copy volume let alone additional telefacsimile transmittals that will occur if we allow telefacsimile transmittals. The Commission could easily be overwhelmed if multiple parties in one proceeding decide to use telefacsimile filing to submit their voluminous pleadings in the final hour on the final day. This challenge would be made worse if other parties also decided to use those same facilities on the same day.

However, in response to IRRC’s suggestions that we prohibit electronic filing yet still consider the use of telefacsimile transmittals, the final regulation at § 1.54(b)(4) allows the parties the option to use electronic communications for service among themselves. In that instance, nevertheless, a final version must be filed with the Secretary no later than the close of business at the Commission on the due date regardless of the parties’ agreement. This reconciles the prohibition against electronic filing with the Commission’s limited facilities.

*Section 1.15. Extensions of time and continuances.*

*Section 1.15(b).* The proposed regulation inserted the phrase “for a continuance” in § 1.15(b).

IRRC and the Utility Bar suggest that the phrase “timely filed” replace the current “filed at least 5 days prior to the hearing date” language of § 1.15(b).

The Utility Bar also suggests that the word “filing” replace “submitted” in the last sentence of § 1.15(b).

The Commission disagrees with IRRC and the Utility Bar. The phrase “timely filed” should not replace the phrase “filed at least five days in advance” for several reasons. A strict limit leaves little or no discretion to address cases where a litigant, particularly a pro se litigant, is unable to comply due to unforeseen circumstances or inadvertence. A strict requirement also provides a costly and inefficient basis for dismissing a proceeding, typically involving pro se litigants, on procedural grounds knowing that the case will be refiled. The other recourse, dismissal with prejudice, is relatively draconian compared to the possible violation, e.g., a failure to file in 5 days.

The Commission retains the existing regulatory phrase. However, the Commission agrees that the word “filed” should replace the word “submitted” in the final regulation.

*Subchapter C. Representation Before the Commission*

The proposed regulation reflected electronic filing requirements and Pennsylvania Supreme Court authority over the practice of law. The Pennsylvania Supreme Court promulgates its own rules. The Commission concluded it lacks authority to promulgate rules that contravene the Pennsylvania Supreme Court rules.

The substance of the proposed regulation is that: (1) individuals may represent themselves, (2) in adversarial proceedings, any entity other than an individual must be represented by an attorney, (3) in nonadversarial proceedings, entities may be represented as permitted by the rules of the Pennsylvania Supreme Court, and (4) in informal proceedings brought under Chapter 14 of the

Public Utility Code or Chapters 56 and 64 of the Commission's regulations only, representation may be by other than a licensed attorney. Throughout, the information required to be provided by an attorney includes the Pennsylvania Supreme Court identification number.

The final regulation deletes the proposed electronic filing and reaffirms the Pennsylvania Supreme Court's authority over the practice of law that requires use of the Pennsylvania Supreme Court attorney identification number whenever appropriate.

*Section 1.21. Appearance [in person].* The proposed regulation reflected the Supreme Court's authority over the practice of law in Pennsylvania.

IRRC suggests that the Commission define the term "appropriate individual" in § 1.21(d). The Utility Bar suggests that the Commission define the terms "informal complaint" and "informal proceeding." They also want the Commission to address the relationship with an "informal investigation" under Subchapter B and Section 3.113. The Utility Bar concludes that the correct term should be "informal complaint" rather than "informal proceeding" in the final regulation.<sup>1</sup> The OSBA comment suggests that § 1.21(a) be revised to allow sole proprietorships to represent themselves before the Commission.

The final regulation defines an "appropriate individual" for informal proceedings in a way that does not contravene the Pennsylvania Supreme Court's authority. The final regulations contain definitions for "informal complaint," "informal investigation," and "informal proceeding" as well. The final regulation rejects the OSBA comment that "individual" include sole proprietorships. The OSBA comment includes incorporated sole proprietorships although any incorporated entity must be represented by counsel.

*Section 1.22. Appearance by attorney or certified legal intern.* The proposed regulation is premised on the Pennsylvania Supreme Court's authority. The Utility Bar suggests that the phrase "Subject to the provisions of § 1.21" be added to underscore the view that § 1.22 does not mean that all must be represented by counsel including pro se individuals that represent themselves. The final regulation inserts the proposed phrase for clarification although the phrase is limited to § 1.21(a) because it governs pro se representation by individuals as defined in § 1.8.

*Section 1.24. Notice of appearance or withdrawal.* The proposed regulation established the process for filing a notice of appearance or withdrawal including pro se individuals. The proposed regulation permitted electronic filing.

*Section 1.24(a).* The Utility Bar suggests that the Commission require a pro se litigant to file a change of address with "active" parties under § 1.24(a).

The final regulation adopts the proposed regulation. The regulation does not require a pro se litigant to provide notice to "active" parties.

A regulation that imposes burdens on pro se litigants by attempting to differentiate between "active" and "inactive" parties in a regulation undermines the effort to end attempts to distinguish between "active" and "inactive" parties. It is difficult if not impossible to make that determination in a general rule when that decision is better made on a case-by-case basis by a presiding officer. For that reason, the definition of party does not differentiate between an active and inactive party.

*Section 1.24(b)(1).* The proposed regulation deems an attorney's signature on the pleading tantamount to an appearance in a representative capacity. The Utility Bar opposes this departure from traditional Commission practice. They view the departure as undermining support for electronic filing when the problem can be easily corrected with a letter of clarification. The Utility Bar alternatively suggests that all counsel listed on an initial pleading be deemed to have entered an appearance if the Commission retains the proposed regulation. The OSBA comment suggests that if the Commission does not intend an appearance sheet to substitute for notice under § 1.25, the Commission should automatically enter the appearance of each attorney listed on the initial pleading regardless of who signed the pleading.

The final regulation retains the proposed regulation holding that the attorney signing the initial pleading in a representative capacity is the attorney of record. There is no valid reason for replacing the proposed regulation with any proposed alternatives. The alternatives are costly, burdensome on the Commission and litigants, and encourage litigation based on allegations of incomplete or defective service of process on multiple attorneys in such instances. These alternatives may have merit in an electronic filing environment because of their potential to reduce duplication, storage, and retention costs. Our decision to prohibit electronic filing renders multiple attorney service inadvisable.

*Section 1.24(b)(2)(i)(A).* The proposed regulation required an electronic mailing address. IRRC questions the imposition of electronic mailing addresses in the absence of electronic filing. The final regulation agrees with IRRC and deletes the requirement to supply an electronic mailing address although a party can voluntarily provide that address to facilitate service among the parties.

*Section 1.25(a). Form of Notice of Appearance.* The proposed regulation allowed a party to request email receipt of documents. It also required a party to provide their Pennsylvania Attorney I.D. Number and electronic mailing address. The Utility Bar wants the Commission to clarify whether electronic requests are in lieu of, or in addition to, hard copy requests. This provision, in their view, does not address a telefacsimile number request. IRRC suggests that the electronic filing provisions in this Section reflect the Commission's response to their suggested elimination of electronic filing.

The final regulation prohibits electronic filing. The final regulation requires a party to provide a telefacsimile number and adds the word Pennsylvania to the Attorney I.D. Number. The final regulation inserts the phrase "Other Jurisdictions Admitted" for pro hac vice appearances and lets a party provide an email address.

The telefacsimile line is added for regulatory consistency. Pennsylvania is added to clarify that the Attorney I.D. number is the Pennsylvania Attorney I.D. Otherwise, a pro hac vice counsel must list their jurisdictional admissions. One can voluntarily provide an email address to facilitate electronic communication.

#### *Subchapter D. Documentary Filings*

The proposed regulation restructured the form of a documentary filing in formal cases to make it easier to follow. The proposed regulation contained a format for exchanging electronic documents among the parties. The final regulation prohibits electronic filing.

*Section 1.31.* The proposed regulation addressed documentary filing requirements and procedures. The pro-

<sup>1</sup> Utility Bar, p. 7.

posed regulation addressed the form, attachments, identifying information, and electronically submitted documents.

*Section 1.31(a).* The proposed regulation required pleadings to be in numbered format. The OSBA claims that § 1.31(a) is routinely ignored and should be abandoned. The Commission disagrees. This requirement is a longstanding requirement that can be addressed if ignored.

*Section 1.31(b).* The proposed regulation required attachment of documents relied on in the pleadings as exhibits although copies of writings or orders of record with the Commission need not be attached if the docket reference number of the proceeding in which they were filed was provided.

The Utility Bar opposes use of the word “exhibits” because it is misleading and denies attorneys any flexibility in defining how to attach their documents. The OSBA suggests that the Commission intended to include publicly available court decisions within the class of those not required to be produced.

The Commission deletes the word “exhibit” in response to the Utility Bar comment. The Commission agrees with the OSBA comment that reported court decisions do not have to be produced.

*Section 1.31(c).* The proposed regulation established requirements governing the information provided in any document filed with the Commission. The Utility Bar suggests the phrase “caption of the proceeding” for § 1.31(c)(2) and the phrase “Within the title of the proceeding” for § 1.31(c)(3). The Commission agrees.

*Section 1.32. Form of Documents.* The proposed regulation at § 1.32(d) requires that electronically filed documents comply with margin and spacing requirements applicable to other filed documents.

IRRC opposes electronic filing in this regulation. The Commission agrees. The final regulation eliminates this requirement because no document can currently be filed electronically with the Commission.

*Section 1.33. Incorporation by Reference.* The proposed language for § 1.33(b) deleted the existing 20-year time frame covering documents that cannot be incorporated by reference without determining if they are in the Commission’s active files. IRRC and the OSBA suggest restoring some kind of cutoff to avoid subjecting every document to a burdensome determination of its status. The OSBA comment disputes the wisdom of requiring a party to contact the Commission to confirm that even a recently filed comment remains in the active records. This is burdensome and unnecessarily expensive. IRRC recognizes that 20 years may be too long and suggests that the Commission consider a shorter period.

The final regulation reinstates the existing rule. The Commission agrees that elimination of the current rule could be a burden if imposed on every document. The Commission realizes the existing 20-year rule reflects a requirement prior to electronic filing and duplication. Nevertheless, the Commission retains the existing rule pending examination of this issue in any subsequent rulemaking focused on electronic filing.

*Section 1.35. Execution.* The proposed regulation at § 1.35(a)(2) allowed an electronically filed document to contain an electronic signature in a form approved by the Commission.

IRRC opposes electronic filing. The final regulation deletes electronic filing in this provision based on IRRC’s suggestion that such filing requirements are premature at this time.

*Section 1.36. Verification.* The proposed regulation expanded the pool of those who may sign the verification, to “other authorized employees” of the party of a corporation or association.

The Utility Group supports the use of verification but requests that the Commission include affidavits. IRRC and the Utility Group comments want the word “utilized” to replace the word “permitted” in the last sentence of § 1.36(a). The Utility Group believes this avoids confusion about verification in lieu of an affidavit. To the best of the Utility Group’s knowledge, there are no specific provisions directing the use of verification or an affidavit in specified circumstances.

The Commission disagrees with replacing the word “permitted” with “utilized” in § 1.36(a). IRRC correctly notes that the word “permitted” means that verification is required. Verification is required in the final rules. The use of the word “utilized” is ambiguous. Counsel could argue that a party, not the rules, determines where verification or notarization is applicable. The final rules do want to allow the parties to choose between less expensive verification and more expensive notarization. The parties, however, cannot unilaterally decide when the regulations require them make that choice. The word “utilized” implies that and is to be avoided.

*Section 1.37. Number of Copies.* The proposed regulation at § 1.37(c) allowed a single copy of a document to be filed electronically with the Secretary’s Bureau. IRRC opposes electronic filing in this regulation. The Commission agrees. The final regulation eliminates electronic filing of one copy.

*Section 1.38. Rejection of Filings.* The proposed regulation codifies existing Commission practice. The Commission can reject nonconforming filings or filings by persons that do not comply with Commission directives.

Three concerns underscore IRRC’s objection. The proposal appears to preclude a utility from bringing or defending an action before the Commission for failing to satisfy any regulatory obligation. The statutory authority for this provision is unclear. Subchapter A of the Public Utility Code outlines the procedures for bringing matters to the Commission’s attention. There is no indication the legislature intended to permanently foreclose Commission channels because a utility is not in full compliance with Commission regulations. Finally, IRRC questions the meaning of the phrase “delinquent in its regulatory obligations” and states that if the PUC believes this proposal is consistent with regulatory intent, it should explain the meaning of this phrase.

The Utility Bar has additional concerns. They agree with IRRC that the phrase “delinquent in its regulatory obligations” is unclear. The absence of any materiality standard concerns them. The Commission never rejects a pleading on minor grounds such as delinquencies in fine or assessment payments. The Commission must identify the reasons, establish a time limit, and allow a party an opportunity to cure any defect.

The Commission agrees with IRRC and revises the final rule accordingly. The final regulation does not automatically preclude access to Commission process. This more narrowly drawn provision is consistent with the Commission’s authority in Section 501(b) of the Public Utility Code because it is a necessary and proper require-

ment not otherwise inconsistent with law. Moreover, any abuse can be addressed by an appeal from any staff action pursuant to § 5.44 of our regulations. The Commission also agrees with IRRC that the phrase “delinquent in its regulatory obligations” is vague. The final regulation removes the phrase.

#### *Subchapter E. Fees*

*Section 1.42. Mode of payment of fees.* The proposed regulation permitted other methods of payment in the future, such as credit cards, when the Commission is prepared to accept them.

IRRC suggests that the regulations replace the nonregulatory “should” with the regulatory “shall” in the second sentence if the Commission retains this revision.

The Commission agrees with IRRC. The final regulation replaces “should” with “shall.” The final regulation limits payment methods to the forms of payment allowed in the existing regulation given the Commission’s limitations. The Commission concludes that electronic payments, like electronic filing, are inadvisable at this time.

*Section 1.43. Schedule of fees payable to the Commission.* The proposed regulation rescinded subsections (b), (c) and (d) of § 1.43 to reflect that the Commission no longer performs testing. The remaining fees are not changed.

The Ryan comment wants the Commission to impose a \$25 fee for filing a Formal Complaint. The final regulation rejects this suggestion. The General Assembly recently rejected a \$25 filing fee when adopting amendments to the Public Utility Code. Such a fee could undermine the warning service that formal complaints of this nature play in advising the Commission about potential service problems. A fee could also frustrate the role that such formal complaints play in helping the Commission meet its statutory obligation to ensure the delivery of adequate, efficient, safe and reasonable service under Section 1501 of the Public Utility Code.

#### *Subchapter F. Service of Documents*

The proposed regulations amended Section 1.56(a)(4) to provide that a faxed document must be transmitted prior to 4:30 p.m. local time. This thwarted attempts to send documents after offices close. Section 1.56(a)(5) provided for electronic service when agreed to by the parties. The proposed regulation revised §§ 1.53(b)(3), 1.54(b)(3), 1.56(a)(5), and 1.59(b)(1)(ii) to reflect electronic filing.

IRRC opposes electronic filing regulations and the Commission agrees. The final regulations prohibit electronic filing.

*Section 1.53. Service by the Commission.* The proposed regulation revised the applicability of this provision, revised the forms of service to allow electronic filing, made minor revisions to registered or certified mail requirements, and addressed provisions concerning change of address and alternative service.

*Section 1.53(b)(1). Forms of Service.* The proposed regulation allowed service by person, by anyone authorized by the Commission, or by electronic means. IRRC and the OSBA suggest that the word “by” be inserted between “made” and “mailing” in the first sentence. The Utility Group states that the proposed regulation excludes service by mail to a person’s residence. The Utility Group wants the Commission to include residence in the final regulation.

The Commission agrees with IRRC and the Utility Group. The final regulation inserts “by” between “made”

and “mailing” in the first sentence as well as “residence” after “person’s” and before “principle” in § 1.53(b)(1).

*Section 1.53(b)(3). Electronic Filing.* The proposed regulation allowed the Commission to serve a recipient electronically. IRRC opposes electronic filing in this rule-making. The Commission agrees with IRRC. The final regulation eliminates § 1.53(b)(3).

*Section 1.54. Service by a party.* The proposed regulation provided detailed provisions governing electronic service.

*Section 1.54(b)(3).* Section 1.54(b)(3) authorized electronic service among the parties. IRRC asks the Commission to review this provision as part of their response to IRRC’s comment about electronic filing. The Ryan comment proposed a series of revisions to § 1.54 detailing who, what, when, and where service is provided, particularly relating to multi-attorney service.

The Commission agrees with IRRC. Section 1.54(b)(3) is revised to prohibit electronic filing in the final regulation. The final regulation does allow the parties to use electronic service voluntarily. However, even in those situations where the parties agree to use electronic filing, the final regulation at § 1.54(b)(3) requires that the filing be stamped on the due date. The Commission uses the term stamped instead of postmarked so that a filing party can use the United States Postal Service or an overnight delivery service. Corrected versions can be filed if they are not substantive and with the approval of the Presiding officer. This optional use of electronic communications preserves traditional filing given our adoption of IRRC’s comment prohibiting electronic filing.

The Commission does not adopt the Ryan comment on detailed service provisions that include service on multiple numbers of attorneys. The Ryan comment is costly to private parties and the Commission. The suggestion imposes unnecessary burdens on the Commission to provide a minimal benefit. The only benefit seems to be that a party with resources sufficient to retain multiple numbers of attorneys is no longer required to assume the cost and burden of informing those attorneys. This suggestion effectively shifts duplication and distribution costs to the public and the Commission. The suggestion could also dramatically increase the number of challenges based on defective or imperfect service.

*Section 1.55. Service on attorneys.* This proposed regulation detailed service on attorneys including electronic service. The Ryan comment wants §§ 1.54(a) and 1.55(b) revised to authorize multiple attorney service.

The Commission disagrees with the Ryan comment on multiple attorney service. This comment essentially shifts duplication, distribution, and noncompliance responsibilities from a private party with resources sufficient to have multiple attorneys to the Commission and the public. This needlessly complicates litigation when the only discernible benefit seems to be that litigants no longer bear the cost of circulating information among their multiple counsels in complex litigation. This also increases the potential for parties to raise, and require the Commission to devote resources deciding, allegations of defective or imperfect service.

*Section 1.56. Date of Service.* The proposed regulation changed the time requirement to 4:30 p.m. prevailing local time in § 1.56(a). The proposed regulation also dates service for electronic filings as the date the document entered an information system designated by the recipient for receiving service and from which the recipient could retrieve the filing.



IRRC opposes the use of electronic filing at the Commission at this time. IRRC wants the provision in § 1.56(a)(5) governing the date of service for electronic documents to reflect its opposition to electronic filing. The Utility Group proposed revisions to § 1.56(a)(5) for clarity and to limit service to “active” parties. The OSBA comment suggests that § 1.56(a)(5)’s provision for electronic email by “4:30 p.m. local time” is ambiguous.

The Commission agrees with IRRC. The final regulation prohibits electronic filing with the Commission. This requires the use of traditional service although the parties can use electronic communications for service among themselves when appropriate.

The Commission does not adopt the Utility Group’s comment on differentiating between active and inactive parties in this provision. As explained throughout this rulemaking, the difficulties of differentiating between an active or inactive party for date of service and disposition is better made by a presiding officer on a case-by-case basis and not in a general regulation.

*Section 1.59. Number of copies to be served.* Section 1.59(b)(1) of the proposed regulation governed the number of copies of a brief to be served. Section 1.59 differentiated between hard copy filings, which required two, and electronic or telefacsimile filing which only required one copy.

IRRC wants the Commission to revise § 1.59(b)(1)(ii) governing electronic filing copies. The Commission agrees. Section 1.59(b)(1)(ii) is deleted although the parties, as opposed to the Commission, can agree on electronic service on a case-by-case basis.

#### *Subchapter G. Matters Before Other Tribunals*

*Section 1.61. Notice and filing of copies of pleadings before other tribunals.* The proposed regulation for § 1.61(c) was removed because it is identical to (d). The proposed language added the category of “licensee.” The proposed language also required that a licensee or utility whose parent company had declared bankruptcy to inform the Commission. The proposed regulations help the Commission monitor bankruptcy proceedings without approving the bankruptcy plans of certificated utilities.

There were no comments on this proposed regulation. The final regulation adopts the proposed regulation and ministerial changes.

#### *Subchapter H. Public Access to Commission Records*

*Sections 1.71 to 1.73. Objectives and Fiscal Records.* The proposed regulation expressed the Commission’s commitment to maintaining a record system that facilitates public access and imposes an obligation to retain fiscal records according to statutory, regulatory, and administrative requirements. There are no comments. The final regulation adopts the proposed regulation.

*Section 1.76. Tariffs, minutes of public meetings and annual reports.* The proposed regulation contains no substantive changes compared to the existing regulation. The Utility Group proposed ministerial language changes for clarity. The Commission agrees. The final regulation incorporates those suggestions.

*Sections 1.81 to 1.86. Amendments or withdrawals of submittals.* The proposed regulation made ministerial changes for clarity and consistency. There are no comments. The final regulation contains the ministerial changes.

### *Chapter 3. Special Provisions*

#### *Section 3.1. Definitions.*

The proposed regulation replaces the word “Executive Director” with “Director of Operations” for consistency.

#### *Section 3.2 through Section 3.5. Petitions for issuance of emergency order.*

The proposed regulation removed references to the office of Executive Director. The term Director of Operations was used in its place. The Utility Bar comment identifies places in the proposed regulations at §§ 3.1, 3.2, 3.3, 3.4 and 3.5 where Executive Director should be replaced by Director of Operations for consistency.

The Commission agrees with the Utility Group. The final regulation uses the term Director of Operations for consistency and clarity.

The proposed regulation reorganized the emergency order sections. The provisions referring to ex parte emergency orders were located together and those sections referring to interim emergency orders were located together. The proposed regulation provided language adjustments so that there would be parallel standards for both sections. The proposed regulation relocated § 3.5 to § 3.3. This resulted in the elimination of § 3.5. Section 3.9 was relocated to § 3.6a.

IRRC suggests ministerial changes and parallel construction in § 3.2. The Commission agrees with IRRC and made adjustments in the final regulation responsive to these suggestions.

*Section 3.6 through Section 3.10. Interim emergency relief.* The proposed regulation reorganized this section. The sections referring to interim emergency orders were located together. The proposed regulation provided language adjustments so that there would be parallel standards for this section and §§ 3.2–3.5 for emergency orders. The proposed regulation relocated § 3.5 to § 3.3. This resulted in the elimination of § 3.5. Section 3.9 was relocated to § 3.6a.

There were no comments on this proposal. The final regulation adopts the proposed regulation.

#### *Subchapter B. Informal Complaints*

This proposed regulation changed the subheading to read “Informal Complaints and Investigations” because it better reflected the contents of the section. The proposed regulation also created and labeled Sections for ease of reference. Section (b) of § 3.112 proposed a process for staff review of informal complaints.

The Utility Group comment on § 3.112 wants the final regulation to require the Commission to issue and serve a written decision of every informal complaint. The final regulation rejects the Utility Group requirement that Section 3.112 require a written decision. The Commission informally resolves thousands of matters on an ongoing basis. Few of those resolutions become a formal proceeding. The alleged benefit resulting from a mandated written decision because of its usefulness in subsequent formal proceedings is not justified by the additional burden and cost. Such a result could also increase the number of formal appeals of informal complaints. The burden and costs for the paperwork required to implement this suggestion could overwhelm the Commission’s administrative processes and certainly increase staffing and implementation costs ultimately recovered in assessments and rates.

The final regulation takes the least expensive and effective approach for resolving informal complaints. The Commission recognizes that a respondent to informal complaints may want a written decision to address

allegations and factual assertions that could be inaccurate or incomplete. The cost to issue and serve a written decision addressing an informal resolution in those instances is far greater than a cost-effective solution that could, at times, rely on some ambiguous or unexplored factual allegations. The cost to resolve these ambiguities by service of a formal written decision is greater than an informal resolution and will almost certainly increase staff and resource needs ultimately recovered in assessments and rates.

Equally important, the role that these informal matters provide in advising the Commission about service problems is undermined if every informal matter, including allegations by current or ex-employees of a utility, became the subject of a written decision. A written decision imposes additional procedural requirements on pro se litigants. This could well result in more formal appeals and increase those costs.

The Commission, however, recognizes the Utility Group's desire to secure some kind of process for questioning ambiguities in informal complaint resolutions. For that reason, § 3.112(e) of the final regulation permits an appeal of any resolution of informal complaints under § 5.44 of our rules. The final regulation continues addressing Informal Complaints in § 3.112 and Informal Investigations in § 3.113.

#### *Subchapter D. Crossing Proceedings*

The proposed regulation modified the service requirements for § 3.361 complaints and notice of the forms for § 3.363. There were no comments on these proposed changes.

*Section 3.361. Crossing complaints.* The proposed regulation revised subsection (a) to serve the owner of the railroad right-of-way, which may be different from the public utility operating over it, as a party to a Commission proceeding. There are no comments. The final regulation adopts the proposed regulation.

*Section 3.363. Claims for property damages from crossings.* The proposed regulation modified subsection (a)(2) to indicate that forms are no longer listed in the regulations. They are available from the Secretary. There are no comments. The final regulation adopts the proposed regulation.

#### *Subchapter E. Motor Transportation Proceedings*

The proposed regulation made no changes to this section. This Section will be dealt with in a separate rulemaking proceeding.

#### *Subchapter F. Arbitration of Disputes*

The proposed regulation contained no substantive revisions to this section. The Ryan comment wants a new § 3.392 regulation addressing Commission arbitrations.

The Commission denies that request. The Commission recognizes the concerns expressed in the Ryan comment. However, the Commission is unwilling to issue a final comprehensive rule given the complexity of such a rule and the very limited opportunity of other parties to address this suggestion.

#### *Subchapter G. Water or Wastewater Utility Proceedings*

*Section 3.501. Certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider.* The proposed elimination of significant parts of the existing regulation generated substantial comments. In response to those comments, the final regulation retains the existing regulation as well as some

additional provisions. A detailed discussion of each section's existing, proposed, and final Section is set forth below.

*Section 3.501(a) and (a)(1) to (a)(10). Applicability.* The existing regulation contains a list of requirements an applicant for a certificate of convenience must satisfy. The proposed regulation deleted this list in favor of forms.

The proposed regulation agreed with DEP that additional requirements, including a county comprehensive plan, municipal comprehensive plan and zoning designations, must be addressed by an applicant. The proposed regulation required an applicant to provide a certification letter as opposed to a Commission determination.

IRRC and DEP stress that the existing regulation should be retained because it is more comprehensive than the proposed regulation and reflects years of interagency comity. IRRC and DEP are concerned about establishing mandatory filing requirements in any way other than by setting them forth in a regulation. We agree. The final regulation retains the filing requirements for new and existing but uncertificated service.

The final regulation for § 3.501(a) also makes a ministerial change in § 3.501(a) to underscore that it is the Commission that has always been responsible for determining filing requirements. The final regulation retains the existing regulations for § 3.501(a)(1)—(10) as mandatory filing requirements. There are some minor ministerial title revisions for these provisions at § 3.501(a)(6)—(10). They do not impact retention of the existing filing requirements.

The final regulation at § 3.501(a)(2)(vi) requires that a copy of county comprehensive plans, municipal comprehensive plans and zoning designations be provided upon request of the Commission. Section 3.501(a)(2)(vi) takes this approach because these plans typically are voluminous and reflect a considerable duplication cost. The Commission does not want to impose mandatory submission requirement given these costs unless the plans are necessary and requested. An applicant letter is required to address compliance with the applicable requirements of these plans pursuant to § 3.501(a)(7) regardless of whether the Commission requests a copy of these voluminous documents.

The proposed regulation would have required an applicant to provide a letter certifying compliance with these requirements. The final regulation at § 3.501(a)(7) adopts the proposed regulation and requires an applicant to submit a letter addressing whether the applicant does or does not meet the requirements of these and additional governmental entities.

The Commission also agrees with the Utility Group that the word "new" should be stricken from § 3.501(a). We agree on the need to retain the long-standing filing requirements of § 3.501. The Commission has and will continue to apply these filing requirements to initial and existing but uncertificated utilities.

In addition, DEP raises a concern that, with respect to applications for additional and expanded authority by water and wastewater utilities, the Commission would not consider whether the proposed expansion would be in compliance with DEP requirements. The Commission takes seriously each utility's obligation to comply with the applicable DEP requirements. For this reason, the Commission will continue to require water and wastewater utilities to demonstrate compliance with applicable DEP requirements (via DEP certification) and the Commission will consider and may rely upon the local government's

applicable zoning and planning requirements (via certification by the governmental entity) in considering a utility's application for additional or expanded service.

*Section 3.501(b).* The existing Section establishes filing requirements. Section 3.501(b) requires the applicant to file an original and three copies with the Commission. The applicant is advised that failure to include the required information and documents may subject the application to rejection. The application must contain exhibits. An affidavit of service must show the identity of those served under Section (d) as an accompaniment to the original and copies submitted to the Commission. Section 3.501(c) governs docketing and publication requirements.

The proposed § 3.501(b) continued many of these provisions. However, the proposed regulation deleted the original and three copies requirement. The proposed regulation retained the affidavit requirement. An applicant had to submit the forms set forth in the proposed § 3.501(c).

The final regulation for § 3.501(b) lists the additional considerations an applicant must address. These additional considerations respond to DEP and IRRC comments as well as our determination in the proposed regulation that these matters are an appropriate subject for the final regulations. They also incorporate the Commission obligations under the act of June 22, 2000 (P. L. 483, No. 67) and the act of June 23, 2000 (P. O. 495, No. 68). The new § 3.501(b) also reflects our Commission Policy Statements concerning Local Land Use at 52 Pa. Code § 69.1101 and small water company issues addressed in our policy statement at 52 Pa. Code §§ 69.701 and 711.

The new § 3.501(c) contains the existing § 3.501(b) requirements. The final regulation retains the copy requirements in the existing regulation. The final regulation adopts the first sentence of the proposed regulation at § 3.501(b) requiring conformity with the Commission's documentary filing requirements in §§ 1.31 and 1.32. It also addresses payment of fees set out in §§ 1.42 and 1.43.

*Section 3.501(c).* The existing § 3.501(c) regulation addresses docketing with the Commission, publication in the *Pennsylvania Bulletin*, and additional requirements. The proposed § 3.501(c) replaced the requirements of § 3.501(a) in the current regulation.

The OCA is concerned about the proposal to include less, not more, notice in the proposed regulation. The OCA is particularly concerned about the proposal to reduce newspaper publication from daily publications for two consecutive weeks to once a week for two consecutive weeks. We agree and adopt the OCA's position on newspaper publication.

*Section 3.501(d).* The existing regulation at § 3.501(d) governs copy distribution requirements. The existing regulation at § 3.501(d) does not require service of an application on any water or wastewater utility, municipal corporation or authority with a service area within one mile of a new or affected service area.

The proposed regulation denied a request to expand the copy requirement to include anyone except those abutting a proposed service area. The proposed regulation did, however, allow any water or wastewater utility, municipal corporation or authority with a service area within one mile of the proposed new or affected service area to request a copy. The proposed regulation also eliminated a

requirement that the OCA be served a copy. The proposed regulation moved these revised copy requirements to § 3.501(e).

The OCA wants service expanded to include any water or wastewater utility, municipal corporation or authority within one mile of any proposed or affected service area. The OCA wants notice provided to existing and prospective customers. The OCA opposes the reduction in publication from daily for two consecutive weeks to once a week for two consecutive weeks.

The DEP is concerned about changes that allow or encourage unplanned development or sprawl. DEP claims that the proposed regulation conflicts with the legislative directions of the General Assembly to coordinate agency permitting decisions. DEP is also concerned about the distribution of copies to their regional or central office.

The OSBA is concerned that the Commission's renumbering in the proposed regulation fails to properly convert the existing regulation at § 3.501(d)(1) through (3) into the proposed regulation at § 3.501(e)(1)(i) through (iii), respectively.

In the final regulations, we believe we have addressed all of these concerns. The final requirements relating to copies, notice, and distribution requirements are set forth in § 3.501(c) through (f). The final regulation at § 3.501(f)(3) addresses the OCA's service concern by requiring service on the statutory advocates, including the OCA. These final regulations also restore the existing application requirements. These final regulations expand service to include DEP's regional and central offices, the statutory advocates, and all utilities abutting or within one mile of the proposed service territory. Finally, the customers of any proposed or existing but uncertificated applicant must be notified of any application. This combination of retaining current requirements and expanding the notice and service obligations better meshes our statutory mandates with the concerns of DEP and others.

Based on our agreement with the OCA's position on newspaper publication, we also see no need to reduce the public notice requirements of an applicant as reflected in our newspaper publication requirements. The final regulation continues the existing public notice requirements published in a newspaper of general circulation to ensure broad dissemination of the information.

*Section 3.501(e).* The existing § 3.501(e) is a reference section. The proposed § 3.501(e) contained reduced copy service requirements. The final § 3.501(e) contains a process for development of any forms.

The proposed regulation would have deleted mandatory application requirements in favor of forms that were subject to revision. The final regulation restores the application filing requirements while allowing the Commission to make forms available so that an applicant can understand exactly what is needed to comply with § 3.501. Also, the procedures governing the development of any form for purposes of § 3.501 require publication, website posting, and consultation with interested agencies or persons. This should resolve concerns about the need for public input in the development of forms that reflect the Commission's filing requirements.

*Section 3.501(f).* There is no existing or proposed § 3.501(f) because the copy requirements are set forth in § 3.501(e) of the proposed regulation. The final § 3.501(f)(3) regulation establishes a copy requirement for the OCA but also adds OTS and OSBA. The final § 3.501(f)(3) regulation also establishes service of a copy on DEP's central and appropriate regional offices. Finally,

the final § 3.501(f) regulation establishes a service requirement on any water or wastewater utility, municipal corporation or authority with a service area within one mile of or abutting any proposed new or affected service area.

For ease of understanding this complex and lengthy response, Annex A presents our agreement with the parties' comments as new material written in capitalized text. This reflects incorporation of their suggestions. The proposed regulations are deleted in their entirety.

*Section 3.502(a). Protests to applications for certificate of public convenience as a water supplier or wastewater collection, treatment and disposal provider.* The proposed regulation in § 3.502(a) added the requirement that an attorney for a protestant supply his or her Pennsylvania attorney identification number. There were no comments. The final regulation adopts the proposed regulation.

*Section 3.502(b). Participation in a proceeding.* The existing regulation allows a protestant to participate in a proceeding as a party intervenor if they file a timely protest. The proposed regulation required that the protest be in appropriate and legally sufficient form. IRRC states that the requirement is vague. IRRC wants the final regulation to cross-reference the applicable regulatory standards.

The Commission agrees with IRRC. The final regulation deletes this proposed change and retains the existing regulation.

*Section 3.502(c).* The existing regulation makes no changes. The OSBA comment notes that this provision is governed by § 5.101. However, § 5.101 changes the term "Motions" to "Preliminary Objections." The OSBA comment recommends that the language in this provision be consistent with § 5.101.

#### *Subchapter H. Forms*

*Section 3.551. Official forms.* This proposed regulation deleted the current list of forms stating that forms for applications, petitions, complaints and other matters are available on the Commission's website or from the Secretary. There are no comments. The final regulation adopts the proposed regulation.

#### *Subchapter I. Registration of Securities*

*Section 3.601.* The proposed regulation at § 3.601(b) clarified the certificate filing and payment requirements. The proposed regulation at 3.601(c) replaced the existing list of necessary information with a notice that a form is available from the Commission. There were no comments to this proposal.

The final regulation at § 3.601(b) adopts the certificate filing and payment requirement provisions. The final regulation at § 3.601(c) retains the current list of required information in light of IRRC's expressed concern about the use of forms in lieu of regulatory requirements in § 3.501. The final regulation, however, contains new information in § 3.601(d) detailing the process for developing standard formats. The revision balances IRRC and DEP concerns about forms with notice about revisions, provides an opportunity for input, and authorizes an appeal from any staff action under § 5.44.

#### *Section 3.602. Abbreviated securities certificate.*

*Section 3.602(a).* The proposed regulation made no changes to § 3.602(a) on the scope of our abbreviated securities rules. The late-filed Thomas comment urged the Commission to include two additional categories within the scope of the proposed regulation. Rulemaking

is a quasi-legislative function under Pennsylvania law. There were no objections to this late-filed comment on due process or substantive grounds. The Commission considered the comment. The final regulation for § 3.602(a) incorporates the two suggestions.

*Section 3.602(b).* The proposed regulation contained a list of the required information submitted on the form filed under this provision. There were no comments. The final regulation adopts this proposed regulation. The final regulation, however, also revises the number of days set forth in the proposed regulation for §§ 3.602(c)(1) and (2). Section 3.602(c)(1) is revised from 10 days to 20. The number of days set forth in § 3.602(c)(2) is revised from 10 and 30, respectively, to 20 and 40. These revisions reflect regulatory consistency and review within a reasonable time.

#### *Chapter 5. Formal Proceedings*

##### *Subchapter A. Pleadings and Other Preliminary Matters*

#### *Section 5.1. General provisions.*

*Section 5.1(a).* The proposed regulation for § 5.1(a) added "New matter, reply to new matter, and motions" to the list of pleadings to accurately reflect practice. The OSBA comment notes that since the proposed regulation changes "preliminary motions" to "preliminary objections," the regulation in § 5.1(a)(5) should include a reference to § 5.61 authorizing answers to preliminary objections. The final regulation allows the filing of an answer to a preliminary objection in § 5.101(g) of the final regulation.

*Section 5.1(b).* The proposed regulation for § 5.1(b) deleted preliminary motion and replaced it with preliminary objection. There were no comments. The final regulation adopts the proposed regulation.

#### *Sections 5.11—5.14. Applications.*

*Section 5.12. Contents of applications.* The proposed regulation revised § 5.12 to lay out contents of an application. An added provision encourages inclusion of an e-mail address. The proposed regulation denied the OCA's request for service of every application based on considerations of expediency and the availability of the Commission's website. Moreover, the proposed regulation recognized that § 5.14(b) authorizes the Secretary to direct service of applications upon the OCA and other interested persons in appropriate circumstances.

The OCA filed comments opposing the Commission's denial of its request in the proposed regulation. The OCA claims that the Commission's website does contain notice of a new application, but the absence of the detailed schedules and exhibits in the application require the OCA to go to the Secretary's Bureau to review and copy the application.

The final regulation does not require service of every application on the OCA or the other Statutory Advocates. The Commission receives thousands of applications and many are of minimal interest to the OCA. This includes transportation requests for new authority, abandonment or transfer of existing authority, requests for additional authority, or license applications of gas or electric generation suppliers not otherwise regulated by the Commission. The obligation to serve a copy of every application on the statutory advocates imposes unjustified additional costs and encourages challenges based on defective or imperfect compliance. The only discernible benefit seems to be a reduction in the time the OCA staff must spend coming to and from the Commission to review applications following their publication in the *Pennsylvania Bulletin*.

*Section 5.13. Applications for construction or alteration of crossings.* The proposed regulation for § 5.13(b) added construction within the scope of the plans required under the regulations. There were no comments. The final regulation adopts the proposed regulation.

*Section 5.14. Applications requiring notice.* The proposed regulation eliminated the § 5.14 list of applications that required notice. The Commission proposal reflected the need to update the list in light of market changes.

IRRC and the Utility Group comments express concern that a general reference to publication of applications is less desirable than retention of the existing list. IRRC is additionally concerned that the proposed regulation at § 5.14(c) references the deadline for filing protests in § 5.53 but § 5.53 provides that the time for filing protests shall be as stated in the published notice. IRRC suggests that the PUC establish a standard deadline for filing protests absent good cause shown. The Utility Group wants the list and exceptions in the existing regulation at § 5.14(b) reinstated in the final regulation.

IRRC suggests a general protest period for all applications submitted to the Commission. IRRC is understandably concerned that the regulated community does not know the timing for filing a protest. IRRC suggests publication occur in the *Pennsylvania Bulletin*. The Utility Group believes a 60-day default period is too long. The Utility Group proposes a 30-day period.

The Commission agrees with IRRC and the Utility Group. A notice of application under § 5.14 will continue to be published in the *Pennsylvania Bulletin*. That notice will also establish a protest period consistent with § 5.14(d).

The final regulation at § 5.14(d) reinstates the applications list of the existing regulation at § 5.14(b). Reinstatement of the existing § 5.14(b) list is provided in the new § 5.14(d) provision. Reinstatement ensures that listed applications are subject to a standard 15-day protest period. The Commission has operated for many years with this standard 15-day protest period and we see no compelling reason to change it given the Secretary's authority to establish additional protest periods as appropriate. Section 5.53 contains a 60-day protest period default in case the Commission's notice of application in the *Pennsylvania Bulletin* inadvertently fails to set a protest period.

As noted per the final regulation in § 5.14(b), the Secretary's Bureau can impose additional publication or notification requirements as warranted. This includes publication in a newspaper of general circulation, actual notification to the parties affected, or another form of actual or constructive notification. These will also contain a protest period unless, as indicated in § 5.53, no protest period is established. In that case, the 60-day protest period applies by default.

There are some minor revisions which make the exception consistent with existing regulations, particularly §§ 3.381 and 5.301. The retained exceptions are subject to the existing 60-day protest period. These exceptions are applications under §§ 3.361—3.363 (Crossing complaints, Reimbursement of damages from crossings, and Claims for property damages from crossings) and 52 Pa. Code §§ 57.71—57.77 (relating to siting and construction of electric lines). The reference to § 3.381 in § 5.14(d) of the regulation is removed to make it consistent with the minimum 15-day protest period set forth in § 3.381 of the existing regulation. Section 3.501 is revised to reflect a cross-reference to the 60-day protest period for water and wastewater in § 3.501.

The Commission disagrees with comments suggesting that we establish a standard rule for protest periods. The Commission believes a general rule is inadvisable regardless of whether it is 15 days, 30 days or 60 days for the reasons set forth below.

The existing regulations already impose a 15-day protest period for the applications listed in the final regulation unless they come within an exception or no protest period is established. In those instances, there is a 60-day protest period. This approach is taken because applications to the Commission range from the basic request of a very small carrier to the more complex authority requested by large utilities. A uniform protest period ignores the very real differences in scale of applicants that come before the Commission. The final regulation provides the flexibility required by this difference.

A 15-day standard protest period is appropriate in situations where an applicant wants to implement a business plan or transportation service but needs Commission approval. This is often the case for telecommunications resellers or transportation providers. The § 5.14(b) list for telecommunications in the existing regulation is retained in the final § 5.14(d) regulation. Retention of the 15-day protest period is consistent with the Utility Group's view that a 60-day protest period is too long.

On the other hand, the same 15 day standard protest period is inappropriate for more complex or controversial applications. A 15-day protest period involving, for example, the construction and siting of high-capacity electric lines, the merger applications of immense interstate carriers, in-depth analysis of technical or financial fitness, or applications with a host of unexpected issues is inadvisable. In those cases, the suggested 30-day standard protest period may be inappropriate when a 60-day protest period is advisable given the complexities of the case.

A 30-day standard protest period is superficially appealing but untenable on close examination. A 30-day period may reconcile a 15-day protest period with the 60-day protest period. A 30-day protest period, however, is equally untenable. On the one hand, it errs by extending the protest period for small applications like telecommunications resellers or transportation providers. On the other hand, it errs by shortening the protest period for complex or controversial cases like HV line construction or railroad crossing abandonments. A 30-day standard protest period may be particularly unwise for telecommunications applications because federal law prohibits state action that constitutes a barrier to entry. An unnecessarily long 30-day protest period in telecommunications runs the risk of preemption as a barrier to entry compared to the short 15-day protest period. In that case, a shorter protest period makes sense. With that in mind, the list in § 5.14(d) retains a 15-day protest period for most applications. This makes more sense than a 30 or 60-day rule.

A 60-day protest period is superficially appealing but equally unwise. That rule may well provide interested parties more time to decide if they want to intervene or protest. It also makes little sense to a taxi driver seeking reinstatement or issuance of a new certificate following revocation. A 60-day protest period is difficult for a transportation provider who relinquished their authority, voluntarily or otherwise, and wants to reenter the market. However, a longer protest period is appropriate for complex matters including the exceptions listed in § 5.14(b) of the current regulation.

*Sections 5.21—5.31. Formal Complaints.*

*Section 5.21 Formal complaints generally.* There were no proposed revisions to this section. The Ryan comment suggests language for § 5.21(d). The language provides that it is neither necessary nor appropriate for a respondent to introduce any evidence when the complainant fails to meet its burden of proof by presenting probative evidence or, as is frequently the case with pro se complainant, a failure to appear. The Ryan comment addresses cases where a presiding officer sometimes requires a respondent to present their evidence even though a pro se complainant fails to appear or does not present probative evidence.

The final regulation denies the suggestion for several reasons. For one thing, some utilities want to present their case even if the complainant fails to show or present probative evidence at the hearing. This generates a record in the event the complainant files another complaint.<sup>2</sup> Moreover, administrative proceedings are not tantamount to proceedings in courts of law in Pennsylvania. See *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 4 Pa. Commonwealth Ct. 448, 287 A.2d 161, 167 (1972) holding that an administrative proceeding is not restricted to the niceties of common law pleadings. The comment seems to commingle burden of proof and burden of persuasion although they are not the same. *Corbett and O'Malley v. Bell Telephone Company*, Docket No. C-00923898 (Order entered January 25, 1995), slip op. at 18—20 citing *Page v. Camp Manufacturing Co.*, 180 N.C. 330, 331, 104 S.E. 667 (1920); *McDonald v. Pennsylvania Railroad Company*, 348 Pa. 558, 36 A.2d 492, 495—96 (1940); *Wilson v. Pennsylvania Railroad*, 421 Pa. 419, 219 A.2d 666, 669—670 (1966) (“Burden of proof never shifts but evidence may establish prima facie case sufficient to shift the burden of persuasion”). In some instances, an presiding officer may require a respondent to go forward based on a determination that the complainant’s allegations and attachments provide evidence of a prima facie showing sufficient to shift the burden of persuasion. In that case, it may well be a violation of due process to not require a respondent to respond to the formal complaint notwithstanding a party’s absence or failure to present probative evidence at the hearing. A general rule is inadvisable given these considerations.

*Section 5.22. Contents of formal complaints.*

*Section 5.22(a).* The proposed regulation revised § 5.22 to specify the requirements of a formal complaint when the complainant is represented by an attorney and when the complainant has no formal representation. The proposed regulation at §§ 5.22(a)(2) required an attorney to list his or her attorney identification number. The proposed additions in Sections 5.22(a)(5) and (6) sought more detailed and easier to read information to facilitate Commission responses.

IRRC suggests that the reference to “writing” in § 5.22(a)(7) either define the term or specify what documents are subject to this section. The Utility Group suggests that the final regulation at § 5.22(a)(5) specify whether or not the Formal Complaint is an appeal of an informal complaint. The OSBA thinks this provision seems to contradict § 5.21 of our rules, which only requires identification of a document.

The Commission appreciates the concerns about § 5.22(a)(5). The final regulation retains the requirement

of a clear and concise statement of the act or thing complained of including the result of an informal matter within § 5.22(a)(7). The rephrasing addresses the commentators’ concern, particularly with respect to parties with counsel.

We agree with IRRC on § 5.22(a)(7). In this regard, the Commission generally relied on rules 1019 through 1024 of the Rules of Civil Procedure governing the attachment of writings to a complaint since complaints are the subject of § 5.22. The Commission notes that the language in § 5.22(a)(7) is virtually identical to Rule 1019(i) of the Rules of Civil Procedure. That rule, as this rule, requires attachment of a writing although the term writing is not defined in Rule 76 of the Rules of Civil Procedure’s Rules of Construction nor is the term defined in Sections 1019 through 1024.

The Commission agrees with IRRC and replaces with word “document” for the word “writing” in the final regulation.

The final regulations adopt a modified administrative equivalent of Rules 1002 through 1005 of the Pennsylvania Rules of Evidence for writings (now referred to as documents) and Rules 1019 through 1024 of the Rules of Civil Procedure governing the attachment of a document and its production.

We do not agree with the OSBA comment that § 5.22(a)(7) contradicts § 5.21(b). The final regulation states more clearly that the attachment requirement of § 5.22(a)(7) is not applicable to § 5.21(b) writings. Section 5.21(b) identifies documents that are more easily obtained because they are on file at the Commission. Extension of the mandatory attachment rule of § 5.22(a)(7) to § 5.21(b), particularly with regard to pro se litigants, could dramatically increase the number of pro se proceedings dismissed on procedural grounds. A large increase in dismissals based on noncompliance with an unnecessary procedural requirement could hinder the Commission’s ability to identify and address customer service problems raised by pro se litigants.

*Section 5.22(c).* The proposed regulation revised the language clarifying that a complainant must reference any order or regulation of the Commission that forms the basis for a formal complaint. IRRC suggests that the last sentence in § 5.22(b) also contain the phrase “the act” for consistency.

We agree with IRRC. We add the phrase “the act” in the second sentence.

*Section 5.24. Satisfaction of formal complaints.* The proposed regulation revised § 5.24. The proposed revision addressed circumstances in which a complainant does not wish to proceed but neither is the complainant satisfied. The proposed regulation anticipated closing a complainant’s matter after the complainant acknowledges a lack of interest in pursuing the matter.

IRRC’s comment recognizes that the revised § 5.24(b) allows a respondent to certify satisfaction based on a complainant’s acknowledgement of satisfaction or if the complainant no longer wishes to pursue the matter. The Ryan comment wants the Commission to address the current requirement that a complainant file a withdrawal or the respondent obtain the complainant’s signature. The comment claims this requires considerable resources, such as obtaining the complainant’s signature or preparing for a hearing where the complainant will never appear. The Utility Group suggests an efficient revision that allows the respondent to represent that the complainant is not going to pursue a matter.

<sup>2</sup> *Agnes Manu v. AT&T Communications of Pennsylvania, Inc.; Bell Telephone Company of Pennsylvania, Inc. and Philadelphia Electric Company, Inc.*, Docket Nos. F-09029141, C-00935014, C-00934970, C-00923621, and C-00924554. Three family members filed multiple Formal Complaints regarding arrearages of \$25,775.61, \$1,337.04, \$13,484, \$22,509.82, and \$24,124.21 and then failed to appear. There, a respondent may want to present their response.

The Commission agrees with IRRC as well as the Utility Group and Ryan comments. The final regulation at § 5.24(b) allows the respondent to file a certified writing confirming satisfaction either through a complainant's acknowledgement or in cases where the complainant no longer desires to pursue a matter. The final regulation at § 5.24(c) also requires the respondent to simultaneously serve a copy of the certified writing. The respondent must also include a written statement informing the complainant of their right to object in writing within 10 days. The docket is closed unless the complainant objects in writing. This reconciles concerns about efficiency with due process and certainty.

The final regulation also makes clear that the presiding officer is not required to render a decision unless the parties require one for good cause.

*Section 5.31. Staff-initiated complaints.* The proposed regulation revised the language to include actions taken pursuant to delegated authority and required the named party to file an answer consistent with § 5.61. The OCA suggests that staff-initiated complaints be served on the OCA and OSBA but not on OTS.

The Commission recognizes the need for greater dissemination of information about staff-initiated complaints to all statutory advocates and not just the OCA. For that reason, the final regulation requires that a copy be provided to the Statutory Advocates and the Chief Counsel. The final regulation deletes the current § 5.31(b) as well. These revisions provide the need for information about staff-initiated matters without imposing a service requirement that could give rise to challenges based on imperfect service. Service, because it is a legal term of art, is distinct from the understandable desire for information on Commission undertakings.

*Section 5.32. Complaints in rate proceedings.* The proposed regulation added a new section that recognizes a person's right to file a complaint against a proposed rate filing with the need to impose a reasonable time limit on complaints. This reflected narrower time limits for rate cases compared to nonrate cases under section 332 of the Public Utility Code.

There are no comments. Subsequent Commission review shows that the plain language of section 315 of the Public Utility Code requires the Commission to either include any complaint filed against a proposed rate increase in the case itself or to start another one with the utility still having the burden of proof. This means that, as long as the rates are proposed and not approved, the Commission cannot stop the complaint from either being considered or from instituting another proceeding.

For that reason, the final regulation for § 5.32(b) provides that a complainant filing a formal complaint in a rate case takes the record as they find it.

*Sections 5.41—5.44. Petitions.*

*Section 5.41. Petitions generally.* The proposed regulation made no major substantive changes. The proposed revisions seek to clarify the regulation.

IRRC suggests clarification to the phrase "in compliance with Commission direction" in § 5.41(c) with a cross-reference to the service requirements contained in the final regulation.

The Commission disagrees with cross references in this provision. This provision addresses who is served or given a copy not how the service or copy is accomplished.

The Ryan comment urges the Commission to insert a new sentence in § 5.41(d) imposing a mandatory time

period for Commission decisions. The Ryan comment concedes that the Public Utility Code differentiates between general rate cases, which impose a 7-month period for decisions in 66 Pa.C.S. § 1308, and other non-rate proceedings under section 332(g) that lack this mandate. The Ryan comment suggests a similar time period for § 5.41 petitions. The Ryan Comment proposes a rule that the Commission decide any proceeding initiated by a petition within seven months after filing unless the Commission grants itself a ninety-day extension for good cause shown.

The Commission declines to adopt this comment for several reasons. The Commission manages multiple, and sometimes controversial if not complex, petitions. Petitions run the gamut from a single suspended taxi driver seeking reinstatement through mid-sized carriers seeking resolution of intercarrier compensation matters under state and federal law to large utilities implementing restructuring or broadband deployment.

It is not possible or advisable to craft a mandatory 7 month decision rule for all non-rate cases premised on a statutory provision governing rate cases. Rate cases already consume such a considerable number of resources and staff in order to meet the statutory deadline. The resource and staff needs of the Commission will increase if the same 7 month statutory requirement were imposed on the entire gamut of non-rate cases. This increase is ultimately reflected in assessments and rates. Moreover, it is often difficult to reach a final decision in many matters in 7 months. This includes, for example, the Commission's promulgation of final rules governing the securitization of stranded costs where there were not dispute and billions of dollars. That problem is exacerbated in non-rate cases where there are disputes and complex questions of law and policy.

A general rule requiring a decision within a specific time period for every petition, regardless of its nature, fails to appreciate the sheer variety of proceedings or the costs that come with such a requirement.

*Section 5.42. Petitions for declaratory orders.* The proposed regulation contained no substantive changes for § 5.42. Section 5.42 was broken down for ease of reference.

*Section 5.43. Petitions for issuance, repeal, or waiver of Commission regulations.* The proposed regulation contained no substantive changes for § 5.43. The OCA requested that § 5.43 be revised for consistency to require service on the OCA. The Commission agrees and §§ 5.41—5.43 of the final regulation provides for service of petitions on the Statutory Advocates.

*Section 5.44. Petitions for appeal from actions of staff.* The proposed regulation extended the appeal period to a standard 20 days.

IRRC suggests that the Commission consider a general rule. The Commission agrees with IRRC and extends the challenge period to 20 days in the final regulation.

The Utility Group suggests that the Commission adopt a provision that appeals under this Section are decided at Public Meeting. The Utility Group makes the suggestion given that staff determinations often have a considerable impact to a party. The final regulation clarifies that the Commission decides these appeals at Public Meeting.

*Sections 5.51—5.54. Protests.*

*Section 5.51. Protest to an application.* The proposed regulation made minor linguistic changes for clarity. There were no comments. The final regulation adopts the proposed regulation.

*Section 5.52. Content of a protest to an application.* The proposed regulation contained no substantive changes. There was rewording for clarity. OSBA suggests that the word “shall” be included in brackets in § 5.52(a). IRRC and the Utility Group suggested elimination of the word “shall” due to a typographical error at § 5.52(c). The Commission agrees and inserts the word “must” in the final regulation.

*Sections 5.53 and 5.14. Time of filing protests and applications requiring notice.* The proposed regulation revised § 5.53 to provide a consistent default filing time for filing a protest. The proposed regulation deleted § 5.54 as redundant. There was considerable comment.

For the reasons discussed in § 5.14 earlier, the Commission’s final regulation retains the conjunctive approach to §§ 5.53 and 5.14. In deference to IRRC concerns about a standard protest period, the final regulation establishes a default provision for times when an application published in the *Pennsylvania Bulletin* fails to establish a protest period.

*Section 5.61—5.66. Answers.*

*Section 5.61. Answers to complaints, petitions and motions.* The proposed regulations for §§ 5.61, 5.102 and 5.103 are revised for consistency in providing a twenty day response time.

The OSBA comment suggests that the numbering requirement of § 5.61(b)(1) is complicated, routinely ignored, and should be eliminated. The Commission retains the existing numbering rule based on its experience.

The OCA suggests that the 20-day rule in § 5.61(a)(1) apply to rate complaints in § 5.61(d) as opposed to the reference to § 5.32. The Commission disagrees. Rate case proceedings are under a very tight timeframe and, for that reason, require a shorter answer period. The final regulation establishes a time identical to that for preliminary objections, e.g., 10 days. This is appropriate given that there is no duty, and hence no adverse consequences, for failure to file an answer in rate case proceedings. The Commission also provides § 5.61(e) clarifying the contents of an answer to a petition.

*Section 5.62. Answers seeking affirmative relief or raising new matter.* The proposed regulation reformatted the structure for clarity. The IRRC comment suggests that the Commission determine if a notice to plead must be included with the new matter. IRRC thinks this may be important in view of the fact that § 5.63(b) provides that failure to file a timely reply may be deemed an admission of the facts raised. The Utility Group notes that presiding officers do sometimes instruct utility counsel to append a Notice to Plead, particularly in pro se proceedings, when an answer raises new matter. The Utility Bar asks whether the final rules should contain this requirement.

The Commission declines to impose a Notice to Plead requirement. In many cases, particularly involving pro se litigants, the litigant is unaware of the consequences for not filing a reply with or without a Notice to Plead. In such instances, a Notice to Plead encourages dismissal on procedural grounds as opposed to disposition of the substantive concern. A well-intentioned suggestion that a Notice to Plead be required actually creates an avoidable procedural landmine for the unwary or unsophisticated litigant. The Commission prefers to err on the side of caution by not mandating a Notice to Plead in pro se proceedings. As for formal proceedings where the parties are typically represented by seasoned counsel if not

multiple numbers of attorneys, counsel in those proceedings fully appreciate the § 5.63 ramifications of any failure to reply.

Moreover, practice before the Commission is not synonymous with practice in the courts. The Commission has no jurisdiction to entertain counterclaims involving damages. The Commission does, however, retain an interest in new matter raising a counterclaim that is not one related to damages. The Commission does not want litigants dismissed from a proceeding based on failure to append, or reply to, a Notice to Plead. The Commission prefers, particularly for pro se litigants, to hear all the claims and allegations within our jurisdictional authority. The Commission’s final regulations balance the formalities of courtroom-like proceedings where all parties have counsel with those incredibly varied cases involving pro se litigants.

*Section 5.63. Replies to answers seeking affirmative relief or new matter.* The proposed regulation added replies to new matter including the possible consequences of a failure to reply to new matter. There were no substantive comments.

*Section 5.65. Answers to amendment of pleadings.* The proposed regulation excepted § 5.101 preliminary objections from the provisions of this regulation. There were no substantive comments.

*Section 5.66. Answers to petitions to intervene.* The proposed regulation revised § 5.66 to confirm that an answer to a petition to intervene must be filed within 20 days of service. The Utility Group suggests that answers be limited to “active” parties but not “inactive” parties. The Commission confined the language in the final regulation to “parties” given the difficulties, discussed throughout the rulemaking, of distinguishing between the meanings of “active” and “inactive” parties in a regulation.

*Sections 5.71—5.76. Intervention:*

*Section 5.73. Form and content of petitions to intervene.* The proposed regulation addressed frustration about facing an unknown intervenor group. The proposed regulation required intervenor petitions filed on behalf of more than one person to list the persons and entities comprising the represented group.

The Ryan comment contains an even more detailed proposal imposing nine additional informational matters that must be provide by an association intervenor. The suggested criteria would require an association intervenor to provide the name of the association, the date of formation, their purpose, their organizational structure, the number of members, their governance structure, whether intervention is by resolution or members, the interest of the association, and specific detail on the association’s alleged interest. The Ryan comment is particularly concerned about associations that provide little or no information about their formation, interest, or basis for intervention.

The Commission adopts the proposed regulation as final. The Ryan comment would mandate detailed information about every association’s standing in every proceeding regardless of the nature of the proceeding. Such a universal, detailed and costly-to-administer pleading is burdensome compared to the benefit. A party that wants to challenge an association’s intervention in any proceeding can always ask the presiding officer to require this kind of detailed information. We conclude that the permissive “may” allows this approach better than use of the directory “must” in the final regulation.



*Section 5.74. Filing of petitions to intervene.* The proposed regulation in § 5.74 established a default deadline for filing a Petition to Intervene as well as a Notice of Intervention. The proposed regulation limited intervention regardless of the party. The Sections are revised to notify the presiding officer of the appropriate standard to use in considering a request for intervention.

The IRRC comment notes that this is a marked departure from prior Commission practice. IRRC wants the Commission to clarify the intent behind this regulation. The OCA states that this provision may be legally or administratively unsound if applied to the OCA. The OCA files a Notice of Intervention as a public representative under a statute. This contrasts with a Petition to Intervene filed by a party under caselaw. The OCA cites numerous times the Commission and the public benefited from their public advocacy interventions even if they occurred well after expiration of the established intervention date.

The Commission agrees with IRRC and the OCA. The final regulation at § 5.74(b)(4) and (c) reflect different intervention and participation rights between Statutory Advocates and private litigants. The Statutory Advocates, unlike private litigants, have distinct statutory provisions governing their rights and responsibilities. For example, the Office of Consumer Advocate has statutory authority to file a Notice of Intervention whereas the similar right provided to the other statutory advocates is not called a Notice of Intervention. Section 5.74(b)(4) reflects that difference and provides all Statutory Advocates with the right to file a Notice of Intervention or Right of Participation at any time. Section 5.74(c) provides that right to private litigants although the right is more limited. Finally, the revision provides that any party intervening after expiration of an established protest period takes the record as it exists absent exceptional circumstances. This limitation balances rights with due process, the short timeframe for decisions in rate cases and the need to identify and resolve issues in rate and nonrate proceedings.

*Section 5.75. Notice, service and action on petitions to intervene.* The proposed regulation revised language for clarity. The IRRC and the OSBA comments suggest that the word “permitted” be replaced by “prohibited” in § 5.75(d) consistent with the Commission’s wording changes in this section. We agree with IRRC and the OSBA. We also deleted the phrase “by the moving party” in § 5.75(c) for clarity and brevity. Finally, § 5.75(d) provides for permissive intervention following expiration of any established protest period under § 5.74(b). This provides a regulatory option to permit intervention past the expiration period in appropriate circumstances. For that reason, the final regulation for § 5.75(d) is phrased with the more permissive “may” as opposed to the more limiting “shall” in § 5.74(b).

*Sections 5.91–5.94. Amendment and Withdrawal of Pleadings.* The proposed regulation sets forth revisions intended to reflect the Pennsylvania Rules of Civil Procedure where possible and appropriate.

*Section 5.91. Amendment of pleadings generally.* The proposed regulation made minor language changes and inserted new § 5.91(b). The new provision addressed amendments in response to preliminary objections.

The IRRC comment suggests that the phrase “insofar as appropriate” in § 5.91(a) is redundant and wants the Commission to delete it. The Commission agrees with IRRC.

*Section 5.92. Amendments to conform to the evidence.* The proposed language made changes for clarity, brevity, and ease of reading. There are no substantive comments.

*Section 5.93. Directed amendments.* The proposed regulation made minor language changes for clarity and replaced “participant” with “party” as well. There are no substantive comments.

*Section 5.94. Withdrawal of pleadings in a contested proceeding.* The proposed regulation made minor changes for brevity and clarity. The word “participant” is replaced with the word “party” in the provision. The Utility Group suggests that the Commission differentiate between “active” and “inactive” parties. The final regulation uses the term party consistent with the revision in order to avoid differentiating between active and inactive parties.

*Sections 5.101–5.103. Motions.* The proposed rulemaking changed the term “preliminary motion” to “preliminary objection” consistent with the use of that term by practitioners elsewhere.

*Section 5.101. Preliminary objections.* The proposed rulemaking for § 5.101 contained several revisions.

*Section 5.101(a).* The current regulation specified what preliminary motions are available to parties. The proposed regulation replaced “preliminary motion” with “preliminary objection” where appropriate and rephrases the term “preliminary objection” to more closely model Pa.R.C.P. 1028.

The OSBA asks if the phrase “except motions and prior preliminary objections” should be deleted since the Commission replaces “preliminary motions” with “preliminary objections.”

The final rule retains the phrase. The phrase “except motions and preliminary objections” is retained to reflect the Commission’s long-standing prohibition against responding to a motion or prior preliminary objection with another preliminary objection. This is one place in the final regulations where the word is retained to emphasize the rule against answering a motion or prior preliminary objection with another preliminary objection. Unlike the courts where private parties typically bear litigation costs, the Commission is a regulatory agency whose costs are ultimately recovered in assessments and rates paid by ratepayers. Retention of this rule discourages additional costs attributable to dilatory litigation practices that such a rule could create at the Commission. The final rule also reorders and rephrases the available preliminary objections to more closely model the Pennsylvania Rules of Civil Procedure at Pa.R.C.P. No. 1028.

*Section 5.101(b).* The current regulation governs the filing of preliminary objections and specifies that all preliminary objections must be raised at one time. The proposed regulation allowed two or more preliminary objections to be raised at one time. There was considerable comment to the proposal to allow two or more preliminary objections to be raised at one time. The major concern, expressed in the IRRC comment and Utility Group comment, is that the revision could allow a party with significant resources to unreasonably delay a proceeding or cause unnecessary expenditure by not being required to raise all preliminary objections at once. IRRC and the Utility Group suggest revocation of this proposal.

The Commission recognizes the validity of these comments and requires that all preliminary objections be raised at one time in § 5.101(c).

Section 5.101(b) continues to require that a preliminary objection contain a notice to plead advising the recipient

of the option to file an answer within 10 days of the date of service. In turn, § 5.101(f)(1) specifies that an answer to a preliminary objection may be filed within 10 days and § 5.101(f)(2) addresses the form for such answers.

*Section 5.101(c).* The current regulation governs more specific pleadings. The proposed revision to § 5.101(b) governed the filing of an amended pleading in response to a more specific pleading filed under § 5.101(b).

The OCA comment notes that § 5.101(c) references § 5.61(b) although the proposed revision to § 5.61(b) does not expressly provide that preliminary objections and documents must be filed in 20 days. Section 5.101(d) of the final regulation sets forth a clear response time period.

The Commission agrees with IRRC, the Utility Group, and the OCA that § 5.101(c) must require a party to raise all preliminary objections at one time. In addition, this subsection now provides that the preliminary objections shall be set forth in numbered paragraphs and that the preliminary objection must state the legal and factual basis for each preliminary objection.

*Section 5.101(d).* The current regulations govern the filing of an answer to a preliminary objection. The proposed regulation retained the 10 day filing period and imposed an obligation to contain a notice to plead stating that any answer shall be filed within 10 days of date of service of the objection.

IRRC and OSBA comments express concern about the difference in response deadlines and general lack of clarity concerning preliminary objections. IRRC and the OSBA suggest a standard timeframe. IRRC and the OSBA note that the word "motion" should be changed to "objection" consistent with the Commission's proposed terminology throughout § 5.101.

The Commission agrees with IRRC. The final regulation at § 5.101(d) clarifies that preliminary objections must be filed as a separate document and within the same 20 day period relating to answers to complaints, petitions, and motions set forth in § 5.61. The filing of a preliminary objection does not eliminate the requirement to file an answer to the complaint or other initiating pleading within the 20 day period for answers set forth in § 5.61(a) except for preliminary objections regarding insufficient specificity in § 5.101(e). A § 5.101(e) preliminary objection alleging insufficient specificity does not require an answer until further directed by the presiding officer.

The Commission also agrees with IRRC and the OSBA that a uniform 10-day rule for filing an answer to a preliminary objection is appropriate. That agreement is reflected in the final regulation in § 5.101(f)(1) as discussed above.

The former Motion for a More Specific Pleading in § 5.101(a)(4) of our existing regulations is now rephrased as a Preliminary Objection for Insufficient Specificity in § 5.101(a)(3) of the final regulations. However, a litigant using the term Motion for a More Specific Pleading will not have that pleading rejected on procedural grounds when the motion properly refers to § 5.101(a)(3). The Commission is unwilling to elevate form over substance in regard to the regulations.

The Commission takes this approach for several reasons. This provides an opportunity for a respondent with counsel to inexpensively reply with something other than an answer or a preliminary motion when a respondent is unclear, and this is frequently the case with pro se

litigants, about the exact issue in a complaint. On the other hand, the requirement to raise all preliminary objections at once and the prohibition on filing preliminary motions or motions in response to a preliminary objection is particularly relevant when complainant and respondent have counsel.

These two procedural requirements avoid dilatory and expensive litigation before the Commission. The Commission takes this approach because, unlike the courts where litigation is largely a privately-financed matter, litigation before the Commission is borne by the public in the form of assessments and utility rates. Recognition of this crucial difference plays a considerable role in the Commission's procedural rules and practice.

The final regulation for § 5.101(d) also reflects the Commission's agreement with IRRC and the comments on the need for linguistic clarity and consistency. The revised regulation replaces "preliminary motion" with "preliminary objection" where appropriate.

*Section 5.101(e).* The current regulation at § 5.101(e) specifies a 30-day period a decision by the presiding officer. The proposed revision to § 5.101(e) required a decision on preliminary objections within 30 days of filing or termination of mediation. The final regulation adopts this proposal and requires a presiding officer to render a decision within 30 days of the assignment of the preliminary objection. That provision, however, is moved to a new § 5.101(g) for greater clarity and consistency.

*Section 5.101(f).* The current regulation at § 5.101(f) allows the submission of an amended pleading within 10 days by a party who pleading has been struck. The proposed revisions to § 5.101(f) specified what happened following a ruling.

The IRRC and OSBA comment note that a party who files a pleading that is stricken has 10 days to file an amended pleading whereas a party who filed an overruled preliminary objection has 20 days to plead over. The OSBA is also concerned about delineating the circumstances in the proposed regulation where a party has the right, but not the duty, to file a responsive pleading. The OSBA suggests that the regulation make clear that a party has the right but not duty to file a responsive pleading. The OCA supports the proposed revision despite the different response times.

The Commission agrees with IRRC. The Commission also disagrees with the OSBA. The final regulation retains a uniform 10 days for filing an amended pleading. This uniform period addresses the concern that disparate filing periods cause confusion. However, the Commission does not agree with the OSBA that the regulation must spell out the detailed circumstances when a party with no duty to file a responsive pleading can exercise their right to file an answer. That determination is better left to the party.

This final regulation is moved to a new § 5.101(h) for clarity and consistency.

*Section 5.102. Motions for summary judgment and judgment on the pleadings.* The proposed regulation combines a discussion of a Motion for Judgment on the Pleadings and a Motion for Summary Judgment. These are for clarity and brevity.

The Utility Group is concerned that the proposed revisions confuse Summary Judgments, which can be based on the pleadings and supplemental discovery responses and affidavits, with Judgments on the Pleadings, which are confined to the pleadings.

The Commission recognizes the potential for ambiguity. The final regulation at § 5.102(b) contains the added phrase “to a Motion for Summary Judgment.” This clarifies that a Motion for Summary Judgment can rely on supplemental pleadings and depositions, answers to interrogatories, further affidavits or verifications and admissions appended in support of, and the basis for, the motion.

*Section 5.103. Motions.* The proposed regulation replaced “participant” with “party” in the provision. The proposed regulation to § 5.103(b) required a written motion to contain a notice to plead stating that a responsive pleading is due within 20 days of service. There are no substantive comments. The final regulation retains the Notice to Plead requirements and adopts the proposed 20-day period for answering or objecting to a motion.

*Subchapter B. Hearings*

*Section 5.201—5.203. General.* The proposed regulation replaced “participant” with “party” in the provisions. There are no substantive comments.

*Sections 5.211—5.212. Notice of Hearing.* The proposed regulation replaced “participant” with “party” in the provisions. There are no substantive comments.

*Sections 5.221—5.224. Prehearing and Other Conferences.* The proposed revisions contained language changes for brevity and clarity. The Utility Group comments suggests that the final regulation contain an express statement requiring the parties to be prepared to cooperatively prepare a procedural schedule at the prehearing conference. The Commission reflects our agreement with this suggestion in § 5.222(d)(2)(A). Moreover, a violation could result in sanctions or other action consistent with § 5.371(a)(1).

*Section 5.222. Initiation of prehearing conferences in nonrate cases.* The final regulation for § 5.222(d)(1) and (e)(2) lists mandatory and permissive topics for prehearing conferences in nonrate proceedings.

*Section 5.223. Authority of presiding officer at prehearing conferences.* The final regulation for § 5.223(c) allows a presiding officer to participate in settlement discussion upon agreement of the parties given the importance of having a mediator or presiding officer familiar with a proceeding. However, in recognition of the fact that all parties may not always want the same mediator or presiding officer at a conference and any settlement, the final regulation allows a party to request that a different presiding officer or mediator be assigned upon the request of a party.

*Section 5.224. Prehearing conference in rate proceedings.* The final § 5.224(c) delineates the mandatory subjects of a rate proceeding. Section 5.224(e) provides the presiding officer with discretion to schedule additional prehearing conferences. The proposed § 5.224(f) is deleted in response to comments. The final § 5.224(f) language deletes the phrase “when justice so requires” as a redundant statement of the obvious.

*Sections 5.231—5.235. Settlement And Stipulations.*

*Section 5.231. Offers of settlement.* The proposed regulation for § 5.231 was changed to reflect a regulatory style that limited a section to one topic. The new § 5.231(d) provided that a proposal to settle a discovery dispute is not admissible against a counsel or party in response to prior comments.

The Ryan comment repeats an earlier concern that proposals intended to resolve a discovery dispute should be prohibited in any adjudication of the dispute.

The Commission denies the suggested revision. The proposed regulation reflects adoption of most of the previous Ryan comments on this provision. The proposed revision in § 5.231(d) effectively provides the relief requested. More language could prevent any discussion of any permutation whatsoever of any proposal even remotely related to a proposed resolution. The proposed language is not warranted given this draconian potential.

*Section 5.232. Settlement petitions and stipulations of fact.* The proposed revision to § 5.232 was changed to “Settlement petitions” and all mention of stipulations is removed. The revision also required filing with the Secretary. Section 5.232(b) required identification of the parties that agreed to the settlement or which did not respond to attempts to secure agreement. Section 5.232(d) provided for review by the presiding officer.

IRRC questions use of the phrase “in the public interest” in the proposed regulation for § 5.232(d).

The Ryan comment proposes substantial and detailed procedures governing partial, contested, or uncontested settlements. The Ryan comment proposes that an presiding officer receive a settlement if the parties do not want the pleadings withdrawn and that the settlement identify the parties opposing, supporting, or taking no position on the settlement. The Ryan comment also proposes that each party receive a complete copy of any settlement or stipulation and that a hearing be required and findings made on the settlement or stipulations for partial settlements. Finally, the Ryan comment proposes that the settlement come directly to the Commission if the parties waive exception rights.

The Utility Group opposes removal of stipulations as a possible settlement document. This is inconsistent with current practice wherein stipulations are sometimes included in partial and complete settlements. The Utility Group also states that § 5.232(d)(2) misstates the law by requiring a hearing on a settlement petition if a timely objection is filed and a hearing is necessary in the public interest. The Utility Group claims that hearings are not required if an objection to a settlement raises only questions of policy or law. In the Utility Group’s view, a hearing is required only when a timely objection raises issues of material fact.

The Commission disagrees with IRRC on the need to either eliminate or define the public interest. The presiding officer’s obligation to determine whether a settlement is in the public interest is a necessary corollary to the Commission’s fundamental statutory obligations under the Public Utility Code, particularly sections 501, 1301 and 1501. 66 Pa.C.S. §§ 501, 1301 and 1501. In evaluating any matter, the Commission is obligated to balance the interests of consumers in adequate, safe and reliable service at just and reasonable rates with the interests of utilities in a fair return on facilities devoted to public service. The particular balance struck, however, will always be dictated by the specific facts, circumstances, policy, and applicable law. To provide guidance in this area, the Commission has issued a proposed policy statement that sets forth the factors it will consider in evaluating the merits of a settlement involving violations of the Public Utility Code and Commission regulations.<sup>3</sup> As such, crafting a finite definition for public interest in these regulations is not necessary.

Commission agrees with the Utility Group that the final regulation should retain stipulations, be they com-

<sup>3</sup> Proposed Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations, Docket No. M-0005187 (Order adopted Aug. 11, 2005).

plete or partial, given the usefulness of partial, complete, or contested settlements. Settlements at the Commission frequently contain stipulations of fact by some or all of the parties. However, the Commission disagrees with the Ryan comment on mandating hearings when there are partial settlements or stipulations of fact.

The Commission must provide the fundamental due process rights of notice and an opportunity to be heard, and must render decision based on the record so the court can review the agency's determination. This does not always require the full panoply of trial-type formalities but, rather, notice and an opportunity to defend in an orderly proceeding adapted to the nature of the case. *Conestoga National Bank v. Patterson*, 442 Pa. 289, 275, A.2d 6 (1971). Accordingly, due process is a flexible concept and "calls for such procedural protections as the situation demands." *Pa. Coal Mining Assoc. v. Insurance Dept.*, 471 Pa. 370 A.2d 685, 690 (1977).

The Commission takes this approach to the issue of hearings in settlements. We decline to specify by regulation what due process is required for settlements and partial settlements. We believe that the appropriate use of a trial-type hearing, as opposed to some other procedure for being heard, such as the filing of written objections or comments, is a decision better made initially by a presiding officer under § 5.232(d) settlement review and in accordance with the requirements of Pennsylvania law.<sup>4</sup> In addition, there are times, and section 332(g) rate case proceedings are a good example, where formal objection periods are abbreviated due to the press of time. Consequently, flexibility is the rule.

The Commission does, however, adopt much of the Ryan comment with some modifications. Section 5.232(a) restores stipulations, whole or partial, to the final regulation. Section 5.232(b) requires the settling parties to identify the parties to the settlement that support, oppose, take no position, or did not have an opportunity to enter into the settlement. Section 5.232(c) provides for service of the settlement on the parties with an opportunity for comment. Section 5.232(d) provides for review by a presiding officer. Sections 5.232(e), (f), and (g) provide for an opportunity to comment and review a settlement. Section 232(g) clarifies when, and how, objections to settlements are filed if a case is not assigned to a presiding officer. This balances the competing alternatives of an absolute requirement of hearings with the practical need for flexibility.

*Section 5.233. Refusal to make admissions or stipulations.* The proposed regulation made minor language. There are no substantive comments.

*Section 5.234. Presentation and effect of stipulations.* The proposed regulation made minor language changes. The OSBA comment suggests that stipulations in which only some, not all, of the parties stipulate be binding only on the parties to the stipulation. The Commission agrees with the OSBA. The final regulations clarify that in § 5.234(a).

*Section 5.235. Restrictive amendments to applications for motor carrier of passenger and household goods in use authority.* The proposed regulation clarifies the criteria to be addressed when stipulations are used for motor carrier cases. The IRRC and OSBA comments recommend that the word "shall" in § 5.235(a) not be bracketed.

<sup>4</sup> See, e.g. *Chester Water Authority v. Pa. PUC*, 868 A.2d 384 (Pa. 2005)(constitutional procedural due process is a flexible concept, and thus, implicates procedural protections as each particular situation demands); *Lehigh Valley Power v. Pa. PUC*, 563 A.2d 548 (Pa. Cmwlth. 1989)(trial-type hearing necessary only to resolve disputed questions of fact).

The Commission agrees with IRRC and the OSBA. The final regulation reflects the need for an explanation for restrictive amendments as settlements. These restrictions can reduce, not increase, the number of carriers or even service quality in any given area. For these reasons, an explanation provides the Commission with a better understanding of the value, if any, of a restrictive covenant.

*Sections 5.241—5.245. Hearings.*

*Section 5.241. Attendances.* The proposed regulation contained language changes for brevity and clarity. There are no substantive comments.

*Section 5.242. Order of procedure.* The proposed regulation replaced the word "participant" with "party" throughout the provision. The OCA comment suggests that oral rejoinder, if any, occur before cross-examination is conducted since it is the last opportunity to present direct testimony. The Utility Group urges the Commission to provide more detail on this provision because parties sometimes abuse the opportunity by orally presenting new testimony, issues, and exhibits on the last day of a hearing with minimal opportunity to respond. The Utility Group suggests that the final regulation provide a right to respond if and when that occurs in a hearing.

The Commission understands the comments on this issue as it goes to the heart of procedural due process. The revision to the final regulation at § 5.242(a) limits the opportunities for abuse. The final revision requires that oral rejoinder by a party with the burden of proof shall be conducted before any cross-examination of the witness.

*Section 5.243. Presentation by parties.* The proposed regulation revised the presentation provisions by requiring an opportunity to respond in § 5.243(a). Limits are set forth in § 5.243(b). Section 5.243(f) addresses friendly cross-examination based on the definition set forth in § 1.8.

The Utility Group asks that friendly cross-examination be prohibited or discouraged because they believe it is repetitious and of minimal value. The final regulation retains the option for friendly cross-examination because that procedure is not always repetitious or of no value. The Commission believes that challenges to the inappropriate use or abuse of friendly cross-examination are better made on a case-by-case basis instead of a general rule. Moreover, § 5.243(e) reinforces a party's right to prevent the inappropriate or abuse of presentation rights.

*Section 5.245. Failure to appear, proceed, or maintain order in a proceeding.* The proposed regulation revised the language in the provision for clarity and brevity.

IRRC suggests that the final § 5.245 rule codify application of this provision to intervenors. The Utility Group states that the Commission should go further and allow a presiding officer to punish obstructive behavior by dismissing any complaint, application, petition, or intervenor. The Ryan comment suggests that the Commission address obstructive behavior in a new regulation at § 5.246, specifically noncompliance with prehearing orders and discovery, by granting a continuance until the exhibits become available or there is a complete response to the discovery.

We adopt IRRC's requested codification as § 5.245(c) in the final regulation. We decline to adopt the other suggestions. These issues are better presented to a presiding officer and not in a general rulemaking. Nothing in the current or final regulations prevents counsel from

requesting a continuance, seeking dismissal of an application, complaint, petition, or even intervenor.

Our final rules are general rules of future applicability. Final rules are intended to establish general parameters. The final rules should not adopt suggestions that could encourage interlocutory appeals or needlessly narrow a presiding officer's discretion to address failures to appear, determine the order of proceedings, or maintain order.

*Sections 5.251—5.253. Transcript.* The proposed regulation made language changes for brevity and clarity. The word "party" replaced the word "participant" in the provisions. The OCA suggests that the transcript correction period be shortened. The Commission agrees with the OCA. The final regulation at § 5.253(c) shortens the transcript correction period.

#### *Subchapter C. Interlocutory Review*

*Interlocutory Review: Sections 5.301—5.306.* The proposed regulation made language changes for brevity, clarity and consistency. The word "party" replaced "participant" throughout the provisions. Section 5.306 provided for transmission by telefacsimile when expedited notification proved necessary.

The IRRC comment suggests that Section 5.306 be revised to reflect the Commission's response to IRRC's opposition to electronic filing.

The Commission retains the § 5.306 language. Section 5.306's reference to electronic filing is not mandatory. The reference is intended for use in exceptional circumstances and is accompanied by a requirement to file a hard copy. Exigent circumstances of the type envisioned by this regulation may, of necessity, require electronic means to accomplish expedited notice. The Commission made ministerial corrections to the final regulatory provisions in § 5.304(e) and (f) without changing their meaning.

#### *Subchapter D. Discovery*

##### *Sections 5.321—5.324. General.*

*Section 5.321. General.* The proposed regulation replaced "participant" with "party" throughout the provision. There are no substantive comments. The final regulation adopts the proposed regulation. The final regulation clarifies that § 5.321(f)(5) applies to rate increase cases.

*Section 5.322. Informal agreement regarding discovery or deposition procedure.* The proposed regulation replaced "participant" with "party" throughout the provision. There are no substantive comments. The final regulation adds the ministerial phrase "authorized to administer oaths" and adopts the proposed regulation.

*Section 5.323. Hearing preparation material.* The proposed regulation replaced "participant" with "party" throughout the provision. The proposed regulation also added surety, indemnitor, and agent to the list. There are no substantive comments.

*Section 5.324. Discovery of expert testimony.* The proposed regulation replaced "participant" with "party" throughout the provision.

IRRC and the Utility Group identifies an alleged conflict between the language in this provision and the exclusionary language of § 5.323(a).

The Commission's final regulations at § 5.324(a) and 5.323(a) must be read in light of § 5.321 and Pa.R.C.P. 4003.3—4003.5, which formed the basis for these regulations. The apparent "allowance" language of § 5.324(a) contrasted with the apparent "preclusion" language in

§ 5.323(a) is resolved by reference to the Civil Rules and § 5.321(a). Section 5.321(c) allows discovery not otherwise privileged and identification is provided. These regulations allow the discovery of hearing preparation material and expert testimony so long as they are not privileged. Section 5.321(a) establishes the privilege exclusion, § 5.323(a) permits discovery so long as the material is not privileged or mental impressions for hearing preparation, and § 5.324(a) applies the rule for discovery but expands it to hearing preparation material. The rules when read together allow the discovery of opinions so long as they are not privileged. This explains the apparent preclusion in § 5.323(a) with the apparent inclusion in § 5.324(a).

*Sections 5.331—5.332. Timing and Supplemental Responses.* The proposed regulation replaced "participant" with "party" throughout the provision. There were no substantive comments.

##### *Sections 5.341—5.351. Types of Discovery.*

*Section 5.341. Written interrogatories to a party.* The proposed regulation replaced "participant" with "party" throughout the provision.

The Utility Group suggests that the final § 5.341(b) regulation require service only on "active" parties and a certificate of service with the Secretary. The OCA recommends that the Commission rescind the prohibition against multi-part interrogatories set forth in § 5.341(d) of the existing regulation.

The Commission does not agree with the Utility Group on the need to differentiate between "active" and "inactive" parties in these general regulations for the reasons discussed throughout this rulemaking. The Commission also rejects the request to rescind the prohibition against multi-part interrogatories. The Commission does so because multi-part interrogatories may seek information on multiple matters that may or may not relate to one specific issue. By prohibiting this approach, the Commission's rules require the parties to focus on one issue in each interrogatory. In addition, a multi-part interrogatory may produce responses or objections that are so general that it is difficult to identify exactly what part of what multi-part interrogatory the responding party is addressing.

*Section 5.342. Answers or objections to written interrogatories by a party.* The proposed regulation replaced "participant" with "party" throughout the provision. The rule clarified the process for answering or objecting to interrogatories. The proposed rulemaking differentiated between rate cases, subject to section 1308 of the Public Utility Code, and other proceedings.

*Section 5.342(a).* The Utility Group and the OSBA comments oppose the verification requirement for interrogatories under § 5.342(a)(6). The Utility Group notes that interrogatories are answered by many persons, particularly in rate cases, and that it is unwieldy to impose verification. The Utility Group proposes an alternative requirement that a party answer each interrogatory fully, completely, and truthfully. The OSBA wonders whether the attorney or the experts must verify.

The Commission does not agree that verification should be rescinded. Verification is an inexpensive alternative to notarization, enhances the credibility and accountability of the responding party, and better identifies who says what in complex proceedings. Verification provides an incentive for counsel to be even more familiar with a client's responses than might be the case without verification.

*Section 5.342(d).* IRRC and the Utility Group note that § 5.342(d) and (d)(1) seems to be contradictory. Section (d) requires the filing of answers and objections on a 15-20 day difference in rate or nonrate proceedings. subsection (d)(1) states that objections are to be filed in 10 days for rate cases and 30 days for other cases. IRRC and the Utility Group urge the Commission to rectify the problem. The Utility Group urges the Commission to retain the current rule.

The Commission agrees with IRRC on revising § 5.342(d) and (d)(1). The final rule deletes substantial portions of the proposed regulation and provides that all objections are to be served within 10 days of service of the interrogatories under § 5.61(a)(2). A certificate of service must also be filed with the parties and the Secretary. The final rule also retains the difference between rate and nonrate cases whenever possible, in this case the 15—20 day rules for answers to interrogatories, given the statutory limits of section 332(g) of the Public Utility Code.

*Section 5.343. Procedures in deposition by oral examination.* The proposed rulemaking made ministerial language changes that do not affect the substantive provisions. There are no substantive comments. The Commission adopts the proposed rule as final.

*Section 5.344. Approval by presiding officer.* The proposed rulemaking substituted “party” for “participant” throughout the provision. There are no substantive changes. There are no comments.

*Section 5.345. Procedure on depositions by written questions.* The proposed rulemaking substituted “party” for “participant” throughout the provision. There are no substantive changes. There are no comments.

*Section 5.347. Taking of depositions—objections.* The proposed rulemaking substituted “party” for “participant” throughout the provision. There are no substantive changes. There are no comments.

*Section 5.348. Transcript of deposition, objections, and filing.* The proposed rulemaking substituted “party” for “participant” throughout the provision. There are no substantive changes. There are no comments. The Commission adopts the proposed rule as final.

*Section 5.349. Requests for documents, entry for inspection and other purposes.* The proposed rule replaced “participant” with “party” throughout the provision. The OSBA opposes the verification requirement since the responses are required to only state that inspection and related activities are permitted.

The Commission adopts a final rule by adding the phrase “or notarized, as permitted by § 1.36” in § 5.349(d) of the final regulation. Verification is retained in the final regulation given that § 5.349(b) provides a party with an option to provide copies at the requesting party’s expense or to permit inspection and copying. Verification ensures that the proffered inspection or copying happens in a reasonable and non-obstructive manner.

*Section 5.350. Request for admission.* The proposed rule replaced “participant” with “party” throughout the provision. There are no comments. The Commission adopts the proposed rule as final. The final regulation adds a phrase in § 5.350(d)(3) stating that “grounds for objections shall be specifically stated.”

*Section 5.351. On the record data requests.* The proposed regulation essentially clarified operation of the current rule. The OSBA comment urges the Commission to clarify that the option to make a request orally or in writing in § 5.351(a) applies only to the requesting party.

The Commission adopts a rephrased provision for § 5.351(a). The revision inserts a second sentence to clarify that the “party” making the request in the first sentence can do so orally or in writing. Other ministerial changes are made as well.

*Sections 5.361—5.364. Limitations.* The proposed rule replaced “participant” with “party” throughout the provision. There are no comments. The Commission adopts the proposed rule.

*Sections 5.371—5.373. Sanctions.* The proposed rule replaced “participant” with “party” throughout the provision. The proposed regulation also extended the deadline for § 5.371(c) decisions from 15 to 20 days. There are no comments. The Commission adopts the proposed rule.

#### *Subchapter E. Evidence and Witnesses*

*Sections 5.401—5.409. Evidence.* The proposed regulation replaced “participant” with “party” throughout the provisions. The proposed regulation also revised § 5.402(b).

The IRRC and OCA comments suggest deletion of the word “By” in § 5.401(b)(2)(iii) in the phrase “By considerations of undue delay or waste of time.” The Commission agrees.

*Sections 5.411—5.414. Witnesses.* The proposed regulation replaced “participant” with “party” throughout the provisions. Other ministerial language changes are made as well.

The OSBA suggests that § 5.412(f) contain a revision establishing a general process for developing the record in a proceeding. The OSBA suggests that when the utility has the burden of proof, the utility files its written testimony followed sequentially by intervenor direct testimony, rebuttal testimony by all the parties, and surrebuttal testimony by all parties.

The Commission appreciates the OSBA’s concerns about witness procedure. This concern varies from case to case and for that reason is better addressed by a presiding officer.

*Sections 5.421—5.431. Subpoenas and Protective Orders.* The proposed regulation replaced “participant” with “party” throughout the provisions. This proposed regulation is ministerial and does not impact the substantive meaning.

The OSBA reference to the word “answer” in their comment suggests that a party could file an answer to a subpoena in addition to appearing, objecting, or producing documents. The Utility Group suggests a provision be added to § 5.423 to include requests for a protective order for submittals in nonadversarial proceedings.

The Commission’s reference to “answer” is for timeframe and content only. The word should not be read to authorize an answer as an alternative to objecting, making an appearance, or producing documents set forth in § 5.421(b)(1). For that reason, the final regulation at § 5.421(b)(3) specifies that a “response” shall be filed with the Commission and presiding officer within 10 days of service. This avoids ambiguity and is consistent with the OSBA’s comment for a 10 day reply period.

The Commission agrees with the Utility Group. The final rule contains a new § 5.423(b) crafting a general rule for nonadversarial proceedings. The final regulation refers such requests to the Commission’s Law Bureau for a recommended disposition. The remaining sections are revised to reflect inclusion of this request.

*Sections 5.431. Close of the Record.* The proposed regulation revised the provision for clarity and brevity. No comments were filed. The final rule adopts the proposed regulation with some additional ministerial language that does not change the substantive provisions.

#### *Subchapter F. Presiding Officers*

*Sections 5.481—5.486. Presiding Officers.* The current regulation governs the authority of a presiding officer. The current regulation in § 5.485(a) authorizes a presiding officer to note on the record a participant or counsel of record's disregard of a presiding officer's rulings on matters of order and procedure. The presiding officer may also prepare a special written report to the Commission when necessary.

The proposed regulation revised the language without a substantive change. There are no comments.

The final regulation adopts the proposed revisions. The final regulation does not require the presiding officer to note noncompliance as is the case in the current regulation. Instead, the final regulation changes "shall" to "may" so that a presiding officer has the ability to distinguish between minor infractions compared to major infractions that are subject to the notation on the record rule.

#### *Subchapter G. Briefs*

*Sections 5.501—5.502. Briefs.* The proposed rulemaking intended to clarify the existing distinction between rate cases and nonrate cases. Rate cases are shortened proceedings subject to section 332(g) of the Public Utility Code. Nonrate cases are not. Consequently, the linguistic distinction and regulations often makes these distinctions throughout the regulations. Section 5.502(d) is one such place.

Main or Reply briefs are filed in rate cases. Initial or Response briefs are filed in nonrate cases. The Utility Group notes that the revision to § 5.502(d) inadvertently removes references to the filing of Initial Briefs. IRRC questions whether this is intentional. The OSBA comment requests insertion of language specifically referencing the number of copy obligation for parties in the final regulation. The OSBA also identified typographical errors.

The Commission agrees with IRRC, the Utility Group, and the OSBA. The final regulation for § 5.502(a) requires that copies be served in compliance with § 1.59(b)(1). Sections 5.502(b) and 5.502(c) are revised to reflect the continuing difference between nonrate and rate case filings. In response to the Utility Group comment in § 5.535 regarding the misuse of reply exceptions, § 5.502(d) now allows the filing of amicus curiae briefs. This will minimize any misuse of § 5.535 reply exceptions and maximizes due process opportunities to provide information on issues of interest to the Commission. Section 5.502(e) inserts the word "Initial" to include this brief as one of the briefs subject to filing deadlines.

#### *Subchapter H. Exceptions, Appeals and Oral Argument*

*Section 5.532. Oral argument before presiding officer.* The proposed regulation substituted "party" for "participant" throughout the provision. There are no comments.

*Section 5.533. Procedure to except to initial, tentative, and recommended decisions.* The proposed regulation substituted "party" for "participant" throughout the provision. IRRC suggests insertion of a bracket in the third sentence of § 5.533(c) wherein the existing word "shall"

appears after "exception" and before "exceptions shall" in the proposed regulation. The Commission agrees with IRRC and brackets the word. There are no other comments.

*Section 5.535. Replies.* The proposed regulation substituted "party" for "participant" throughout the provision. The IRRC comment suggests that the word "shall" be bracketed and the word "must" be in bold type in § 5.535(a). The Utility Group comment urges the Commission to insert language permitting a party to file a reply in support of a party's position and prohibit a party from raising new arguments in support thereof.

The OSBA comment notes that the current § 5.535(b) seems to conflict with § 5.533(e). Section 5.535(b) allows last-day filing of reply exceptions subject to the 3-day rule. Section 5.533(e) prohibits last-day filing of reply exceptions and the use of the 3-day rule.

The Commission agrees with IRRC. The final regulation deletes the word shall consistent with our agreement.

The Commission also recognizes the Utility Group's concern that due process should allow a party to respond to new supporting arguments not raised by a party let alone in another reply raising new issues or arguments in the guise of allegedly supporting a party's position. The final regulations address the Utility Group's concern about new material and due process in two ways. Section 5.535(a) expressly prohibits the raising of new arguments or issues in a reply by limiting a reply to arguments or issues identified in an exception. Section 5.502(d) allows the filing of amicus curiae briefs to facilitate the raising of views that might otherwise appear as new arguments or issues in § 5.535 replies. Any exception or replies that transgresses these prohibitions are subject to a Motion to Strike.

The Commission recognizes the OSBA's argument about possible contradiction between §§ 5.533(e) and 5.535. In response to this concern, the general rule in § 5.535(b) provides that the mailbox rule cannot be used for reply exceptions unless the Commission determines otherwise. This language now mirrors the language in § 5.533(e) of the existing regulation addressing replies. The Commission also recognizes that in appropriate circumstances, such as when the Commission suspends the normal exception and reply periods, the mailbox rule may be appropriate.

*Section 5.538. Oral argument before the Commission.* The proposed regulation contained no substantive revisions to this section.

The Ryan comment urges the Commission to insert a new § 5.538(d) on oral argument before the Commission. The Ryan comment requests a governing process for granting oral argument before the Commission given the evolving nature of utility regulation and issues. The Ryan comment recognizes the existing regulation at § 5.538 but notes that parties rarely request it and the Commission rarely orders it sua sponte. The Ryan comment recommends a process similar to the Act 294 process wherein two Commissioners can request oral argument.

The Commission declines to adopt this suggestion. It is not clear if only two should have the authority to compel three other Commissioners to participate in oral argument. It is also not clear if any oral argument granted can be revoked based on a majority vote, if only two Commissioners are required to grant review, or upon a majority vote of the majority voting to grant review. Is it really unclear if the majority or two that granted oral argument can then vote to rescind any oral argument

they originally supported. Finally, the infrequent use of the existing regulation undermines any professed need for an additional regulation.

*Subpart I. Reopening, Reconsideration and Rehearing*

*Sections 5.571—5.572.* The proposed regulation revised the language without substantive change to the provisions. There are no comments.

*Appendix J. Reports of Compliance*

*Sections 5.591—5.592.* The proposed regulation in § 5.591(a) required a party that had to do or perform an act to file a notice within 30 days of the effective date stating that the requirement has or has not been met. Section 5.592 deletes the existing reference to sections 1307 and 1308 of the Public Utility Code. Both provisions change “participant” to “party” as well.

The OCA comment suggests a revision to § 5.592(d) stating that rates cannot go into effect in a compliance tariff filing if an exception is filed. The OCA further suggests that the Commission should review and make a determination on the exceptions in order to avoid the additional cost and burden of permitting rates to go into effect and then issuing a subsequent order amending or denying portions of the compliance filing. The OSBA comment seeks a regulatory mandate that a clean and red-lined electronic copy be required so the parties can quickly identify the changes.

The Commission rejects these proposals. The Commission’s long-standing practice in cases wherein complex exceptions are filed to a voluminous rate case is to allow a rate to sometimes go into effect, depending on the circumstances, to avoid undue harm to the utility or the consumers. These determinations are fact and issue based. As with the Ryan comment seeking detailed provisions on obstructive behavior, the OCA seeks a general rule of uniform applicability when a case-by-case approach is better.

The OSBA’s suggestion about red-lined and original copies is a good idea in an electronic filing regulation. The Commission is reluctant to mandate a red-lined copy because many tariff filings are made by smaller companies that lack the technological means to inexpensively provide a red-lined copy. Moreover, the issue of a red-lined copy can be made to the presiding officer during the proceeding, requested in the exceptions as part of the Commission’s order, or ordered by the Commission in the Final Order. For these reasons, the Commission is not imposing this requirement.

*Subchapter K. Appeals to Court*

*Sections 5.631—5.632.* The proposed regulation revised the language without substantive change to the provisions. There are no comments.

Accordingly, under 66 Pa.C.S. §§ 501, 504—506, 1301 and 1501, and sections 201—204 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201—1204) and the regulations promulgated thereunder in 1 Pa. Code §§ 7.1, 7.2 and 7.5, the Commission proposes adoption of the final regulations as revisions of the rules pertaining to practice and procedure before the Commission in Chapters 1, 3 and 5, as noted and set forth in Annex A; *Therefore,*

*It Is Ordered That:*

1. The regulations of the Commission, 52 Pa. Code Chapters 1, 3 and 5, are amended by amending §§ 1.2—1.4, 1.7, 1.8, 1.11, 1.15, 1.21—1.25, 1.31, 1.33, 1.35—1.37, 1.42, 1.43, 1.51, 1.53—1.56, 1.58, 1.59, 1.61, 1.71—1.73, 1.76, 1.81, 1.82, 1.86, 3.1—3.4, 3.6—3.8, 3.10, 3.111—3.113, 3.361, 3.363, 3.501, 3.502, 3.551, 3.601, 3.602, 5.1, 5.12—5.14, 5.22, 5.24, 5.31, 5.41—5.44, 5.51—5.53, 5.61—5.63, 5.65, 5.66, 5.73—5.75, 5.91—5.94, 5.101—5.103, 5.201—5.203, 5.212, 5.221—5.224, 5.231—5.235, 5.241—5.243, 5.245, 5.251—5.253, 5.302—5.306, 5.321—5.324, 5.331, 5.332, 5.341—5.345, 5.347—5.351, 5.361, 5.362, 5.364, 5.371—5.373, 5.401, 5.402, 5.404—5.409, 5.412, 5.421, 5.423, 5.431, 5.481—5.486, 5.501, 5.502, 5.532, 5.533, 5.535, 5.571, 5.572, 5.591, 5.592 and 5.631—5.633; by adding §§ 1.38, 3.6a and 5.32; and by deleting §§ 3.5, 3.9 and 5.54 to read as set forth in Annex A.

*(Editor’s Note:* The proposal to amend § 1.32 (relating to form of documents) has been withdrawn by the Commission.)

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

3. The Secretary shall submit this order and Annex A to the Governor’s Budget Office for review of fiscal impact.

4. The Secretary shall submit this order and Annex A for review by the designated standing committees of both houses of the General Assembly, and for review by IRRC.

5. The Secretary shall deposit this order and Annex A with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.

6. These regulations shall become effective upon publication in the *Pennsylvania Bulletin*.

7. The contact person for this final-form rulemaking is Joseph K. Witmer, (717) 787-3663; or Jaime M. McClintock, (717) 783-2811. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4597.

8. A copy of this order shall be served upon all persons who submitted comments in this rulemaking proceeding.

JAMES J. MCNULTY,  
*Secretary*

*(Editor’s Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 36 Pa.B. 1555 (April 1, 2006).)

**Fiscal Note:** Fiscal Note 57-236 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 52. PUBLIC UTILITIES**

**PART I. PUBLIC UTILITY COMMISSION**

**Subpart A. GENERAL PROVISIONS**

**CHAPTER 1. RULES OF ADMINISTRATIVE PRACTICE AND PROCEDURE**

**Subchapter A. GENERAL PROVISIONS**

**§ 1.2. Liberal construction.**

(a) This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or



proceeding may disregard an error or defect of procedure which does not affect the substantive rights of the parties.

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

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

(d) These liberal construction provisions apply with particularity in proceedings involving pro se litigants.

(e) Subsection (a) supersedes 1 Pa. Code § 31.2 (relating to liberal construction).

**§ 1.3. Information and special instructions.**

(a) Information as to procedures under this subpart, and instructions supplementing this subpart in special instances, will be furnished upon application to:

(1) By first-class mail:

Secretary  
 Pennsylvania Public Utility Commission  
 Post Office Box 3265  
 Harrisburg, Pennsylvania 17105-3265

(2) In person or by mail other than first-class:

Secretary  
 Pennsylvania Public Utility Commission  
 Commonwealth Keystone Building  
 400 North Street  
 Harrisburg, Pennsylvania 17120

(b) Subsection (a) is identical to 1 Pa. Code § 31.4 (relating to information and special instructions).

**§ 1.4. Filing generally.**

(a) Submittals, pleadings and other documents filed with the Commission should be addressed as follows:

(1) By first-class mail:

Secretary  
 Pennsylvania Public Utility Commission  
 Post Office Box 3265  
 Harrisburg, Pennsylvania 17105-3265

(2) In person or by mail other than first-class:

Secretary  
 Pennsylvania Public Utility Commission  
 Commonwealth Keystone Building  
 400 North Street  
 Harrisburg, Pennsylvania 17120

(b) Submittals, pleadings and other documents filed with the Commission should clearly designate the docket number or similar identifying symbols, if any, employed by the Commission, and should set forth a short title. The identity of the individual making the submission, including name, mailing address and status (for example, party, attorney for a party, and the like) must appear on the document, along with any special instructions for communication by other than first class mail.

(c) Submittals and pleadings, including documents filed under Chapter 5 (relating to formal proceedings) must also comply with Subchapter D (relating to documentary filings).

(d) In a proceeding when, upon inspection, the Commission is of the opinion that a submittal or pleading tendered for filing does not comply with this subpart or

this title or, if it is an application or similar document, does not sufficiently set forth required material or is otherwise insufficient, the Commission may decline to accept the document for filing and may return it unfiled, or the Commission may accept it for filing and advise the person tendering it of the deficiency and require that the deficiency be corrected.

(e) The Commission may order redundant, immaterial, impertinent or scandalous matter stricken from documents filed with it.

(f) Subsections (a)—(e) are identical to 1 Pa. Code § 31.5 (relating to communications and filings generally).

**§ 1.7. Sessions of the Commission.**

Public meetings of the Commission ordinarily will be held in its offices in the Commonwealth Keystone Building, Harrisburg. Schedules for public meetings can be obtained from the Commission Secretary or viewed on the Commission's website.

**§ 1.8. Definitions.**

(a) Subject to additional definitions contained in subsequent sections which are applicable to specific chapters or subchapters, the following words and terms, when used in this subpart, have the following meanings, unless the context clearly indicates otherwise:

*Act*—66 Pa.C.S. §§ 101—3315 (relating to the Public Utility Code).

*Adjudication*—An order, decree, decision, determination or ruling by the Commission affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of the parties to the proceeding in which the adjudication is made.

*Applicants*—In proceedings involving applications for permission or authorization which the Commission may give under statutory or other authority delegated to it, the parties on whose behalf the applications are made.

*Adversarial proceeding*—A proceeding initiated by a person to seek authority, approvals, tariff changes, enforcement, fines, remedies or other relief from the Commission which is contested by one or more other persons and which will be decided on the basis of a formal record.

*Electronic mail*—A means of dispatching or receiving a submittal in relation to a Commission matter through electronic means.

*Formal complaint*—A verified written document filed with the Commission under 66 Pa.C.S. § 701 (relating to complaints) requesting a legal proceeding before a presiding officer or a mediator.

*Formal investigation*—A matter initiated by the Commission or Commission staff that results in a formal record.

*Formal proceeding*—A matter intended to produce a formal record.

*Formal record*—The pleadings and submittals in a matter or proceeding, a notice or Commission order initiating the matter or proceeding, and if a hearing is held, the following: the designation of the presiding officer, transcript of hearing, exhibits received in evidence, offers of proof, motions, stipulations, subpoenas, proofs of service, references to the Commission and determinations made by the Commission thereon, certifications to the Commission, and anything else upon which action of the presiding officer or the Commission may be based.

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

*Individual*—A natural person.

*Informal complaint*—A document or communication to the Commission seeking action on a matter that lacks the legal or other requirements of a formal complaint under 66 Pa.C.S. § 701 and does not involve a legal proceeding before a presiding officer or mediator.

*Informal investigation*—A matter initiated by the Commission staff that may result in a formal complaint, a settlement or other resolution of the matter or termination by letter.

*Informal proceeding*—A matter not intended to produce a formal record.

*Initial decision*—A decision by a presiding officer which becomes final unless timely exceptions are filed by a participant, the Commission requests review upon its own motion or as otherwise established by the act.

*Intervenor*—A person intervening or petitioning to intervene as a party as provided by §§ 5.71–5.76 (relating to intervention).

*Mediation*—An informal, nonadjudicative Commission process through which a Commission-designated mediator assists the parties in an attempt to reach a mutually acceptable resolution.

*Mediator*—An individual designated to conduct a mediation.

*Nonadversarial proceeding*—A proceeding initiated by a person which is not contested or a proceeding initiated by the Commission or at the request of a person to develop regulations, policies, procedures, technical rules or interpretations of law.

*Notarial officer*—An officer authorized under § 5.346 (relating to persons before whom depositions may be taken) to take depositions for use before the Commission or presiding officer.

*Party*—A person who appears in a proceeding before the Commission.

*Person*—Except as otherwise provided in this subpart or in the act, the term includes individuals, corporations, partnerships, associations, joint ventures, other business organizations, trusts, trustees, legal representatives, receivers, agencies, governmental entities, municipalities or other political subdivisions.

*Petitioners*—Persons seeking relief, not otherwise designated in this section.

*Pleading*—An application, complaint, petition, answer, motion, preliminary objection, protest, reply, order to show cause, new matter and reply to new matter or other similar document filed in a formal proceeding.

*Presiding officer*—A person designated by the Commission to preside over a matter.

*Principal*—A party with power to authorize its counsel to enter into stipulations or settlement agreements.

*Proof of service*—A certificate of service which complies with §§ 1.57 and 1.58 (relating to proof of service; and form of certificate of service).

*Protestants*—Persons objecting on the ground of private or public interest to the approval of an application or other matter which the Commission may have under consideration.

*Rate proceeding*—An on the record proceeding brought by or before the Commission, the purpose of which is to determine the justness and reasonableness of a proposed or present rate for utility service, including, but not limited to, proceedings initiated under sections 1307, 1308, 1310 and 1312 of the act.

*Recommended decision*—An opinion and order submitted for the approval of the Commission by the presiding officer.

*Respondents*—Persons subject to a statute or other delegated authority administered by the Commission, who are required to respond to an order or notice issued by the Commission instituting a proceeding or investigation on its own initiative or otherwise.

*Secretary*—The Secretary of the Commission, who is the Commission officer with whom pleadings and other documents are filed and by whom official records are kept.

*Staff*—The Commission's Office of Trial Staff prosecutor or Law Bureau staff counsel and other Commission employees participating in a proceeding before the agency.

*Statutory advocate*—The Office of Trial Staff, the Office of Consumer Advocate and the Office of Small Business Advocate.

*Submittal*—An application, amendment, exhibit or similar document involving matters filed in an adversarial or nonadversarial proceeding.

*Telefacsimile transmittal*—A means of dispatching or receiving a submittal in a Commission matter through electronic means that prints a hard copy facsimile of a document in a legible form at the recipient's machine.

*Tentative decision*—An order of the Commission which becomes final unless exceptions are filed by a party within the time period specified by statute or as set forth in the order.

*Trade secret*—A 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.

*Verification*—When used in reference to a written statement of fact by the signer, means supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

(b) Subsection (a) supersedes 1 Pa. Code § 31.3 (relating to definitions).

## **Subchapter B. TIME**

### **§ 1.11. Date of filing.**

(a) Whenever a pleading, submittal or other document is required or permitted to be filed under this title or by statute, it will be deemed to be filed on one of the following dates:

(1) On the date actually received in the office of the Secretary.

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

(3) On the date deposited in the United States Mail as shown by the United States Postal Service stamp on the envelope or noted on a United States Postal Service Form 3817 certificate of mailing. A mailing envelope stamped by an in-house postage meter is insufficient proof of the date of mailing.

(b) Failure to include a legible delivery receipt with a document submitted in accordance with the methods specified in subsection (a)(2) or (3) may result in an untimely filing.

(c) A document transmitted by telefacsimile to the Commission will not be accepted for filing within the meaning of this section.

(d) Subsection (a) supersedes 1 Pa. Code § 31.11 (relating to timely filing required).

**§ 1.15. Extensions of time and continuances.**

(a) Extensions of time shall be governed by the following:

(1) Except as otherwise provided by statute, whenever under this title or by order of the Commission, or notice given thereunder, an act is required or allowed to be done at or within a specified time, the time fixed or the period of time prescribed may, by the Commission, the presiding officer or other authorized person, for good cause be extended upon motion made before expiration of the period originally prescribed or as previously extended. Upon motion made after the expiration of the specified period, the act may be permitted to be done where reasonable grounds are shown for the failure to act.

(2) Requests for the extension of time in which to file briefs shall be filed at least 5 days before the time fixed for filing the briefs unless the presiding officer, for good cause shown, allows a shorter time.

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

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.15 (relating to extensions of time).

**Subchapter C. REPRESENTATION BEFORE THE COMMISSION**

**§ 1.21. Appearance.**

(a) Individuals may represent themselves.

(b) Except as provided in subsection (a), persons in adversarial proceedings shall be represented in accordance with § 1.22 (relating to appearance by attorneys and legal intern). For purposes of this section, any request for a general rate increase under § 1307(f) or § 1308(d) of the act (relating to sliding scale of rates; adjustments; and voluntary changes in rates) shall be considered to be an adversarial proceeding.

(c) In nonadversarial proceedings, persons may be represented in the following manner:

- (1) A partner may represent the partnership.
- (2) A bona fide officer of a corporation, trust or association may represent the corporation, trust or association.
- (3) An officer or employee of an agency, political subdivision or government entity may represent the agency, political subdivision or government entity.

(d) In informal proceedings brought under Chapters 56 and 64 (relating to standards and billing practices for residential utility service; and standards and billing practices for residential telephone service) and Chapter 14 of the act (relating to standards and billing practices for residential utility service; and standards and billing practices for residential telephone service), parties may be represented by one of the following:

(1) A paralegal working under the direct supervision of an attorney admitted to the Pennsylvania Bar.

(2) An appropriate individual including a family member or other individual or entity with oral or written authority.

(e) Subsection (a) supersedes 1 Pa. Code § 31.21 (relating to appearance in person).

**§ 1.22. Appearance by attorney or certified legal intern.**

(a) Subject to § 1.21(a) (relating to appearance), an attorney at law admitted to practice before the Supreme Court of Pennsylvania shall represent persons in Commission proceedings.

(b) An attorney not licensed in this Commonwealth may appear before the Commission in accordance with the Pennsylvania Bar Admission Rules.

(c) A law student meeting the requirements of Pa.B.A.R. No. 321 (relating to requirements for formal participation in legal matters by law students) may appear in a Commission proceeding consistent with Pa.B.A.R. No. 322 (relating to authorized activities of certified legal interns).

(d) Subsection (a) supersedes 1 Pa. Code § 31.22 (relating to appearance by attorney).

**§ 1.23. Other representation prohibited at hearings.**

(a) Persons may not be represented at a hearing before the Commission or a presiding officer except as stated in § 1.21 or § 1.22 (relating to appearance; and appearance by attorney or certified legal intern).

(b) Subsection (a) supersedes 1 Pa. Code §§ 31.23 (relating to other representation prohibited at hearings).

**§ 1.24. Notice of appearance or withdrawal.**

(a) *Individuals.* An individual appearing without legal representation before the Commission or a presiding officer shall file with the Secretary an address for service of a notice or other written communication. A change in address which occurs during the course of the proceeding shall be reported to the Secretary promptly.

(b) *Attorneys.*

(1) *Appearance by initial pleading.* An attorney who signs an initial pleading in a representative capacity shall be considered to have entered an appearance in that proceeding.

(2) *Appearance in all other instances.* An attorney shall file with the Secretary a written notice of appearance.

(i) *Content of notice.* Initial pleadings, entries of appearance and notices of withdrawal must include:

(A) The attorney's name, mailing address and electronic mailing address, if available.

(B) Pennsylvania attorney identification number or, if not licensed in this Commonwealth, identification of the jurisdictions in which the attorney is licensed to practice law.

(C) Telephone number and telefacsimile number, if applicable.

(D) The name and address of the person represented.

(ii) *Filing.*

(A) *Appearance.* The notice of appearance shall be served on the parties to the proceeding, and a certificate of service shall be filed with the Secretary.

(B) *Change in address.* A change in address which occurs during the course of the proceeding shall be reported to the Secretary and the parties promptly.

(3) *Withdrawal.* An attorney may withdraw an appearance by filing a written notice of withdrawal with the Secretary. The notice shall be served on the parties and the presiding officer, if one has been designated.

(c) *Supersession.* Subsections (a)—(e) supersede 1 Pa. Code § 31.24 (relating to notice of appearance).

**§ 1.25. Form of notice of appearance.**

(a) The form of notice of appearance is as follows:

COMMONWEALTH OF PENNSYLVANIA  
BEFORE THE PENNSYLVANIA PUBLIC  
UTILITY COMMISSION

In the Matter of:

[File, Docket or other identifying No.:]

NOTICE OF APPEARANCE

Please enter my appearance in the above-designated matter on behalf of \_\_\_\_\_.

I am authorized to accept service on behalf of said party in this matter

[CHECK ONE]

[ ] On the basis of this notice, I request a copy of each document hereafter issued by the Commission in this matter.

[ ] I am already receiving or have access to a copy of each document issued by the Commission in this matter (alone, or in a consolidated proceeding) and do not on the basis of this notice require an additional copy.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name (Printed)

\_\_\_\_\_  
P. O. address

\_\_\_\_\_  
City, state and zip code

\_\_\_\_\_  
Telephone Number  
(including area code)

\_\_\_\_\_  
Telefacsimile Number  
Including Area Code

\_\_\_\_\_  
Pennsylvania Attorney I.D. No./  
Other Jurisdiction(s) Admitted

\_\_\_\_\_  
Electronic Mail Address  
(Optional)

(b) Subsection (a) is identical to 1 Pa. Code § 31.25 (relating to form of notice of appearance).

**Subchapter D. DOCUMENTARY FILINGS**

**§ 1.31. Requirements for documentary filings.**

(a) *Form.* Pleadings must be divided into numbered paragraphs.

(b) *Attachments.* Copies of documents relied upon in the pleadings must be identified and attached. Copies of reported court decisions, writings or orders already of record with the Commission need not be attached to the pleading if reference by docket number is made to the proceeding in which they were filed in accordance with § 1.33 (referring to incorporation by reference).

(c) *Identifying information.* Documents filed with the Commission in a proceeding must clearly contain the following information:

(1) The docket number or similar identifying symbols, if any.

(2) The title or caption of the proceeding before the Commission.

(3) Within the title of the document, the name of the person on whose behalf the filing is made. If more than one person is involved, only a single name is necessary.

(d) *Supersession.* Subsections (a)—(c) supersede 1 Pa. Code § 33.1 (relating to title).

**§ 1.33. Incorporation by reference.**

(a) Documents on file with the Commission may be incorporated by reference into a subsequent pleading, submittal or other document. A document may be so incorporated only by reference to the specific document and to the prior filing and docket number at which it was filed.

(b) Documents on file with the Commission for more than 20 years may not be incorporated by reference in a current document unless the person filing the current document first ascertains that the earlier document continues to be readily available in the active records of the Commission.

**§ 1.35. Execution.**

(a) *Signature.* A pleading, submittal or other document must be signed in ink by the party in interest, or by the party's attorney, as required by subsection (b), and show the office and mailing address of the party or attorney. An original hard copy must be signed, and other copies filed shall conform thereto unless otherwise ordered by the Commission.

(b) *Signatory.*

(1) A pleading, submittal or other document filed with the Commission must be signed by one of the following:

(i) The person filing the documents, and severally if there is more than one person so filing.

(ii) An officer if it is a corporation, trust, association or other organized group.

(iii) An officer or employee thereof if it is another agency, a political subdivision, or other governmental authority, agency or instrumentality.

(iv) An attorney having authority with respect thereto.

(2) A document filed by a corporation, trust, association or other organized group, may be required to be supplemented by appropriate evidence of the authority of the officer or attorney signing the documents.

(c) *Effect.*

(1) The signature of the individual signing a document filed with the Commission constitutes a certificate by the individual that:

(i) The individual has read the document being signed and filed, and knows the contents thereof.

(ii) The document has been signed and executed in the capacity specified upon the document with full power and authority to do so, if executed in a representative capacity.

(iii) 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, to the best of the individual's knowledge, information and belief formed after reasonable inquiry.

(iv) The document is not interposed for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(2) If a document is signed in violation of this subsection, the presiding officer or the Commission, upon motion or upon its own initiative, may impose upon the individual who signed it, a represented party, or both, an appropriate sanction, which may include striking the document, dismissal of the proceeding or the imposition of civil penalties under section 3301 of the act (relating to civil penalties for violations).

(d) *Supersession.* Subsections (a)—(c) supersede 1 Pa. Code § 33.11 (relating to execution).

**§ 1.36. Verification.**

(a) Applications, petitions, formal complaints, motions and answers thereto containing an averment of fact not appearing of record in the action or containing a denial of fact must be personally verified by a party thereto or by an authorized officer or other authorized employee of the party if a corporation or association. Verification means a signed written statement of fact supported by oath or affirmation or made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities). When verification is permitted, notarization is not necessary.

(b) The verification form should comply substantially with the following:

VERIFICATION

I, \_\_\_\_\_, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: \_\_\_\_\_  
 \_\_\_\_\_  
 (Signature)

(c) When an affidavit is used, it must be notarized and the form should comply substantially with the following:

AFFIDAVIT

I, \_\_\_\_\_ (Affiant) being duly sworn (affirmed) according to law, depose and say that (I am authorized to make this affidavit on behalf of \_\_\_\_\_ corporation, being the holder of the office of with that corporation, and that, I am an employee or agent of

\_\_\_\_\_ and have been authorized to make this affidavit on its behalf and that) the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and (I or corporation) expect to be able to prove the same at any hearing hereof.

\_\_\_\_\_  
 (Signature of affiant)

Sworn and subscribed before me this \_\_\_\_\_ day of \_\_\_\_\_, 2\_\_\_\_.

\_\_\_\_\_  
 (Signature of official administering oath)  
 (My Commission Expires)

(d) An applicant for motor carrier rights shall include in the verification the following statement:

Applicant is not now engaged in intrastate transportation of property or passengers for compensation in this Commonwealth except as authorized by the Pennsylvania Public Utility Commission certificate or permit, and will not engage in the transportation for which approval is herein sought, unless and until the transportation is authorized by your Honorable Commission.

(e) An individual who executes a pleading, submittal or other document knowing that it contains a false statement and who causes it to be filed in the Commission shall be subject to prosecution for the Commission of a misdemeanor of the second degree in violation of 18 Pa.C.S. § 4904(a).

(f) Subsections (a)—(e) supersede 1 Pa. Code § 33.12 (relating to verification).

**§ 1.37. Number of copies.**

(a) *General rule.* When a pleading, submittal or document other than correspondence is submitted in hard copy, an original and three copies of each, including the cover letter, shall be furnished to the Commission at the time of filing.

(b) *Exceptions.*

(1) When the document is an application or petition, one copy may be filed without exhibits.

(2) When the document is a complaint or petition and more than one respondent is named, an additional copy of the complaint or petition must be filed for each additional respondent.

(3) When the document is subject to a statutory requirement or is otherwise ordered or requested by the Commission, a different number of copies may be designated.

(4) When the document is subject to § 5.409, § 5.502 or § 5.533 (relating to copies and form of documentary evidence; filing and service of briefs; and procedure to

except to initial, tentative and recommended decisions), the filing must conform to the requirements in the applicable section.

(c) Subsections (a)—(c) supersede 1 Pa. Code § 33.15 (relating to number of copies).

**§ 1.38. Rejection of filings.**

The Commission may reject a filing if it does not comply with any applicable statute, regulation or order of the Commission.

**Subchapter E. FEES**

**§ 1.42. Mode of payment of fees.**

(a) Fees shall be paid by money order or check made payable to the Commonwealth of Pennsylvania or by any method currently acceptable to the Commission. For payments other than money order or check, the Secretary's Bureau shall be contacted for prior approval before submitting payment in a form other than money order or check. Payments by cash are not accepted without prior Secretary approval and remain at the risk of the sender.

(b) Subsection (a) supersedes 1 Pa. Code § 33.22 (relating to mode of payment of fees).

**§ 1.43. Schedule of fees payable to the Commission.**

(a) *Fees for services.* The fees for services rendered by the Commission are as follows:

<i>Description</i>	<i>Fee (in dollars)</i>
Initial filing of Form A for intangible transition property notice.....	\$550
Subsequent filing of notice changes in intangible transition property notice on Form B .....	\$350
Chapter 74 public information requests relating to perfection of security interests.....	\$10 plus standard per page copying costs
Copies of papers, testimony, microfiche, records and computer printouts per sheet.....	\$.75
Copies of microfiche per sheet .....	\$1.50
Copies of microfilm per roll .....	\$80
Certifying copy of a paper, testimony or record.....	\$5
Filing each securities certificate.....	\$350
Filing each abbreviated securities certificate ..	\$25
Filing each application for a certificate, permit or license or amendment of a certificate, permit or license.....	\$350
Filing an application for a certificate of public convenience for a motor common carrier of property.....	\$100
Filing an application for emergency temporary authority as common carrier of passengers or household goods in use, contract carrier of passengers or household goods in use, or broker or for an extension thereof.....	\$100

*Fee  
(in dollars)*

*Description*  
Filing an application for temporary authority as common carrier of passengers or household goods in use, contract carrier of passengers or household goods in use, or broker .....

\$100

Filing an application for a certificate to discontinue intrastate common carrier passenger or household goods in use service ..

\$10

(b) *Supersession.* Subsection (a) supersedes 1 Pa. Code §§ 33.21(b) and 33.23 (relating to filing fees; and copy fees).

**Subchapter F. SERVICE OF DOCUMENTS**

**§ 1.51. Instructions for service, notice and protest.**

Upon receiving an application or petition, the Secretary will instruct the applicant or petitioner concerning the required service and public notice consistent with this section.

**§ 1.53. Service by the Commission.**

(a) *Applicability.* This section applies to service of an order, notice or other document originating with the Commission and other documents designated by the Commission, except when the Commission specifically requires a different form of service.

(b) *Forms of service.*

(1) *First class mail.* Service may be made 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 the person's residence, principal office or place of business.

(2) *Personal.* Service may be made personally by anyone authorized by the Commission.

(c) *Registered or certified mail.* Service of a petition under § 3.391 (relating to arbitration of claims for billing and collecting services), and service of a complaint under section 702 of the act (relating to service of complaint on parties) must be by registered or certified mail, return receipt requested.

(d) *Change of address.* It is the duty of a party to apprise the Commission promptly of changes to the party's current address.

(e) *Alternative service.* If the Commission is unable to serve a party by mail at the party's last known address, the Commission may make service by publication in a newspaper of general circulation in the same area as the party'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.

(f) *Supersession.* Subsections (a)—(e) supersede 1 Pa. Code § 33.31 (relating to service by the agency).

**§ 1.54. Service by a party.**

(a) Pleadings, submittals, briefs and other documents, filed in proceedings pending before the Commission shall be served upon parties in the proceeding and upon the presiding officer, if one has been assigned.

(b) Service may be made by one of the following methods:

(1) *First class mail.* Service may be made by mailing the requisite number of copies to each party as provided in § 1.59 (relating to number of copies to be served), properly addressed with postage prepaid.

(2) *Personal.* Service may be made personally.

(3) *Electronic.* Service may be made electronically, to those parties who have agreed to accept service in that manner. Documents served electronically need not be followed by service of a hard copy to the parties if the parties have so agreed. A final version in hard copy shall be stamped on the date due for filing with the Secretary regardless of any agreement among the parties. Any subsequent corrected version not otherwise substantively altering the final version in hard copy may be filed upon approval of the administrative law judge.

(4) *Telefacsimile.* Service may be made by telefacsimile to those parties who have agreed to accept service in that manner. Documents served electronically need not be followed by service of a hard copy if the parties have so agreed.

(c) In a proceeding in which only some of the parties participate, the parties, with the authorization of the presiding officer, may limit the service of documents to parties and persons or individuals which state on the record or request in writing that they wish to be served.

(d) Subsections (a) and (b) supersede 1 Pa. Code § 33.32 (relating to service by a party).

**§ 1.55. Service on attorneys.**

(a) When an attorney enters an appearance under § 1.24 (relating to notices of appearances or withdrawals), service must be directed to the attorney in the same manner as prescribed for his client.

(b) When a party is represented by an attorney, service upon the attorney shall be deemed service upon the party. Separate service on the party may be omitted.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 31.26 (relating to service on attorneys).

**§ 1.56. Date of service.**

(a) The date of service shall be the day when the document served meets one of the following conditions:

- (1) The document is deposited in the United States mail.
- (2) The document is deposited with an overnight express package delivery service.
- (3) The document is delivered in person.

(4) The document is transmitted by telefacsimile or electronic mail as provided in § 1.54(b) (relating to service by a party) prior to 4:30 p.m. local prevailing time.

(5) The document enters an information processing system designated by the recipient for the purpose of receiving service and from which the recipient is able to retrieve the served document in a form capable of being processed by the recipient's system prior to 4:30 p.m. local time.

(b) Unless otherwise prescribed by the Commission or presiding officer, whenever a party is required or permitted to do an act within a prescribed period after service of a document upon the party and the document is served by first-class mail by the United States Postal Service, 3 days shall be added to the prescribed period.

(c) Subsection (a) 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 the parties, listed below, in accordance with the requirements of § 1.54 (relating to service by a party).

(List names and addresses of parties served.)

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2 \_\_\_\_.

\_\_\_\_\_  
(Signature)

Counsel for

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

**§ 1.59. Number of copies to be served.**

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

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

- (1) Briefs:
  - (i) Service of hard copies—two copies.
  - (ii) Service by telefacsimile or electronic mail, when permitted—one copy.
- (2) Other documents—one copy.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 33.37 (relating to number of copies).

**Subchapter G. MATTERS BEFORE OTHER TRIBUNALS**

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

(a) When matters over which the Commission may have jurisdiction under the act are raised in proceedings filed with a court or other regulatory body by a 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 so that it may have sufficient notice and time for proper consideration of the matters within its jurisdiction.

(b) Upon filing of a petition for bankruptcy under the United States Bankruptcy Code (11 U.S.C.) by a jurisdictional utility or licensee or by a parent, affiliate, or direct or indirect subsidiary of a utility or licensee, the utility or licensee shall file a copy of the petition with the Commission, and serve the Office of Trial Staff, the Office of Consumer Advocate and the Office of Small Business Advocate.

(c) An entity subject to the regulatory jurisdiction of the Commission, or its trustee in bankruptcy, shall file a copy of the reorganization plan for itself or for its bankrupt parent, subsidiary or affiliate for Commission review within 10 days after the debtor has filed the plan, its supplements and amendments, or has received notice that the plan has been filed with the court.

(d) If the reorganization plan submitted under subsection (c) contemplates the abandonment of service, the submittal must include an application under Chapter 11 of the act (relating to certificates of public convenience). If a licensee's reorganization plan includes the abandonment of the license, the submittal must include the appropriate pleading as required by the act.

## Subchapter H. PUBLIC ACCESS TO COMMISSION RECORDS

### § 1.71. Statement of objectives.

The Commission's records maintenance system is intended to provide for the greatest degree of public access to Commission documents that is consistent with the exercise of the functions of the Commission under the act and other applicable laws. The Commission's system is designed to meet that objective and to give public notice of which classes of documents are available for inspection. The system provides a predictable standard, which nevertheless permits the Commission to take cognizance of the circumstances of individual requests for documents which may militate in favor of or against disclosure.

### § 1.72. Content and review of formal case files.

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

(1) The files for formal cases initiated prior to May 15, 1977, will contain a records, correspondence and testimony folder.

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

(b) *Contents.* Contents of folders in formal cases will conform with the following:

(1) Formal cases initiated prior to May 15, 1977, will conform with the following:

(i) *Testimony folder.* This folder will contain hearing transcripts and exhibits.

(ii) *Record folder.* This folder will contain formal filings in a case, including but not limited to, complaints, petitions, answers, replies, motions, briefs and requests for procedural or interim orders and opinions.

(iii) *Correspondence folder.* This folder will contain staff reports, acknowledgments, proofs of service and other documents not covered by subparagraphs (i) and (ii).

(2) Formal cases initiated on or after May 15, 1977, will conform with the following:

(i) *Testimony folder.* This folder will contain the same material as described in subparagraph (i).

(ii) *Document folder.* This folder will contain formal filings in a case, including but not limited to, complaints, petitions, answers, replies, motions, briefs and requests for procedural or interim orders and opinions. In addition, it will contain correspondence from or to the Commission except for staff reports, investigative materials and other material not subject to the disclosure requirements of the Commission.

(iii) *Report folder.* This folder will contain staff reports, investigative materials and other material not subject to the disclosure requirements of the Commission.

(c) *Access.* Access to files in formal cases will conform with the following:

(1) The record and testimony folders for cases initiated prior to May 15, 1977, will be available for inspection upon request made to file room personnel during normal Commission business hours.

(2) The document and testimony folders for cases initiated on or after May 15, 1977, will be available for inspection upon request made to file room personnel during normal Commission business hours.

(3) Material contained in the correspondence folders of formal cases initiated prior to May 15, 1977, will be available for inspection if the material would otherwise have qualified for placement in the document folder, as described in subsection (b)(2)(ii) of cases initiated on or after May 15, 1977. The inspection will be subject to the procedures outlined in subsection (d).

(4) The material contained in the report folder of cases initiated on or after May 15, 1977, will not be available for public inspection except as described in § 1.74 (relating to disclosure of other documents).

(d) *Procedures.* Procedures for review of correspondence and report folders will conform with the following:

(1) *Correspondence folders.* Review procedures for correspondence folders will be as follows:

(i) A person desiring access to a correspondence folder of a formal case may request file room personnel for a review of the file to determine which material contained therein may be released for inspection.

(ii) The review will be made and the requestor notified within 30 days.

(iii) If dissatisfied with the results of the first review, the requestor may ask that the documents removed from the correspondence folder before it was given to him be reviewed again.

(iv) A 30-day period applies to the second request for review.

(2) *Report folders.* Review procedures for report folders will be as follows:

(i) A person may request file room personnel for a review of particular documents or for a specifically defined portion of the report folder to determine which, if any, material contained in the folder may be released for inspection.

(ii) The review, except for good cause, will be made and the requestor notified within 30 days.

### § 1.73. Fiscal records.

(a) Except as provided in subsection (b), an account, voucher or contract dealing with the receipt or disbursement of funds by the Commission or its acquisition, use or disposal of services or supplies, materials, equipment or other property will be available during normal Commission business hours upon request made to the Commission fiscal office. Fiscal records are retained in accordance with time periods set by applicable statutory, regulatory and administrative requirements.

(b) No fiscal record, nor unseverable part thereof, which contains material exempted from the disclosure requirements provided in the act of June 21, 1957 (P. L. 390, No. 212) (65 P. S. §§ 66.1—66.4) or which otherwise presents a substantial need for nondisclosure, will be available for public inspection.

### § 1.76. Tariffs, minutes of public meetings and annual reports.

Tariffs, minutes of public meetings and annual reports will be available for public inspection and copying upon request to the Secretary's Bureau during the Commission's office hours.

## Subchapter I. AMENDMENTS OR WITHDRAWALS OF SUBMITTALS

### § 1.81. Amendments.

(a) An amendment to a submittal or pleading may be tendered for filing at any time and will be deemed filed in



accordance with § 1.11 (relating to date of filing) unless the Commission otherwise orders.

(b) Subsection (a) is identical to 1 Pa. Code § 33.41 (relating to amendments).

**§ 1.82. Withdrawal or termination.**

(a) A party that 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 petition for leave to withdraw the appropriate document. If no party objects to the petition within 10 days of service, the matter 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 will be denied and the staff may be directed to participate.

(b) Withdrawal of a pleading in a contested proceeding is governed by § 5.94 (relating to withdrawal of pleadings in a contested proceeding).

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

**Subchapter J. DOCKET**

**§ 1.86. Docket.**

(a) The Secretary will maintain a docket of all proceedings, and each proceeding as initiated will be assigned an appropriate designation. The docket will be available for inspection and copying by the public during the Commission's office hours.

(b) Subsection (a) is identical to 1 Pa. Code § 33.51 (relating to docket).

**CHAPTER 3. SPECIAL PROVISIONS**

**Subchapter A. SPECIAL COMMISSION ACTIONS**

**EMERGENCY RELIEF**

**§ 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, the Commission's Director of Operations or the Commission's Secretary in response to an emergency.

*Interim emergency order*—An interlocutory order issued by a presiding officer which is immediately effective and grants or denies injunctive relief during the pendency of a proceeding.

**EX PARTE EMERGENCY ORDERS**

**§ 3.2. Petitions for issuance of emergency orders.**

(a) To the extent practicable, a petition for emergency order must be in the form of a petition as set forth in § 5.41 (relating to petitions generally) and shall be served on the persons directly affected by the application.

(b) A petition for emergency order must be supported by a verified statement of facts which establishes the existence of an emergency, including facts to support the following:

- (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.

**§ 3.3. Disposition of ex parte emergency orders.**

(a) *Authority.* The Chairperson, a Commissioner, the Commission's Director of Operations and the Commission's Secretary have the authority to issue an emergency order.

(b) *Form.* An emergency order will be issued in writing and filed with the Secretary with copies to Commissioners and the Director of Operations.

(c) *Ratification.* An emergency order or the denial of a petition for emergency order issued by a single Commissioner or the Director of Operations or the Commission's Secretary will be ratified, modified or rescinded by the Commission at the next scheduled public meeting after issuance of the order.

(d) *Service.* An emergency order or the denial of a petition for emergency order will be served by the Secretary as expeditiously as practicable upon the persons directly affected by the decision with copies to the Commissioners and the Director of Operations.

**§ 3.4. Hearings following issuance of emergency orders.**

(a) A person against whom an emergency order is issued may file a petition for an expedited hearing to determine whether the emergency order will remain in effect. The petition must conform to the form and service requirements in §§ 5.41—5.44 (relating to petitions generally).

(b) The petition for expedited hearing shall be filed with the Secretary and a copy served upon the Chief Administrative Law Judge.

(c) The hearing will be held before a presiding officer within 10 days of receipt of the petition by the Secretary.

(d) If the emergency order is issued by a single Commissioner or the Director of Operations or by the Commission's Secretary, the presiding officer will have the authority to stay the effect of the order until the next scheduled public meeting.

(e) The decision of the presiding officer will constitute a recommended decision to be acted upon by the Commission at its next scheduled public meeting.

**§ 3.5. (Reserved).**

**INTERIM EMERGENCY RELIEF**

**§ 3.6. Petitions for interim emergency orders.**

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

(b) To the extent practicable, a petition for an interim emergency order must be in the form of a petition as set forth in § 5.41 (relating to petitions generally). A petition for an interim emergency order must be supported by a verified statement of facts which establishes the existence of the need for interim emergency relief, including facts to support the following:

- (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.

(c) Allegations set forth in the petition shall be deemed to have been denied by the opposing parties, and an answer is not required. A party may file an answer in the form set forth in § 5.61 (relating to answers to complaints, petitions and motions) no later than 5 days after service of a copy of the petition.

(d) Other pleadings, memoranda or briefs related to a petition for interim emergency order are not permitted unless specifically requested by the presiding officer.

**§ 3.6a. Hearing on petitions for interim emergency orders.**

An interim emergency order may not be issued until the presiding officer holds a hearing on the merits of the petition. The hearing must be held within 10 days of the filing of the petition.

**§ 3.7. Issuance of interim emergency orders.**

(a) A presiding officer will issue an order granting or denying interim emergency relief within 15 days of the filing of the petition.

(b) An order granting a petition for interim emergency relief will set forth the findings required by § 3.6(b) (relating to hearing on petitions for interim emergency orders).

(c) An interim emergency order or an order denying interim emergency relief will be served as expeditiously as practicable on the parties.

**§ 3.8. Form of interim emergency orders.**

(a) An order following a hearing on a petition for interim emergency relief will include:

- (1) A brief description of the evidence presented.
- (2) A grant or denial of the petition.

(b) An order following a hearing on a petition for interim emergency relief may require a bond to be filed in a form satisfactory to the Secretary and will specify the amount of the bond.

**§ 3.9. (Reserved).**

**§ 3.10. Commission review of interim emergency orders.**

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

(b) When the presiding officer rules upon the petition for an interim emergency order, the presiding officer will also certify the question of the grant 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 parties and the Commission shall follow the procedures in § 5.305, if applicable.

**Subchapter B. INFORMAL PROCEEDINGS  
GENERALLY**

**INFORMAL COMPLAINTS AND INVESTIGATIONS**

**§ 3.111. Form and content of informal complaints.**

(a) Informal complaints may be by letter or other writing. No form of informal complaint is suggested, except as set forth in §§ 56.162 and 64.152 (relating to

informal complaint filing procedures), but in substance the letter or other writing must contain the essential elements of a formal complaint as specified in § 5.22 (relating to contents of formal complaint).

(b) Informal complaints shall be submitted to the Secretary for referral to the appropriate bureau, addressed to the following: Pennsylvania Public Utility Commission, Post Office Box 3265, Harrisburg, Pennsylvania 17105-3265.

(c) Subsection (a) supersedes 1 Pa. Code § 35.5 (relating to form and content of informal complaints).

**§ 3.112. Action on informal complaints.**

(a) *Filing.* The Secretary will place a copy of an informal complaint related to a docketed matter in the official document folder.

(b) *Commission staff review.*

(1) Commission staff will review the informal complaint to determine whether the subject matter is within the Commission's jurisdiction, except as set forth in Chapters 56 and 64 (relating to standards and billing practices for residential utility service; and standards and billing practices for residential telephone service).

(2) Commission staff will evaluate the allegations of the complaint, and, if warranted, institute an informal investigation or informal proceeding.

(3) Commission staff may institute formal action with respect to the subject matter of the informal complaint.

(c) *Commission staff action.* Upon the completion of the Commission's investigation of an informal complaint, the Commission staff will notify the informal complainant of the results of its review and investigation. The submission or withdrawal of an informal complaint is without prejudice to the right of the complainant to file and prosecute a formal complaint.

(d) *Caveat.* The submission of an informal complaint does not entitle complainant to a formal hearing before the Commission.

(e) *Further action.* A staff determination made under this provision is appealable under § 5.44 (relating to petitions for appeal from actions of the staff).

(f) *Supersession.* Subsections (a)—(d) supersede 1 Pa. Code §§ 35.6 and 35.7 (relating to correspondence handling of informal complaints; and discontinuance of informal complaints without prejudice).

**§ 3.113. Resolution of informal investigations.**

(a) The Commission staff may conduct informal investigations or informal proceedings in appropriate circumstances regarding the condition and management of a public utility or other person subject to its jurisdiction. The informal investigations are typically undertaken to gather data or to substantiate allegations of potential violations of the act and may be conducted with or without hearing.

(b) Under 65 Pa.C.S. Chapter 7 (relating to Sunshine Act), the Commission's official actions resolving informal investigations will be as follows:

(1) When the Commission staff determines that no violation or potential violation of the act has occurred, the informal investigation will be terminated by letter.

(2) When the Commission staff determines that a violation or potential violation of the act has occurred and when formal action is deemed to be warranted, the

Commission staff will initiate a docketed on-the-record proceeding to resolve the issues.

(3) When the utility, or other person subject to the Commission's jurisdiction, has committed to undertake action to address or remedy a violation or potential violation of the act or to resolve another perceived deficiency at the utility, in the form of a settlement with the Commission staff or other resolution of the matter, the Commission's consideration of the settlement or approval of the utility's action will occur at public meeting. Except for staff reports and other documents covered by a specific legal privilege, documents relied upon by the Commission in reaching its determination shall be made part of the public record. Before the Commission makes a final decision to adopt the settlement or to approve the utility's action, the Commission will provide other potentially affected persons with the opportunity to submit exceptions thereon or to take other action provided for under law.

**Subchapter D. CROSSING PROCEEDINGS**

**§ 3.361. Crossing complaints.**

(a) Whenever a complaint is made under section 2702 of the act (relating to construction, relocation, suspension and abolition of crossings) that a crossing is dangerous or inadequate and requires reconstruction, relocation, alteration or abolition, public utilities, owners of the railroad right-of-way and municipal corporations concerned and, if applicable, the Department of Transportation, will be made parties respondent.

(b) In complaint proceedings under section 2702 of the act for the relocation, alteration or abolition of crossings, the complainant shall publish a concise statement of the proceeding which designates the crossing with sufficient particularity to be readily identifiable by owners of property adjacent thereto or affected thereby, with notice of time and place fixed by the Commission for hearing, once a week for 2 consecutive weeks immediately prior to the date of hearing in at least one newspaper of general circulation, in the county in which the crossing is located. Proof of the publication shall be filed with the Commission on or before the date of hearing.

**§ 3.363. Claims for property damages from crossings.**

(a) Claims for property damage for property taken, injured or destroyed must conform with the following requirements:

- (1) Be captioned " \_\_\_\_\_ , Plaintiffs, v. Defendants."
- (2) Follow, in general as to form and content, the form available from the Secretary.
- (3) Name as defendants those charged with the duty of paying the damages under the provisions of the order of the Commission.

(b) A prima facie claim shall first be filed with the Commission. After filing and service and opportunity to answer, the Commission may proceed to resolve the claim, or under section 2704 of the act (relating to compensation for damages occasioned by construction, relocation or abolition of crossings) may submit the matter to the court of common pleas of the proper county. In either case, notice will be given by the Commission to all parties to the claim.

**Subchapter G. WATER OR WASTEWATER UTILITY PROCEEDINGS**

**§ 3.501. Certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider.**

(a) *Applicant.* An applicant for a certificate of public convenience as a public water or wastewater collection, treatment or disposal provider, including noncertificated utilities, shall provide a copy of the business plan required by the Department of Environmental Protection (DEP) in 25 Pa. Code § 109.503(a)(3) (relating to public water system construction permits). The Commission may reject an application which fails to include the required information and documents. The following additional information, or documents, if not included in the business plan, shall also be included in the application, using the current forms and schedules specified by the Commission.

- (1) *Plant in service.*
  - (i) Proposed utilities shall provide:
    - (A) A full description of the proposed waterworks or wastewater collection, treatment and disposal facilities and the manner, including the timing, in which the proposed service area and utility will be constructed.
    - (B) A breakdown of the cost of construction, by major plant category, including the sources of funds used to construct the facilities.
  - (ii) Utilities that have been providing service shall provide:
    - (A) The original cost, by year and major plant category, of used and useful plant in service and related accrued depreciation calculations.
    - (B) A breakdown of the sources of funds used to finance the construction of the facilities.

(2) *Map of service area.* A map or plan of suitable scale highlighting the boundaries of the proposed service area, including:

- (i) A courses and distances or metes and bounds description.
- (ii) The location or route of the proposed waterworks or wastewater collection, treatment or disposal facilities.
- (iii) The approximate time schedule for installation of the various component facilities.
- (iv) The elevations of major facilities and service areas.
- (v) The DEP permitted productive or treatment capacity of sources or treatment facility and the pipe sizes and material used for construction for all transmission and distribution or collection facilities.
- (vi) A copy of the county comprehensive plan, municipal comprehensive plan and applicable zoning designations, if requested.

(3) *Customers.*

- (i) Proposed utilities shall provide an estimate of the number of customer connections by class in the first, fifth and tenth years, and completed development anticipated, as well as estimated water usage or gallons of wastewater treated in each of those years.
- (ii) Utilities that have been providing service shall submit the actual number of customers by class and related consumption or gallons treated in the current calendar year and future number of connections anticipated for the next 10 years.

(iii) Each utility shall demonstrate its ability to provide adequate water supply, treatment, storage and distribution or adequate wastewater collection, treatment or disposal capacity to meet present and future customer demands.

(4) *Rates.*

(i) Proposed utilities shall provide a proposed initial tariff which includes rates, proposed rules, and conditions of service in the format specified by the Commission (classified rate schedule).

(ii) Utilities which have been providing service shall provide a proposed initial tariff which includes rates, proposed rules, and conditions of service. The utility shall notify the customers of the utility of the filing of the application and the rates filed.

(5) *Cost of service.*

(i) Proposed utilities shall provide a 1, 5 and 10-year estimate of operating revenues, operation and maintenance expenses, annual depreciation and taxes. If operating income reflects a loss, proposed utilities shall provide a detailed explanation of the source of funds to be used to subsidize the estimated losses in support of future viability.

(ii) Utilities that have been providing service shall file the two most recent Federal Income Tax Returns (corporation) or related Schedule C forms (partnership or individual). If tax returns reflect an operating loss, utilities shall describe in detail how the operating losses are subsidized, supported by an analysis of the future viability of the utility.

(6) *Proof of compliance.* Proof of compliance with applicable design, construction and operation standards of DEP or of the county health department, or both, including:

(i) Copies of public water supply/water quality management or National Pollution Discharge Elimination System (NPDES) permits if applicable.

(ii) Valid certified operators' certificates appropriate to the facilities being operated.

(iii) Utilities that have been providing service, a 5-year compliance history with DEP with an explanation of each violation.

(iv) A DEP 5-year compliance history of other utilities owned or operated, or both, by the applicant, including affiliates, and their officers and parent corporations with regard to the provision of utility service.

(7) *Additional documentation.* In addition to a copy of the documents submitted under paragraphs (1)–(6), the applicant shall submit a letter addressing all the applicable requirements or mandates of the following governmental entities. The letter must also append copies of certification issued by the following governmental entities confirming that the applicant does or does not meet all the applicable requirements or mandates of the following:

(i) DEP.

(ii) The Delaware River Basin Commission, the Susquehanna River Basin Commission, the Ohio River Basin Commission and the Great Lakes Commission.

(iii) The requirements of any Statewide water plan, including any local watershed areas.

(iv) The requirements of any officially adopted county comprehensive plans, municipal comprehensive plans, and applicable zoning designations, including any necessary amendments.

(8) *Affected persons.* The identity of public utilities, municipalities, municipal authorities, cooperatives and associations which provide public water supply service or wastewater collection, treatment or disposal service within each municipality, or a municipality directly adjacent to the municipalities, in which the applicant seeks to provide service that abuts or is situated within 1 mile of the applicant's proposed facilities.

(9) *Other requirements.* Demonstrate compliance with DEP regulations in 25 Pa. Code § 109.503(a)(3) or section 5 of the Pennsylvania Sewage Facilities Act requirements (35 P. S. § 750.5), whichever is applicable; or whether the applicant has contacted each public water supplier or wastewater collection, treatment or disposal supplier in paragraph (8), and one of the following applies:

(i) Whether a supplier is willing and able to serve the area which the applicant seeks to serve either directly or through the bulk sale of water to the applicant, or treatment of wastewater to the applicant.

(ii) If one or more supplier is willing to serve the area (either directly or through the bulk sale of water to applicant), the applicant should demonstrate that, when considering both the cost of service and the quality of service, the ultimate consumer would be better served by the applicant than by the other water suppliers.

(10) *Verification.* A verification that the water sources and customers are metered in accordance with § 65.7 (relating to metered service). If unmetered water service is currently provided, the applicant shall provide a metering plan to the Commission.

(b) *Additional considerations.* The Commission will consider and may rely upon the comprehensive plans, multimunicipal plans, zoning ordinances and joint municipal zoning ordinances, consistent with the authority in sections 619.2 and 1105 of the Municipalities Planning Code (53 P. S. §§ 10619.2 and 11105), when reviewing applications for a certificate of public convenience as a public water supplier or wastewater collection, treatment or disposal provider.

(c) *Filing.* Applications under this section must conform to §§ 1.31 and 1.32 (relating to requirements for documentary filings; and form of documents), and include a mode of payment as prescribed by § 1.42 (relating to mode of payment of fees) and in the amount delineated in § 1.43 (relating to schedule of fees payable to the Commission). The applicant shall file with the Commission the original and three copies of the application. An application which fails to include the information and documents outlined in subsections (a) and (b), as specified by the Commission for water and wastewater collection, treatment or disposal companies, is subject to rejection by the Commission. The original and three copies must contain exhibits. An affidavit of service showing the identity of those served under subsection (f) shall accompany the original and the copies of the application filed with the Commission.

(d) *Notice.* The application will be docketed by the Secretary of the Commission and thereafter forwarded for publication in the *Pennsylvania Bulletin* with a 60-day protest period. The applicant shall also publish notice of application as supplied by the Secretary, daily for 2 consecutive weeks in one newspaper of general circulation located in the territory covered by the application and shall submit proof of publication to the Commission. In addition, the utility or applicant shall individually notify existing customers of the filing of the application.

(e) *Application form.* The Commission may provide a standard application form for use by an applicant for § 3.501 and will, to the extent practicable, provide the application form on the Commission's website.

(1) Any standard application form developed for purposes of § 3.501 that involves a matter of an interagency nature will be developed or revised only after notice is published in the *Pennsylvania Bulletin*, posted on the Commission's website to the extent practicable, and after consultation with interested persons or agencies is conducted.

(2) Any standard application form developed for purposes of § 3.501 that involves matters other than those governed by § 3.501(e)(1) will be developed or revised only after notice is published in the *Pennsylvania Bulletin*, posted on the Commission's website to the extent practicable, and after consultation with any interested persons or agencies is conducted.

(3) Any standard application form developed for purposes of § 3.501 will be developed by the Commission staff and may be subject to formal approval by the Commission. Any standard application form developed for purposes of § 3.501 not formally approved by the Commission shall be subject to § 5.44 (relating to petitions for appeal from actions of the staff).

(f) *Copies.* At the time of filing, the applicant shall cause a complete copy of the application with exhibits to be served by registered or certified mail, return receipt requested, upon:

(1) Each city, borough, town, township, county and related planning office which is included, in whole or in part, in the proposed service area.

(2) A water or wastewater utility, municipal corporation or authority which provides water or wastewater collection, treatment or disposal service to the public and whose service area abuts or is within 1 mile of the service area proposed in the application.

(3) The statutory advocates and DEP's central and regional offices.

(g) *References.* Subsection (a) supplements § 5.11 (relating to applications generally).

**§ 3.502. Protests to applications for certificate of public convenience as a water supplier or wastewater collection, treatment or disposal provider.**

(a) *Protests generally.* A person objecting to the application shall file with the Secretary and serve upon the applicant or applicant's attorney, if any, a written protest which must contain the following:

(1) The applicant's name and the docket number of the application.

(2) The name, business address and telephone number of the protestant.

(3) The name, business address, Pennsylvania attorney identification number and telephone number of the protestant's attorney or other representative.

(4) A statement of the nature of the protestant's interest in the application.

(b) *Participation in a proceeding.* Upon the filing of a timely protest the protestant will be allowed to participate in the proceeding as a party intervenor. Statutory advocates participate in any proceeding based on their statutory right of participation.

(c) *Motions.* A protest will be treated as a pleading; and the applicant may, within 20 days after the closing date for the filing of protests, file motions to strike, to dismiss, or for amplification as provided in § 5.101 (relating to preliminary motion).

(d) *Protests: time of filing.* A protest shall be filed within the time specified in the notice appearing in the *Pennsylvania Bulletin*, which shall be at least 60 days from the date of publication thereof except when the need for the proposed service or other exigent circumstances supports a request for a shorter protest period. Failure to file the protest in accordance with this subsection shall be a bar to subsequent participation in the proceeding, except if permitted by the Commission for good cause shown or as provided in § 5.71 (relating to initiation of intervention).

**Subchapter H. FORMS**

**§ 3.551. Official forms.**

Forms for applications, petitions, complaints and other matters are available on the Commission's website or from the Secretary of the Commission, P. O. Box 3265 Harrisburg, Pennsylvania, 17105-3265; (717) 772-7777.

**Subchapter I. REGISTRATION OF SECURITIES**

**§ 3.601. General.**

(a) *Scope.* A public utility shall file with the Commission and receive from it notice of registration of a securities certificate before the public utility issues or assumes securities.

(b) *Format.* A securities certificate must be in a form consistent with §§ 1.31 and 1.32 (relating to requirements for documentary filings; and form of documents), accompanied by payment in the amount provided in § 1.43 (relating to schedule of fees payable to the Commission) and in a payment mode provided for in § 1.31.

(c) *Form.* The securities certificate must provide information required by the Commission on a form available from the Commission or shown on its website as well as additional information required by the Commission. The securities certificate must contain the following information:

(1) The name and address of the public utility filing the securities certificate.

(2) The name and address of the public utility's attorney.

(3) A brief corporate history of the public utility, a general description of the territory in which it actually furnishes service to the public, and of the kind of service rendered.

(4) Whether the public utility is controlled by a corporation, and, if so:

(i) The name of the controlling corporation.

(ii) The form and manner of control.

(iii) The extent of control.

(iv) Whether control is direct or indirect.

(v) The names of intermediaries through which control, if indirect, is held. When control is in a holding company organization, show the chain of ownership of control to the main parent company.

(5) The following information regarding the securities which the public utility proposes to issue or assume:

(i) The exact title of security.

(ii) The aggregate par value, or if no par value then the number of shares, or the principal amount to be issued or assumed.

(iii) In the case of stock certificates, as applicable:

- (A) Par value.
- (B) Dividend rate and payment dates.
- (C) Redemption value.
- (D) Liquidation value.
- (E) Voting powers.
- (F) Preferences as to assets and dividends.
- (G) Cumulative and participating dividend provisions.
- (H) Callability and conversion provision.

(iv) In the case of evidences of indebtedness, as applicable:

- (A) Nominal date of issue.
- (B) Date of maturity.
- (C) Interest rate and payment dates.
- (D) Extent to which taxes on securities are assumed by the issuer.
- (E) Callability and conversion provisions.
- (F) Maintenance.
- (G) Depreciation and sinking or other fund provision.
- (H) Name and address of trustee and whether affiliated with the public utility.

(6) The method by which the public utility proposes to dispose of the securities, giving pertinent details as to date and manner of sale, exchange or other disposition. If sale, include minimum net price to the public utility, maximum commission or fee to be paid to investment bankers, brokers or others, and whether securities are to be sold on an underwriting or take-down basis. State whether or not those negotiating or arranging the sale are in any way affiliated with the utility. If a private sale, state whether the purchasers are in any way affiliated with the utility. Show in tabular form an estimate in reasonable detail of the expenses to be incurred in issuing the securities, including, by groups, legal fees, fees and documentary taxes to governmental authorities, printing expenses, underwriting or brokerage commission, duplicate interest and other expenses.

(7) The purpose for which the public utility proposes to issue or assume the securities.

(i) If the purpose is the acquisition of all or part of the assets of a going concern, state:

- (A) The name and address of the vendor and the docket number of Commission approval of the acquisition.
- (B) A brief description of property, and whether it is all or part of a completed system.
- (C) The full consideration to be paid, including any indebtedness to be assumed by the utility.
- (D) The manner of determining consideration.
- (E) The manner in which acquisition is to be recorded on the public utility's books.

(F) The original cost of physical property to be acquired, stated according to plant accounts prescribed by the classification of accounts applicable to the public utility.

(G) The depreciation applicable thereto as recorded on the books of the vendor.

(H) The manner of determining the original cost and depreciation.

(I) An income statement for the latest available 12 months applicable to the operation of the property being acquired.

(ii) If the purpose is the purchase or construction of new facilities, or the betterment of existing facilities, give:

(A) A brief description of the new facilities or betterments.

(B) A list of plant accounts prescribed by the classification of accounts applicable to the utility to be charged with the new facilities or betterments, showing opposite each account the estimated cost to be charged.

(C) A list of the accounts and the amounts to be credited thereto for the retirements of any property resulting from the purchase or construction of new facilities or betterments.

(D) The manner of determining amounts at which retired property is to be credited.

(E) The date when it is expected that the purchase or construction or betterment will be completed.

(iii) If the purpose is to obtain working capital, explain any unusual condition which exists, or will exist, in the public utility's current assets or current liabilities, stating:

(A) The approximate cost of average materials and supplies inventory which the public utility expects to carry.

(B) The average time elapsing between the date when the public utility furnishes or begins a period of furnishing service to customers and the date when collection is made from customers for the service.

(C) The minimum bank balance requirements.

(D) A statement, by accounts, of the operating expenses for the latest available 12 months.

(iv) If the purpose is to refund obligations, describe obligations in detail.

(A) Explain the purpose for which obligations were issued, or refer to number of securities certificate, securities application or certificate of notification in which the purpose appears.

(B) State the date of last disposition of obligation, the amount disposed of and the price received.

(C) State whether refunding is to meet maturity, or to effect saving in interest or other annual charges; if to effect saving, state date when, and price at which obligations are to be called, and submit statement showing saving to be effected as a result of refunding.

(D) State disposition to be made of any discount or expense remaining unamortized on the obligations to be refunded and of any premium included in the call price.

(E) State whether any unamortized debt discount and expense was originally incurred in connection with securities not now outstanding, and if so, give amount applicable to each issue.

(v) If the purpose is reimbursement for moneys already expended, state the purpose for which the moneys were expended in as complete detail as if the securities now being issued were for that purpose as required by this subsection and by subsections (a), (b) and (d).

(A) List the names and principal amounts of any securities already issued against the expenditures.

(B) State the dates upon or between which the expenditures were made.

(8) State whether a registration statement, application or declaration has been filed or will be filed with the Securities and Exchange Commission in respect to the securities herein proposed to be issued or assumed. If so, state:

- (i) The date filed.
- (ii) The nature of the application or declaration.
- (iii) The closing date before the Securities and Exchange Commission.

(9) The public utility shall attach to each securities certificate:

(i) A balance sheet of the public utility set up by ledger accounts and not by groupings dated within at least 3 months of the date of securities certificate, including any transactions which have occurred between the date of the balance sheet and the date of filing the securities certificate and an explanation of any major contingent liabilities faced by the public utility.

(ii) An income account of the public utility set up by general ledger accounts, not by groupings, showing in detail the other credits and charges made to surplus during the year, for the 12-month period ending by the date of the balance sheet.

(iii) A statement with respect to the plant accounts appearing on the balance sheet showing the following:

(A) A summary by the detailed plant accounts prescribed in the system of accounts applicable to the public utility.

(B) The portion of the plant account balance representing increments in plant book values resulting from the acquisition of property through purchase, merger and consolidation or reorganization.

(C) The portion of the plant account balance representing increases in plant book values resulting from the recording of appraised values by the public utility unless the public utility has filed with the Commission an original cost study.

(iv) A statement of securities of other corporations owned by the public utility, including:

- (A) The name of the issuer.
- (B) The exact title of the security.
- (C) The amount owned.
- (D) The date acquired.
- (E) The price paid.
- (F) The book value.
- (G) The market value.

(H) The cost to the affiliate, if acquired from an affiliate.

(V) A statement showing the status of the funded debt of the public utility outstanding at the date of the balance sheet, plus particulars of any important changes in the funded debt outstanding which have taken place since that date. The statement must be in the form available from the Commission.

(vi) A statement showing the status of outstanding capital stock of the public utility as of the date of the

balance sheet, including any important changes in the capital stock outstanding which have taken place since the date of the balance sheet according to the form available from the Commission.

(vii) A copy of the registration statement filed by the public utility with the Securities and Exchange Commission under the Securities Act of 1933 (15 U.S.C.A. §§ 77A—77aa) with respect to the proposed issuance or assumption of securities.

(viii) Copies of applications and declarations filed by the public utility with the Securities and Exchange Commission with respect to the proposed issuance or assumption of securities, under the Public Utility Holding Company Act of 1935 (15 U.S.C.A. §§ 79—79z-6).

(ix) A copy of the resolution of the board of directors of the public utility authorizing the proposed issuance or assumption of securities.

(x) A copy of the stock certificate or other security proposed to be issued or assumed. Bonds or other evidences of indebtedness secured by mortgage, collateral trust agreement or other underlying instrument. This exhibit must be a copy of the underlying instrument, rather than of the evidence of indebtedness itself.

(xi) A statement showing, in journal entry form, the charges and credits to be made on the books of account of the public utility as a result of the proposed issuance or assumption of securities.

(xii) An affidavit in the form prescribed by §§ 1.35 and 1.36 (relating to execution; and verification).

(d) *Format form.* The Commission may provide a standard format form for use by an applicant for this section and will, to the extent practicable, provide the format form on the Commission's website.

(1) Any standard format form developed for purposes of this section that involves a matter of an interagency nature will be developed or revised only after notice is published in the *Pennsylvania Bulletin*, posted on the Commission's website to the extent practicable, and after consultation with an interested agency is conducted.

(2) Any standard format form developed for purposes of this section that involves matters other than those governed by paragraph (1) will be developed or revised only after notice is published in the *Pennsylvania Bulletin*, posted on the Commission's website to the extent practicable, and after consultation with an interested agency is conducted.

(3) Any standard format form developed for purposes of this section will be developed by staff and may be subject to formal approval by the Commission. Any standard format form developed for purposes of this section not otherwise subject to formal approval by the Commission will be subject to §§ 5.41—5.44 (relating to petitions).

**§ 3.602. Abbreviated securities certificate.**

(a) *Scope of rule.* The abbreviated procedure of subsections (b) and (c) applies to an issuance or assumption of a security which meets one of the following requirements:

(1) The issuance or assumption of securities has been authorized by another state commission having primary jurisdiction.

(2) The financing is provided by an agency of a state or the United States government.

(3) The issuance or assumption of securities is by a utility having a presence in this Commonwealth of less than 10% as measured by either:

(i) The ratio of gross investment within this Commonwealth to the utility's total gross investment.

(ii) The ratio of gross operating revenues from service rendered during the immediately preceding fiscal year under tariffs filed with the Commission for intra-State service to the total gross operating revenues of the public utility during the fiscal year from all service, wherever rendered, of the type described in section 102 of the act (relating to definitions).

(4) The declaration by a utility of a stock split if there is no impact on the control of the utility or negative impact attributable to commingling of competitive enterprises with noncompetitive enterprises.

(5) The issuance of a dividend by a utility in the form of the utility's stock if there is no impact on the control of the utility or negative impact attributable to commingling of competitive enterprises with noncompetitive enterprises.

(b) *Form.* At the election of the issuing public utility, a securities certificate relating to an issuance of securities within the scope of this rule may consist of two copies of a letter addressed to the Secretary and setting forth the following information:

- (1) The name and address of the public utility.
  - (2) The title or capacity of the representative of the public utility executing the letter.
  - (3) The designation of the securities to be issued or assumed and the approximate number of shares, principal amount, or other units proposed to be issued or assumed.
  - (4) A statement setting forth the specific subsections that qualifies the issuance of the abbreviated procedure together with the underlying calculations, when applicable.
  - (5) A verification or affidavit conforming to § 1.36 (relating to verifications and affidavits) in compliance with section 1902 of the act (relating to contents of securities certificate).
- (c) *Filing and registration.* An abbreviated securities certificate under this section, together with the filing fee specified in § 1.43 (relating to schedule of fees payable to the Commission), shall be filed with the Secretary.
- (1) The certificate will be deemed, in fact and in law, to have been registered if no order of rejection has been entered after 20 days from the filing of a securities certificate.
  - (2) Prior to the expiration of the 20-day period, the Secretary may extend the 20-day consideration period to not more than a total of 40 days upon notification of the public utility served. Further extension to the period will be by the order of the Commission.

(d) *Exemption.* The filing of a securities certificate with the Commission under Chapter 19 of the act (relating to securities and obligations), relating to an issuance or assumption of securities is not required of a public utility which owns or operates facilities within this Commonwealth, but which has received no gross operating revenues for service rendered during the immediately preceding fiscal year and 12-month period under tariffs filed with the Commission for intrastate service within this Commonwealth.

## CHAPTER 5. FORMAL PROCEEDINGS

### Subchapter A. PLEADINGS AND OTHER PRELIMINARY MATTERS

#### GENERAL PROVISIONS

#### § 5.1 Pleadings allowed.

(a) The pleadings in an action before the Commission include the following:

- (1) Application and protest.
- (2) Formal complaint, answer, new matter and reply to new matter.
- (3) Order to show cause and answer.
- (4) Petition and answer.
- (5) Preliminary objections.
- (6) Motions.

(b) A pleading except a preliminary objection may be subject to a preliminary objection as set forth in § 5.101 (relating to preliminary objections).

#### APPLICATIONS

#### § 5.12. Contents of applications.

(a) Applications must conform to this section unless a form or other specific requirements are provided in Chapter 3 (relating to special provisions). Applications must :

- (1) Be in writing.
- (2) State clearly and concisely the authorization or permission sought.
- (3) Cite by appropriate reference the statutory provisions, regulations or other authority under which the Commission authorization or permission is sought.
- (4) Set forth, in the order indicated, the following—unless otherwise provided by this chapter or in Chapter 3 for the specific type of application involved:
  - (i) The exact legal name of the applicant.
  - (ii) The jurisdiction under the statutes of which the applicant was created or organized and the location of the principal place of business of the applicant, when the applicant is a corporation, trust, association or other entity.
  - (iii) The name, title, mailing address, telephone number and electronic mail address, if available, of the person to whom correspondence or communication in regard to the application is to be addressed. The Commission will serve, when required, notices, orders and other papers upon the person named, and service will be deemed to be service upon the applicant.

(b) Subsection (a) supersedes 1 Pa. Code § 35.2 (relating to contents of applications).

(c) Subsection (a) supersedes 1 Pa. Code § 35.2 (relating to contents of applications).

(d) Subsection (a) supersedes 1 Pa. Code § 35.2 (relating to contents of applications).

#### § 5.13. Applications for construction or alteration of crossings.

(a) Applications for construction, relocation, alteration, protection or abolition of a crossing under section 2702 of the act (relating to construction, relocation, suspension, and abolition of crossings) must comply substantially with the requirements as to crossing complaints as set forth in § 3.361 (relating to crossing complaints).

(b) Plans submitted for the construction, relocation, alteration, protection or abolition of a crossing complained against shall be accompanied by the names and post office addresses of the record owners of all property



necessary to be acquired in the execution thereof, and shall, when directed by the Commission, be supplemented by a description by metes and bounds of all property necessary to be acquired.

**§ 5.14. Applications requiring notice.**

(a) *General rule.* Notice of applications to the Commission for authority under the act must be published in the *Pennsylvania Bulletin* and as may otherwise be required by the Commission.

(b) *Supplemental requirements.* The Secretary may require additional publication or notification in one or more of the following ways:

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

(2) Actual notification to the parties affected by the application.

(3) Another form of actual or constructive notification, including service of the application on interested persons.

(c) *Protest deadlines.* The time for filing protests to applications is governed by § 5.53 (relating to time of filing of protests).

(d) *Publication of application.* Except as set forth in §§ 3.361—3.363, 3.501 and 57.71—57.77 as relating to the 60-day protest period, or as otherwise provided by the Secretary, application to the Commission for the following types of authority will 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 to the public, including the following:

- (i) Electric.
- (ii) Gas.
- (iii) Telephone.
- (iv) Water.
- (v) Wastewater.
- (vi) Pipeline.
- (vii) Radio-telephone common carrier service.

(2) To initiate, in a different nature or to a different territory than is currently authorized, fixed utility service to the public, including the following:

- (i) Electric.
- (ii) Gas.
- (iii) Telephone.
- (iv) Water.
- (v) Wastewater.
- (vi) Pipeline.
- (vii) Radio-telephone common carrier service.

(3) To abandon, in whole or in part, fixed utility service to the public, including to the following:

- (i) Electric.
- (ii) Gas.
- (iii) Telephone.
- (iv) Water.
- (v) Wastewater.

(vi) Pipeline.

(vii) Radio-telephone common carrier service.

(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 section 619 of the Pennsylvania Municipalities Planning Code (53 P. S. § 10619).

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

**FORMAL COMPLAINTS**

**§ 5.22. Content of formal complaint.**

(a) A formal complaint must set forth the following:

(1) The name, mailing address, telephone number, telefacsimile number and electronic mailing address, if applicable, of the complainant.

(2) If the complainant is represented by an attorney, the name, mailing address, telephone number, telefacsimile number and Pennsylvania Supreme Court identification number of the attorney and, if available, the electronic mailing address.

(3) The name, mailing address and certificate or license number of the respondent complained against, if known, and the nature and character of its business.

(4) The interest of the complainant in the subject matter—for example, customer, competitor, and the like.

(5) A clear and concise statement of the act or omission being complained of including the result of any informal complaint or informal investigation.

(6) A clear and concise statement of the relief sought.

(7) Except for a document referenced within § 5.21(b) (relating to formal complaints generally), a document, or the material part thereof, or a copy must be attached when a claim is based upon the document, the material part thereof, or a copy. If the document, the material part thereof, or a copy is not accessible, the complaint must set forth that the document, the material part thereof, or the copy is not accessible and the reason, and set forth the substance of the document or material part thereof.

(b) A verification executed in accordance with § 1.36 (relating to verification) shall be attached to the formal complaint.

(c) A complaint brought by a public utility or other person licensed by the Commission regarding the act, a regulation or order of the Commission must be substantially in the form prescribed by subsection (a). The complaint must reference the act, the regulation or order and shall quote the pertinent portions thereof.

(d) Subsections (a) and (c) supersede 1 Pa. Code § 35.10 (relating to form and content of formal complaints).

**§ 5.24. Satisfaction of formal complaints.**

(a) If the respondent satisfies a formal complaint either before or after a hearing, the complainant shall file with the Commission a certified statement to that effect. The certified statement must set forth that the complaint is satisfied and that the complaint docket should be marked closed. The presiding officer is not required to render a decision upon submission of the certified statement concerning the satisfaction of a complaint unless the parties request one for good cause.

(b) In lieu of the certified statement required by subsection (a), the respondent may provide a certified writing to the Commission that it has addressed the complaint and at least one of the following:

(1) That the complainant has acknowledged satisfaction to the respondent.

(2) That the complainant has acknowledged to the respondent that the complainant no longer wishes to pursue the complaint.

(c) In the case of certification of satisfaction under subsection (b), the respondent shall simultaneously serve a copy of the respondent's certified writing, including a statement informing the complainant of the complainant's right to object in writing within 10 days, upon the complainant. Unless the complainant objects, in writing, to the certification within 10 days of its filing, the complaint docket will be marked closed.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.41 (relating to satisfaction of complaints).

**§ 5.31. Staff-initiated complaints.**

(a) A Commission bureau may commence a proceeding pursuant to statutory or regulatory authority or pursuant to delegation by the Commission by filing a complaint in accordance with § 5.22 (relating to content of formal complaint). The complaint will contain a statement of the particular matter about which the bureau is complaining or inquiring, and the complaint will require that the respondent named file a written answer in the form required by § 5.61 (relating to answers to complaints, petitions and motions).

(b) A Commission bureau filing a complaint under this section involving a fixed utility or licensee will provide a copy to the Office of Trial Staff, the Chief Counsel, the Office of Consumer Advocate, and the Office of Small Business Advocate.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.14 (relating to orders to show cause).

**§ 5.32. Complaints in rate proceedings.**

(a) *Prior to suspension.* A person may file a complaint against a general rate increase within the meaning of section 1308(d) of the act (relating to voluntary changes in rates) within the time period specified in the notice provided to customers of the tariff filing.

(b) *After suspension.* A person filing a complaint during the suspension of a proposed general rate increase shall take the record of the suspended rate proceeding as it stands at the time of the complaint's filing.

**PETITIONS****§ 5.41. Petitions generally.**

(a) *General requirements.* Petitions for relief under the act or other statute that the Commission administers, must be in writing, state clearly and concisely the interest of the petitioner in the subject matter, the facts

and law relied upon, and the relief sought. Petitions for relief must comply with § 1.51 (relating to Instructions for service, notice, and protest).

(b) *Service.* A copy of the petition shall be served on all persons directly affected and on other parties whom petitioner believes will be affected by the petition. Copies of the petition shall be served upon the office of trial staff, the Office of Consumer Advocate and the Office of Small Business Advocate. Service shall be evidenced with a certificate of service filed with the petition.

(c) *Copies.* Copies shall also be served as directed by the Commission.

(d) Subsection (a) supersedes 1 Pa. Code § 35.17 (relating to petitions generally).

**§ 5.42. Petitions for declaratory orders.**

(a) Petitions for the issuance of a declaratory order to terminate a controversy or remove uncertainty must:

(1) State clearly and concisely the controversy or uncertainty which is the subject of the petition.

(2) Cite the statutory provision or other authority involved.

(3) Include a complete statement of the facts and grounds prompting the petition.

(4) Include a full disclosure of the interest of the petitioner.

(b) The petitioner shall serve a copy of the petition on the Office of Trial Staff, Office of Consumer Advocate, Office of Small Business Advocate, all persons directly affected and on other parties who petitioner believes will be affected by the petition. Service shall be evidenced with a certificate of service filed with the petition.

(c) Copies shall also be served in compliance with Commission direction.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.19 (relating to petitions for declaratory orders).

**§ 5.43. Petitions for issuance, amendment, repeal, or waiver of Commission regulations.**

(a) A petition to the Commission for the issuance, amendment, waiver or repeal of a regulation must set forth clearly and concisely the interest of the petitioner in the subject matter, the specific regulation, amendment, waiver or repeal requested, and cite by appropriate reference the statutory provision or other authority involved. The petition must set forth the purpose of, and the facts claimed to constitute the grounds requiring the regulation, amendment, waiver or repeal. Petitions for the issuance or amendment of a regulation shall incorporate the proposed regulation or amendment.

(b) A copy of the petition shall be served on all persons directly affected and on other parties who petitioner believes will be affected by the petition. Copies of the petition shall be served on the Office of Trial Staff, the Office of Consumer Advocate and the Office of Small Business Advocate. Service shall be evidenced with a certificate of service filed with the petition.

(c) Copies shall also be served in compliance with Commission direction.

(d) Subsection (a) is identical to 1 Pa. Code § 35.18 (relating to petitions for issuance, amendment, waiver or repeal of regulations).

**§ 5.44. Petitions for appeal from actions of the staff.**

(a) Actions taken by staff, other than a presiding officer, under authority delegated by the Commission, will be deemed to be the final action of the Commission unless appealed to the Commission within 20 days after service of notice of the action, unless a different time period is specified in this chapter or in the act.

(b) An action taken by staff under delegated authority will note the parties' right to appeal the action under this section.

(c) Petitions for appeal from the actions of the staff will be addressed by the Commission at public meeting.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.20 (relating to appeals from actions of the staff).

**PROTESTS**

**§ 5.51. Protest to an application.**

(a) A person objecting to the approval of an application filed with the Commission may file a protest to the application.

(b) Protests to motor carrier property applications are not permitted. See § 3.381(c) (relating to applications for transportation of property, household goods in use and persons).

(c) Subsection (a) supersedes 1 Pa. Code § 35.23 (relating to protest generally).

**§ 5.52. Content of a protest to an application.**

(a) *Form.* A protest to an application must:

(1) Set out clearly and concisely the facts from which the alleged interest or right of the protestant can be determined.

(2) State the grounds of the protest .

(3) Set forth the facts establishing the protestant's standing to protest.

(b) *Motor carrier.* Protests in motor carrier cases must conform with § 3.381(c)(1) (relating to applications for transportation of property and persons).

(c) *Filing and service.* A protest shall be filed with the Secretary and served upon the applicant or the applicant's attorney, if any.

**§ 5.53. Time of filing.**

A protest shall be filed within the time specified in the published notice of the application. If no protest time is specified, the protest shall be filed within 60 days of publication of the notice.

**§ 5.54. (Reserved).**

**ANSWERS**

**§ 5.61. Answers to complaints, petitions, motions, and preliminary objections.**

(a) *Time for filing.* Unless a different time is prescribed by statute, the Commission, or the presiding officer, answers to complaints and petitions shall be filed with the Commission within 20 days after the date of service.

(1) Answers to motions shall be filed within the 20 days provided by §§ 5.102 and 5.103 (relating to motions for summary judgment and judgment on the pleadings; and motions).

(2) Answers to preliminary objections shall be filed within the 10 days provided by § 5.101 (relating to preliminary objections).

(b) *Form of answers to complaints.* The answer must be in writing and:

(1) Set forth in paragraphs numbered to correspond with the complaint.

(2) Advise the parties and the Commission as to the nature of the defense.

(3) Admit or deny specifically all material allegations of the complaint.

(4) State concisely the facts and matters of law relied upon.

(5) Include a copy of a document, or the material part of a document when relied upon in the answer. If the writing or a copy is not available, the answer must set forth that the document is not available and the reason, and set forth the substance of the document.

(c) *Failure to file an answer to a complaint.* A respondent failing to file an answer within the applicable period may be deemed in default, and relevant facts stated in the pleadings may be deemed admitted.

(d) *Answers to complaints in rate proceedings.* For complaints which are docketed with Commission-instituted rate proceedings, an answer may be filed within 10 days of date of service. However, an answer is not required, except as may be directed by the Commission or the presiding officer.

(e) *Form of answers to petitions.* The answer must be in writing and:

(1) Advise the parties and the Commission of the parties' position on the issues raised in the petition.

(2) State the parties' standing to participate in any Commission proceeding resulting from the petition.

(3) State concisely the facts and matters of law relied upon.

(4) Include a copy of a document, or the material part of a document when relied upon in the answer. If the writing or a copy is not available, the answer must set forth that the document is not available and the reason, and set forth the substance of the document.

(f) *Supersession.* Subsections (b)—(e) supersede 1 Pa. Code § 35.35 (relating to answers to complaints and petitions).

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

(a) *Answers seeking affirmative relief.* In its answer, a respondent may seek relief against other parties in a proceeding if common questions of law or fact are present. The answer must conform to this chapter for answers generally and set forth:

(1) The facts constituting the grounds of complaint.

(2) The provisions of the statutes, rules, regulations or orders relied upon.

(3) The injury complained of.

(4) The relief sought.

(b) *Answers raising new matter.* An affirmative defense shall be pleaded in an answer or other responsive pleading under the heading of "New Matter." A party may set forth as new matter another material fact which is not merely a denial of the averments of the preceding pleading.

**§ 5.63. Replies to answers seeking affirmative relief or new matter.**

(a) Unless otherwise ordered by the Commission, replies to answers seeking affirmative relief or to new matter shall be filed with the Commission and served within 20 days after date of service of the answer, but not later than 5 days prior to the date set for the commencement of the hearing.

(b) Failure to file a timely reply to new matter may be deemed in default, and relevant facts stated in the new matter may be deemed to be admitted.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.39 (relating to replies to respondents seeking affirmative relief).

**§ 5.65. Answers to amendments of pleadings.**

(a) Except as provided under § 5.101 (referring to preliminary objections), an answer to an amendment, modification or supplement to an application, complaint, petition or other pleading set forth under § 5.91 (referring to amendments of pleadings generally) shall be filed with the Commission within 20 days after the date of service of the amendment, modification or supplement, unless for cause the Commission or presiding officer with or without motion prescribes a different time.

(b) Subsection (a) supersedes 1 Pa. Code § 35.40 (relating to answers to amendments of pleadings).

**§ 5.66. Answers to petitions to intervene.**

(a) A party may file an answer to a petition to intervene within 20 days of service, and in default thereof, may be deemed to have waived objection to the granting of the petition. Answers shall be served upon all other parties.

(b) Subsection (a) supersedes 1 Pa. Code § 35.36 (relating to answers to petitions to intervene).

**INTERVENTION**

**§ 5.73. Form and content of petitions to intervene.**

(a) Petitions to intervene must set out clearly and concisely the following:

(1) The facts from which the alleged intervention right or interest of the petitioner can be determined.

(2) The grounds of the proposed intervention.

(3) The petitioner's position regarding the issues in the proceeding.

(b) When the circumstances warrant, petitions to intervene filed on behalf of more than one person may be required to list those persons and entities comprising the represented group.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.29 (relating to form and contents of petitions to intervene).

**§ 5.74. Filing of petitions to intervene.**

(a) Petitions to intervene may be filed following the filing of an application, petition, complaint or other document seeking Commission action.

(b) Petitions to intervene shall be filed:

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

(2) No later than the date fixed for filing protests as published in the *Pennsylvania Bulletin* except for good cause shown.

(3) In accordance with § 5.53 if no deadline is set in an order or notice with respect to the proceedings.

(4) A statutory advocate may exercise a right of participation or file a notice of intervention consistent with law at any time in a proceeding. A statutory advocate exercising a right of participation or filing a notice of intervention following expiration of any protest or intervention period shall take the record as developed unless determined otherwise in exceptional circumstances for good cause shown.

(c) Except with regard to statutory advocates under subsection (b)(4), intervention will not be permitted once an evidentiary hearing has concluded absent extraordinary circumstances.

(d) The Commission or presiding officer may, when the circumstances warrant, permit the waiver of the requirements of § 5.409 (relating to copies and form of documentary evidence) with respect to copies of exhibits for the intervenor.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.30 (relating to filing of petitions to intervene).

**§ 5.75. Notice, service and action on petitions to intervene.**

(a) *Notice and service.* Petitions to intervene, when tendered to the Commission for filing, must show service thereof upon all parties to the proceeding in conformity with § 1.54 (relating to service by a party).

(b) *Action on petitions.* As soon as practicable after the expiration of the time for filing answers to petitions as provided in § 5.66 (relating to answers to petitions to intervene), the Commission or presiding officer will grant or deny the petition in whole or in part or may, if found to be appropriate, authorize limited participation.

(c) *Rights upon grant of petition.* Admission as an intervenor will not be construed as recognition by the Commission that the intervenor has a direct interest in the proceeding or might be aggrieved by an order of the Commission in the proceeding. Intervenors are granted no rights which survive discontinuance of a case.

(d) *Actions on petitions filed after a hearing has commenced.* Except with regard to statutory advocates under § 5.74(b)(4) (relating to filing of petitions to intervene), petitions to intervene may be filed or will be acted upon during a hearing unless prohibited by the Commission or presiding officer after opportunity for all parties to object.

(e) *Supersession.* Subsections (a)—(d) supersede 1 Pa. Code § 35.31 (relating to notice and action on petitions to intervene).

**AMENDMENT AND WITHDRAWAL OF PLEADINGS**

**§ 5.91. Amendments of pleadings generally.**

(a) *Generally.* A modification of or supplement to an application, complaint, petition or other pleading shall be deemed as an amendment to the pleading, and must comply with the requirements of this subchapter relating to the pleading amended.

(b) *Amendments in response to preliminary objections.* A party may file an amended pleading as of course within 20 days after service of a copy of a preliminary objection filed under § 5.101 (referring to preliminary objec-

tions). If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

(c) *Limitation.* Except as otherwise provided in this subchapter, no amendment to a pleading may be filed within 5 days preceding the commencement of or during a hearing unless directed or permitted by the Commission or the presiding officer after opportunity for all parties to be heard thereon.

(d) *Exception in rate cases.* This section does not apply to an increase in the aggregate amount of a general rate increase request.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.48 (relating to amendments of pleadings generally).

**§ 5.92. Amendments to conform to the evidence.**

(a) *Amendment by consent.* When the parties introduce issues at a hearing not raised by the pleadings whether by express or implied consent of the parties, the issues shall be treated in all respects as if they had been raised in the pleadings.

(b) *Amendments by motion.* Amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise new issues may be made upon motion of a party at any time during the hearing as set forth in § 5.102 (relating to motions for summary judgment and judgment on the pleadings).

(c) *Amendment following objection.* If evidence upon new issues is objected to on the ground that it is not within the issues raised by the pleadings, the Commission or the presiding officer may allow the pleadings to be amended and the evidence to be received, when it appears that the presentation of the merits of the proceedings will be served thereby without prejudicing the public interest or the rights of a party.

(d) *Continuance following objection.* A continuance may be granted by the Commission or the presiding officer under § 1.15 (relating to extensions of time and continuances) when necessary to allow the objecting party to address new issues and evidence.

(e) *Notice of amendment.* If an amendment adopted under this section has the effect of broadening the issues in the proceeding, notice of the amendment shall be given in the same manner as notice was given at the commencement of the proceeding and to the same persons who received the notice.

(f) *Supersession.* Subsections (a)—(e) supersede 1 Pa. Code § 35.49 (relating to amendments to conform to the evidence).

**§ 5.93. Directed amendments.**

(a) The Commission may at any time, or during a hearing, presiding officers may on their own motion or the motion of a party, direct parties to state their case by way of amendment more fully or in more detail. The amendment shall be reduced to writing and filed within the time fixed by the Commission or the presiding officer.

(b) Subsection (a) is identical to 1 Pa. Code § 35.50 (relating to directed amendments).

**§ 5.94. Withdrawal of pleadings in a contested proceeding.**

(a) Except as provided in subsection (b), a party desiring to withdraw a pleading in a contested proceeding may file a petition for leave to withdraw the appropriate document with the Commission and serve it upon the other parties. The petition must set forth the reasons for

the withdrawal. A party may object to the petition within 20 days of service. After considering the petition, an objection thereto and the public interest, the presiding officer or the Commission will determine whether the withdrawal will be permitted.

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

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

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.51 (relating to withdrawal of pleadings).

**PRELIMINARY OBJECTIONS**

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
- (6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(b) *Notice to plead.* A preliminary objection must contain a notice to plead which states that an answer to the objection shall be filed within 10 days of the date of service of the objection.

(c) *General rule.* Preliminary objections shall be raised at one time. The preliminary objections must be set forth in numbered paragraphs, state with specificity the legal and factual grounds relied upon, and may be inconsistent. Two or more preliminary objections may be raised in one pleading.

(d) *Time for filing and form.* Preliminary objections shall be filed as a separate document and within the same 20 days provided for in § 5.61 (relating to answers to complaints, petitions, and motions). Except as provided for in subsection (e), the filing of preliminary objections may not eliminate the requirement to file an answer to the complaint or other initiating pleading.

(e) *Preliminary objection regarding insufficient specificity.*

(1) If a preliminary objection regarding insufficient specificity in a pleading is filed, an answer is not required until further directed by the presiding officer or the Commission.

(2) When an amended pleading is filed in response to a preliminary objection alleging insufficient specificity in a pleading, the preliminary motion will be deemed to be moot in accordance with § 5.91 (relating to amendment of pleadings generally).

(f) *Answer to a preliminary objection.*

(1) *Time for filing.* An answer to a preliminary objection may be filed within 10 days of date of service.

(2) *Form.* The answer must be in writing and in numbered paragraphs to correspond with the preliminary objection, and address the legal and factual grounds relied on in the preliminary objection.

(g) *Decision by presiding officer.* A preliminary objection will be decided within 30 days of the assignment of the preliminary objection to the presiding officer.

(h) *Amended pleading.* If a preliminary objection is granted, the party who submitted the stricken pleading has the right to file an amended pleading within 10 days of service of the order.

(i) *Supersession.* Subsections (a)—(h) supersede 1 Pa. Code §§ 35.54 and 35.55 (relating to motions as to complaint; and motions as to answer).

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

(a) *Generally.* After the pleadings are closed, but within a time so that the hearing is not delayed, a party may move for judgment on the pleadings or summary judgment. A motion must contain a notice which states that an answer or other responsive pleading shall be filed within 20 days of service of the motion.

(b) *Answers.* An answer to a motion for judgment on the pleadings or summary judgment, including an opposing affidavit or verification to a motion for summary judgment, may be filed within 20 days of the date of service of the motion. The answer to a motion for summary judgment may be supplemented by depositions, answers to interrogatories or further affidavits and admissions.

(c) *Motion for summary judgment.* A motion for summary judgment must be based on the pleadings and depositions, answers to interrogatories, admissions and supporting affidavits. Documents not already filed with the Commission shall be filed with the motion.

(d) *Decisions on motions.*

(1) *Standard for grant or denial on all counts.* 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 applicable 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 party is entitled to a judgment as a matter of law.

(2) *Standard for grant or denial in part.* The presiding officer may grant a partial summary judgment 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 party is entitled to a judgment as a matter of law on one or more but not all outstanding issues.

(3) *Form of decision.* The presiding officer will grant, in whole or in part, the motion in the form of an initial or recommended decision which shall be subject to exceptions as set forth in § 5.533 (relating to exceptions). Denial of a motion will be in the form of a written order.

**§ 5.103. Motions.**

(a) *Scope and content.* A request may be made by motion for relief desired, except as may be otherwise expressly provided in this chapter and Chapters 1 and 3

(relating to rules of administrative practice and procedure; and special provisions). A motion must set forth the ruling or relief sought, and state the grounds therefor and the statutory or other authority upon which it relies.

(b) *Presentation of motions.* A motion may be made in writing at any time, and a motion made during a hearing may be stated orally upon the record, or the presiding officer may require that an oral motion be reduced to writing and filed separately. Written motions must contain a notice which states that a responsive pleading shall be filed within 20 days of the date of service of the motion.

(c) *Response to motions.* A party has 20 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.

(d) *Rulings on motions.*

(1) The presiding officer is authorized to rule and will rule upon motions:

(i) Not formerly acted upon by the Commission prior to the commencement of the hearing where an immediate ruling is essential in order to proceed with the hearing.

(ii) Filed or made after the commencement of the hearing and prior to the submission of a decision in the proceeding.

(2) A motion made during the course of hearing, which if granted would otherwise dispose of parties' rights, should be acted upon by the presiding officer prior to taking further testimony if, in the opinion of the presiding officer, the action is warranted.

(3) If a motion involves a question of jurisdiction, the establishment of a prima facie case or standing, the presiding officer may render a final determination with regard to a motion prior to the termination of hearings by issuing an initial or recommended decision.

(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) supersedes 1 Pa. Code § 35.179 (relating to objections to motions). Subsection (d) supersedes 1 Pa. Code § 35.180 (relating to action on motions).

**Subchapter B. HEARINGS**

**GENERAL**

**§ 5.201. Notice of proceeding; hearing; waiver of hearing.**

(a) When notice and hearing are required under the act, publication in the *Pennsylvania Bulletin* of a notice of application or other initial pleading is sufficient to provide notice of the proceeding. Service on interested persons is also sufficient to provide notice. The notice must fix a reasonable period of time, but not less than 15 days, within which a person desiring to be heard may file a petition to intervene, a protest, complaint or other appropriate pleading. Hearings will be held upon the filing of the pleading, unless waived by the parties.

(b) If the appropriate pleading is not filed within the set period of time, or when the parties have waived hearings, the Commission may dispose of the matter without a hearing upon the basis of the pleadings or submittals and the studies and recommendations of the staff.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.101, 35.103 and 35.121 (relating to waiver of hearing; preliminary notice to Department of Justice; and initiation of hearings).

**§ 5.202. Scheduling of hearing.**

(a) The Commission will schedule hearings other than those involving the lawfulness of rates and will maintain a hearing calendar of all proceedings set for hearing.

(b) Proceedings pending on the calendar will be heard so far as practicable, in their order of assignment to the calendar at the times and places fixed by the Commission or presiding officer, giving regard to the convenience and necessity of the parties and their attorneys.

(c) The Commission or the presiding officer in the exercise of discretion, for cause, may advance or postpone proceedings on the hearing calendar with notice to the parties.

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.102 (relating to hearing calendar).

**§ 5.203. Hearing in rate proceedings.**

(a) Hearing dates in rate proceedings will be fixed by the presiding officer.

(b) The presiding officer will be guided by the requirement of section 315 of the act (relating to burden of proof) that rate cases are to be given preference over all other proceedings, and are to be decided as speedily as possible.

(c) The presiding officer may continue a scheduled hearing upon his own motion or upon the request of a party for good cause shown. Mere convenience or other engagements of counsel will not ordinarily constitute grounds for continuance.

(d) Subsections (a)—(c) supersede 1 Pa. Code §§ 35.121 and 35.123 (relating to initiation of hearings; and conduct of hearings).

**NOTICE OF HEARING**

**§ 5.212. Notice of nonrulemaking proceedings.**

(a) The presiding officer, the Office of Administrative Law Judge or the Commission is authorized to schedule prehearing conferences and hearings. Parties 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 parties or their attorneys so far as time and the proper execution of the functions of the Commission permit.

(b) A protestant in a motor carrier case shall 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.

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

**PREHEARING AND OTHER CONFERENCES**

**§ 5.221. Conferences to adjust, settle or expedite proceedings.**

(a) To provide opportunity for the submission and consideration of facts, arguments, offers of settlement or proposals of adjustment, for settlement of a proceeding, or the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the

parties may be held at any time prior to or during hearings as time, the nature of the proceeding, and the public interest permit.

(b) Subsection (a) is identical to 1 Pa. Code § 35.111 (relating to conferences to adjust, settle or expedite proceedings).

**§ 5.222. Initiation of prehearing conferences in nonrate proceedings.**

(a) To make possible a more effective use of hearing time in formal proceedings, other than rate proceedings which are governed by § 5.224 (relating to prehearing conference in rate proceedings), to otherwise expedite the orderly conduct and disposition of the proceedings and to serve the ends of justice and the public interest, it is the policy of the Commission to arrange for conferences between parties to the proceedings prior to the commencement of hearings.

(b) The Commission, or the presiding office may direct that a prehearing conference be held, and direct the parties to the proceeding to appear to consider the matters enumerated in subsection (c). Notice of the time and place of the conference shall be given to all parties to the proceeding. The conferences may be conducted telephonically.

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

(1) The possibilities for settlement of the proceeding, subject to the approval of the Commission.

(2) The amount of hearing time which will be required to dispose of the proceeding and the establishment of a schedule of hearing dates.

(3) Arrangements for the submission of direct testimony of witnesses in writing in advance of hearing to the extent practicable, and for the submission in advance of hearing or written requests for information which a party contemplates asking another party to present at hearing.

(4) Other matters that may aid in expediting the orderly conduct and disposition of the proceeding and the furtherance of justice, including the following:

(i) The simplification of the issues.

(ii) The exchange and acceptance of service of exhibits proposed to be offered in evidence.

(iii) The obtaining of admissions as to, or stipulations of, facts not remaining in dispute, or the authenticity of documents which might properly shorten the hearing.

(iv) The limitation of the number of witnesses.

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

(d) Parties and counsel will be expected to attend the conference fully prepared for a useful discussion of all problems involved in the proceeding, both procedural and substantive, and fully authorized to make commitments with respect thereto.

(1) The preparation must include submission of a prehearing memorandum and list:

(i) The presently identified issues.

(ii) The names and addresses of the witnesses.

(iii) The proposed area of testimony of each witness.

(2) The preparation may include:

- (i) Development of a proposed procedural schedule.
- (ii) Advance study of all relevant materials.
- (iii) Advance informal communication between the parties, including requests for additional data and information, to the extent it appears feasible and desirable.
- (e) Failure of a party to attend the conference, after being served with notice of the time and place thereof, without good cause shown, shall constitute a waiver of all objections to the agreements reached and to an order or ruling with respect thereto.
- (e) Subsections (a)—(c) supersede 1 Pa. Code § 35.112 (relating to conferences to expedite hearings). Subsection (d) is identical to 1 Pa. Code § 35.113 (relating to initiation of conferences).

**§ 5.223. Authority of presiding officer at conferences.**

(a) The presiding officer at a conference may dispose of procedural matters which he is authorized to rule upon during the course of the proceeding. When it appears that the proceeding would be substantially expedited by distribution of proposed exhibits and written prepared testimony reasonably in advance of the hearing session, the presiding officer, at his discretion, and with regard for the convenience and necessity of the parties, may direct advance distribution by a prescribed date. The rulings of the presiding officer made at the conference will control the subsequent course of the hearing, unless modified for good cause shown.

(b) The presiding officer will have authority to participate in the discussions, to arrange for recording stipulations or agreements reached at conference, to fix the date of initial hearing and the date for additional hearings which may be required to dispose of the proceeding, and otherwise to assist the parties to reach agreement that will expedite the proceeding and serve the ends of justice.

(c) The presiding officer may participate in settlement discussions upon agreement of all parties. A different presiding officer or a mediator, if appropriate, will be assigned by the Chief Administrative Law Judge to participate in settlement discussions upon the request of a party.

(d) Subsection (a) is identical to 1 Pa. Code § 35.114 (relating to authority of presiding officer at conference) and subsection (b) supplements § 35.114.

**§ 5.224. Prehearing conference in rate proceedings.**

(a) In a rate proceeding, the presiding officer may schedule the following:

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

(2) Other conferences as deemed necessary.

(3) A conference held telephonically, upon agreement of the parties.

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

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

(2) Other proposed orders with respect to discovery, including the establishment of sanctions (in addition to those provided by §§ 5.371 and 5.372 (relating to sanctions-general; and sanctions-types)) against any party failing to respond to discovery in a timely manner.

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

(c) At the first prehearing conference, parties may submit a written statement addressing the issues in subsection (b) and shall list:

- (1) The presently identified issues.
- (2) The names and addresses of the witnesses.
- (3) The proposed area of testimony of each witness.

(d) Following the first prehearing conference, the presiding officer will enter an order establishing a tentative set of hearing dates, establishing a plan and schedule for discovery, determining whether a public input hearing will be held, if that decision has not already been made, and addressing other matters deemed necessary.

(e) Further prehearing conferences may be scheduled at the discretion of the presiding officer.

(f) The presiding officer, or the Commission will have the authority to amend the requirements of this section either sua sponte or upon motion of a party.

(g) The rules applicable to prehearing and other conferences in §§ 5.221—5.223 (relating to conferences to adjust, settle or expedite proceedings; initiation of prehearing conferences in nonrate proceedings; and authority of presiding officer at conferences) are applicable to prehearing conferences in rate cases except to the extent they are inconsistent with this section.

**SETTLEMENTS**

**§ 5.231. Offers of settlement.**

(a) It is the policy of the Commission to encourage settlements.

(b) Nothing contained in this chapter or Chapter 1 or 3 (relating to rules of administrative practice and procedure; and special provisions) preclude a party in a proceeding from submitting, at any time, offers of settlement or proposals of adjustment, or from requesting conferences for that purpose.

(c) Parties may request that the presiding officer participate in the settlement conferences or that an additional presiding officer or mediator be designated to participate in the settlement conferences.

(d) Offers of settlement, of adjustment, or of procedure to be followed, and proposed stipulations not agreed to by every party, including proposals intended to resolve discovery disputes, will not be admissible in evidence against a counsel or party claiming the privilege.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.115 (relating to offers of settlement).

**§ 5.232. Settlement petitions and stipulations of fact.**

(a) *Generally.* A settlement petition, which may contain stipulations of fact by all or some of the parties, shall be filed with the Secretary in accordance with § 5.41 (relating to petitions generally).

(b) *Positions of the parties.* A settlement agreement must specifically identify the parties:

- (1) Supporting the settlement.



- (2) Opposing the settlement.
- (3) Taking no position on the settlement.
- (4) Denied an opportunity to enter into the settlement.

(c) *Service.* A copy of each settlement petition, which may contain stipulations of fact by all or some of the parties, shall be served upon each party to the proceeding, and each party shall have the opportunity to comment on the proposed settlement unless otherwise ordered by the presiding officer.

(d) *Review of settlement by the presiding officer.* The settlement petition will be reviewed by the presiding officer, if one has been assigned. If the presiding officer rules on the petition, the ruling will be made in the form of an initial or recommended decision, subject to § 5.537 (relating to rate case settlements), if approved, or in the form of an order, if disapproved. The presiding officer will determine if the settlement is in the public interest.

(e) *Waiver of exceptions.* The exception period may be waived upon agreement of the parties.

(f) *Disposition of exceptions.* If timely exceptions are filed, they will be considered in a ruling made on the settlement petition.

(g) *Review of a settlement petition by the Commission.* When no presiding officer has been assigned, the Commission will review the settlement. Parties not joining in the settlement may submit objections to the Commission within 20 days of the filing of the petition unless another time period is set by the Commission.

**§ 5.233. Refusal to make admissions or stipulations.**

(a) *Generally.* A party may move for sanctions under subsection (b) when the following conditions are satisfied:

(1) A party refuses to admit or stipulate to the genuineness of documents or the truth of matters of fact during a conference convened under this chapter and Chapter 1 or 3 (relating to rules of administrative practice and procedure; and special provisions).

(2) The party requesting the admissions or stipulations thereafter proves the genuineness of the document or the truth of a matter of fact.

(b) *Sanctions.* The requesting party may apply to the presiding officer for an order requiring the other party to pay the reasonable expenses incurred in making the proof, including reasonable attorney's fees. The presiding officer will grant an order for sanctions unless the presiding officer finds that there were good reasons for the refusal to admit or stipulate or that the admissions or stipulations sought were of no substantial importance.

(c) *Appeal.* An interlocutory appeal may be taken to the Commission immediately from the order made by a presiding officer under Subchapter C (relating to interlocutory review).

(d) *Compliance.* If a party refuses to comply with the order after it becomes final, the Commission or presiding officer may strike all or part of the pleadings of the party or limit or deny further participation by the party.

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.116 (relating to refusal to make admissions or stipulate).

**§ 5.234. Presentation and effect of stipulations.**

(a) Parties may stipulate to relevant matters of fact or the authenticity of relevant documents. The stipulations may be received in evidence at a hearing, and when so received shall be binding on the parties to the stipulation with respect to the matters therein stipulated.

(b) The parties may make stipulations independently of orders or rulings issued under §§ 5.221—5.224 (relating to prehearing and other conferences).

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

(d) Subsections (a)—(b) supersede 1 Pa. Code § 35.155 (relating to presentation and effect of stipulations). Subsection (c) supplements 1 Pa. Code § 35.155.

**§ 5.235. Restrictive amendments to applications for motor carrier of passenger and household goods in use authority.**

(a) Parties to motor carrier applications for passenger and household goods in use authority may stipulate as to restrictions or modifications to proposed motor carrier rights. Stipulations in the form of restrictive amendments or modifications must:

- (1) Be in writing.
- (2) Explain why the stipulation is in the public interest.
- (3) Be signed by each party to the stipulation.
- (4) Be submitted to the Secretary for insertion into the document folder.

(b) Restrictive amendments shall be binding on the parties but not on the Commission if it is determined they are not in the public interest. If a restrictive amendment is not accepted by the Commission, it may remand the matter for appropriate proceedings.

**HEARINGS**

**§ 5.241. Attendance.**

(a) The presiding officer before whom the hearing is held will enter upon the record all parties in attendance.

(b) Subsection (a) supersedes 1 Pa. Code § 35.124 (relating to appearances).

**§ 5.242. Order of procedure.**

(a) In a proceeding, the party having the burden of proof, shall open and close unless otherwise directed by the presiding officer. In a hearing on investigations and in proceedings which have been consolidated for hearing, the presiding officer may direct who will open and close. Oral rejoinder, if proposed by the party with the burden of proof, shall be completed before any cross-examination of the witness is conducted.

(b) Intervenors shall follow the party on whose behalf the intervention is made. If the intervention is not in support of an original party, the presiding officer will designate at what stage the intervenor will be heard.

(c) In proceedings when the evidence is peculiarly within the knowledge or control of another party, the order of presentation set forth in subsections (a) and (b) may be varied by the presiding officer.

(d) The presiding officer may direct the order of parties for purposes of cross-examination, subject to § 5.243(f) (relating to presentation by parties).

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.125 (relating to order of procedure).

**§ 5.243. Presentation by parties.**

(a) A party, has the right of presentation of evidence, cross-examination, objection, motion and argument subject to the limitations in §§ 5.75 and 5.76 (relating to notice, service and action on petitions to intervene; and limitation of participation in hearings). The taking of evidence and subsequent proceedings shall proceed with reasonable diligence and with the least practicable delay.

(b) When an objection to the admission or exclusion of evidence before the Commission or the presiding officer is made, the ground relied upon shall be stated briefly. A formal exception is unnecessary and may 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 party in the proceeding. Facts admitted on the record by a party 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 an issue.

(e) A party will not be permitted to introduce evidence during a rebuttal phase which:

- (1) Is repetitive.
- (2) Should have been included in the party's case-in-chief .
- (3) Substantially varies from the party's case-in-chief.
- (f) If a party conducts friendly cross-examination of a witness, the presiding officer may permit the other parties a second opportunity to cross-examine after friendly cross-examination is completed. The recross-examination shall be limited to the issues on which there was friendly cross-examination.

(g) Subsections (a)—(f) supersede 1 Pa. Code § 35.126 (relating to presentation by the parties).

**§ 5.245. Failure to appear, proceed or maintain order in proceedings.**

(a) After being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding will:

- (1) Be deemed to have waived the opportunity to participate in the conference or hearing.
- (2) Not be permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing.
- (3) Not be permitted to recall witnesses who were excused for further examination.

(b) Subsection (a)(1)—(3) does not apply if the presiding officer determines that the failure to be represented was unavoidable and that the interests of the other parties and of the public would not be prejudiced by permitting the reopening or further examination. Counsel shall be expected to go forward with the examination of witnesses at the hearing under § 5.242 (relating to order of procedure), or as has been otherwise stipulated or has been directed by the presiding officer.

(c) If the Commission or the presiding officer finds, after notice and opportunity for hearing, that the actions of a party, including an intervenor, in a proceeding obstruct the orderly conduct of the proceeding and are inimical to the public interest, the Commission or the presiding officer may take appropriate action, including

dismissal of the complaint, application, or petition, if the action is that of complainant, applicant, or petitioner.

**TRANSCRIPT****§ 5.251. Recording of proceedings.**

(a) If required by law, hearings will be stenographically reported by the Commission's official reporter.

(b) Notwithstanding the review provisions of § 5.252 (relating to review of testimony), the hearing transcript will be a part of the record and the sole official transcript of the proceeding.

(c) The transcripts will include a verbatim report of the hearings and nothing will be omitted therefrom except as is directed by the presiding officer. Changes in the transcript must be made as provided in § 5.253 (relating to transcript corrections).

(d) Subsections (a)—(c) supersede 1 Pa. Code § 35.131 (relating to recording of proceedings).

**§ 5.252. Review of testimony.**

(a) In proceedings when testimony was electronically recorded and subsequently transcribed, a party may review the recording to ensure it was transcribed accurately.

(b) Review will not be permitted except upon written request within 20 days after the transcript has been filed with the Commission.

(c) Upon request for review, the Office of Administrative Law Judge will schedule a time and place for the review which shall be open to all parties. The court reporting firm shall submit the tapes and equipment necessary for the review and shall arrange for the court reporter responsible for transcribing the tapes to be present at the review.

(d) Actual costs associated with making the tapes available for review, including the time of the court reporter, shall be paid by the party requesting review.

(e) Nothing in this section requires the electronic recording of testimony.

**§ 5.253. Transcript corrections.**

(a) A correction in the official transcript may be made only to make it accurately reflect the evidence presented at the hearing and to speak the truth.

(b) Proposed corrections of a transcript may be submitted by either of the following means:

- (1) By written stipulation by the parties of record who were present when the transcription was taken.
- (2) Upon written request of one or more parties of record present when the transcription was taken.

(c) Proposed corrections shall be filed as follows:

- (1) Within 10 days after the transcript has been filed with the Commission.
- (2) Within 10 days after the electronically recorded testimony has been reviewed.
- (3) Upon permission of the presiding officer granted prior to the closing of the record.

(d) Objections or other comments to the proposed corrections shall be filed within 10 days of service of the proposed corrections.

(e) Proposed corrections and objections or other comments shall be served upon the parties of record present when the original transcription was taken.

(f) The presiding officer will rule upon a proposed correction of a transcript within 20 days of its receipt. A request for corrections not acted upon within 20 days is deemed to be:

- (1) Denied if opposed in a timely manner.
- (2) Granted if unopposed.

(g) Subsections (a)—(f) supersede 1 Pa. Code § 35.132 (relating to transcript corrections).

**Subchapter C. INTERLOCUTORY REVIEW**

**§ 5.302. Petition for interlocutory Commission review and answer to a material question.**

(a) During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must be in writing with copies served on all parties and the presiding officer and state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

(b) Within 10 days of service of the petition, each party may submit a brief directed to the Commission supporting or opposing the petition and 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 party. The brief may not exceed 15 pages.

(c) The petitioning party shall also provide with the brief rulings on its question and extracts from the record as will assist the Commission in reaching a decision.

(d) Additional briefs are not permitted unless directed by the Commission.

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

(a) Within 30 days of receipt of the petition, 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 parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) 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 will be deemed to be denied.

**§ 5.304. Interlocutory review of discovery matters.**

(a) *General.* Rulings of presiding officers on discovery are not subject to interlocutory review unless one or more of the following apply:

- (1) Interlocutory review is ordered by the Commission.
- (2) Interlocutory review is certified by the presiding officer.
- (3) The ruling has as its subject matter the deposing of a Commissioner or Commission employee.

(b) *Standard for certification.* A presiding officer may certify that a discovery ruling is appropriate for interlocutory review when the ruling involves an important question of law or policy that should be resolved immediately by the Commission.

(c) *Petition for certification.* A petition for interlocutory review of a presiding officer's ruling on discovery must:

- (1) Be filed within 3 days of the ruling.
- (2) Be in writing.
- (3) State the question to be certified and the reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.
- (4) Be no more than 3 pages in length.
- (5) Be filed with the Secretary and served on all parties and the presiding officer.

(d) *Responsive brief.* A party may file a responsive brief within 7 days of a request for certification, which:

- (1) Either supports or opposes certification.
- (2) Addresses the merits of the question for which certification is requested.
- (3) Addresses whether a stay of proceedings is required to protect the substantial rights of a party.
- (4) Does not exceed 15 pages.

(e) *Presiding officer's decision.* The presiding officer will announce the decision in writing or orally on the record within 5 days of the deadline for filing responsive briefs. The presiding officer's decision will include the reasons why certification has been granted or denied and whether a stay of the proceedings has been granted.

(1) If the presiding officer denies the request for certification, no further action is required of the presiding officer.

(2) If the presiding officer's decision is to grant the request for certification, the presiding officer will serve to each Commissioner the certified question within 5 days of the announcement of the decision. The presiding officer will include the reasons justifying certification, rulings on the certified question and extracts from the record that will assist the Commission in reaching a decision.

(f) *Brief to the Commission following certification.* Parties may submit a brief to the Commission and no other briefs are permitted unless directed by the Commission. A brief may not exceed 15 pages and must address:

- (1) The issue of certification.
- (2) The merits of the certified question.
- (3) The stay of proceedings, when appropriate.

(g) *Scheduling of certified question.* Upon the expiration of the time provided for filing briefs, the Secretary will schedule the certified question for consideration at the next meeting of the Commission.

(h) *Action by the Commission.* 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.
- (3) Answer the certified question.

(i) *Failure to act.* Failure of the Commission to act on a certified question within 30 days of its receipt will be deemed to be an affirmance of the decision of the presiding officer.

(j) *Effect on proceedings.* An interlocutory appeal from the ruling of the presiding officer on discovery will not result in a stay of the proceedings except upon a finding

by the presiding officer or the Commission that extraordinary circumstances exist, or to protect the substantial rights of the parties.

**§ 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 will 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) An extract from the record that will assist the Commission.

(b) A copy of the question certified and the accompanying information will be served on the parties at the same time it is submitted to the Commission.

(c) Within 7 days of service of the certification, each party may submit a brief directed to the Commission 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 party. The brief may not exceed 15 pages.

(d) Additional briefs will not be permitted unless directed by the Commission.

(e) Within 30 days of receipt of the certified question, 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.

(3) Answer the certified question.

(f) Failure of the Commission to act upon a certified question within 30 days of its receipt will be deemed to be an affirmance of the decision of the presiding officer.

**§ 5.306. Expedited notification.**

A presiding officer may order notification of parties by telephone, telefacsimile or other electronic means when time periods are short and delivery by mail may not prove adequate. Notification by means other than by mail will be confirmed by the presiding officer by service in writing and a filing will be made with the Secretary regarding confirmation.

**Subchapter D. DISCOVERY  
GENERAL**

**§ 5.321. Scope.**

(a) *Applicability.* This subchapter applies to a proceeding in which:

(1) A complaint, protest or other adverse pleading has been filed.

(2) The Commission institutes an investigation.

(3) The Commission institutes an on-the-record proceeding.

(b) *Discretion.* The presiding officer may vary provisions of this subchapter as justice requires.

(c) *Scope.* Subject to this subchapter, a party may obtain discovery regarding any matter, not privileged,

which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(d) *Exceptions.* This subchapter does not apply to discovery sought of Commissioners or Commission staff serving in an advisory or adjudicatory capacity.

(e) *Commission staff.* This subchapter applies equally to Commission staff serving in a prosecutory or party capacity in proceedings before the Commission, with no exceptions other than as specifically set forth in this chapter.

(f) *Purpose and methods.* A party may obtain discovery for the purpose of preparation of pleadings, or for preparation or trial of a case, or for use at a proceeding initiated by petition or motion, or for any combination of these purposes, by one or more of the following methods:

(1) Deposition upon oral examination or written questions.

(2) Written interrogatories to a party.

(5) On the record data requests in rate cases.

(g) *Supersession.* Subsections (a)—(e) supersede 1 Pa. Code § 35.145 (relating to depositions).

**§ 5.322. Informal agreement regarding discovery or deposition procedure.**

The parties may by agreement provide that depositions may be taken before a person authorized to administer oaths, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions. The parties may modify the procedures provided by this chapter for methods of discovery and, notwithstanding any provisions of this subchapter, parties are encouraged to exchange information on an informal basis.

**§ 5.323. Hearing preparation material.**

(a) *Generally.* Subject to this subchapter and consistent with Pa. R.C.P. 4003.3 (relating to scope of discovery trial preparation material generally), a party may obtain discovery of any matter discoverable under § 5.321(b) (relating to scope) even though prepared in anticipation of litigation or hearing by or for another party or by or for that other party's representative, including his attorney, consultant, surety, indemnitor, insurer or agent. The discovery may not include disclosure of the mental impressions of a party's attorney or his conclusions, opinions, memoranda, notes, summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery may not include disclosure of his mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy, tactics or preliminary or draft versions of written testimony or exhibits, whether or not final versions of the testimony or exhibits are offered into evidence.

(b) *Statements.* Upon written request, a party is entitled to immediate receipt of a photostatic copy or like reproduction of a statement concerning the action or its subject matter previously made by that party, another

party or a witness. If the statement is not provided, the party may move for an order from the presiding officer. For purposes of this subsection, a statement previously made is one of the following:

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

(2) A stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

**§ 5.324. Discovery of expert testimony.**

(a) Consistent with Pa.R.C.P. 4003.5 (relating to discovery of expert testimony trial preparation material), discovery of facts known and opinions held by an expert, otherwise discoverable under § 5.321 (relating to scope), including that acquired or developed in anticipation of litigation or for hearing, may be obtained as follows:

(1) A party may through interrogatories require both of the following:

(i) That the other party identify each person whom the party expects to call as an expert witness at hearing and to state the subject matter on which the expert is expected to testify.

(ii) That the other party have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as the answer a report of the expert, have the interrogatories answered by the expert or provide written direct testimony of the expert. The answer, separate report or testimony shall be signed by the expert and shall be deemed to be provided under oath in accordance with section 333(d) of the act (relating to prehearing procedures).

(2) If the party against whom discovery is sought, under paragraph (1)(ii), responds by the filing of written direct testimony, the response shall be considered timely, regardless of § 5.342 (relating to answers or objections to written interrogatories by a party), if the written direct testimony is served on all parties at least 20 days prior to the date on which the expert is scheduled to testify or in accordance with the schedule for the submission of written testimony established by the presiding officer. However, the party shall still comply with paragraph (1)(i) within the time otherwise applicable.

(3) Upon cause shown, the presiding officer may order further discovery by other means, subject to restrictions as to scope and provisions concerning fees and expenses as he may deem appropriate.

(b) An expert witness whose identity is not disclosed in compliance with subsection (a)(1) will not be permitted to testify on behalf of the defaulting party at hearing. If the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the presiding officer may grant a continuance or other appropriate relief.

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

(d) The answering party may supplement answers only to the extent that facts, or opinions based on those facts, can reasonably be shown to have changed after preparation of the answer or when additional facts or information have become known to the answering party or when the interest of justice otherwise requires.

(e) Subsections (a)–(d) supersede 1 Pa. Code § 35.152 (relating to fees of officers and deponents).

**TIMING AND SUPPLEMENTAL RESPONSES**

**§ 5.331. Sequence and timing of discovery.**

(a) A party to the Commission proceeding may conduct discovery.

(b) A party shall initiate discovery as early in the proceedings as reasonably possible. In a proceeding, 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 "Staff data requests" and shall be answered fully and completely by the utility within the time periods specified in § 5.342(d) (relating to answers or objections to written interrogatories by a party). Unless a presiding officer has been designated, objections and motions to compel shall be ruled upon by the Chief Administrative Law Judge.

(d) In a rate proceeding, 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 within 10 working days following the first prehearing conference. The presiding officer may establish reasonable limitations upon the timing of discovery.

(e) Unless the presiding officer upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery will not operate to delay another party's discovery.

**§ 5.332. Supplementing responses.**

A party or an expert witness who has responded to a request for discovery with a response that was complete when made is under a duty to supplement a response to include information thereafter acquired, as follows:

(1) A party is under a continuing duty to supplement responses with respect to a question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity of each person expected to be called as an expert witness at hearing, the subject matter on which the expert is expected to testify and the substance of the testimony as provided in § 5.324(a)(1) (relating to discovery of expert testimony).

(2) A party or an expert witness is under a continuing duty to amend a prior response upon discovering that the response is incorrect or incomplete.

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

**TYPES OF DISCOVERY**

**§ 5.341. Written interrogatories to a party.**

(a) Subject to the limitations provided by § 5.361 (relating to limitation of scope of discovery and deposition), a

party may serve upon another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, similar entity or a partnership or association, by an officer or agent, who shall furnish the information as is available to the party.

(b) The party propounding interrogatories shall serve a copy on the parties and shall file a certificate of service with the Secretary. Interrogatories may not be filed with the Commission.

(c) Interrogatories may relate to matters which can be inquired into under §§ 5.321, 5.323 and 5.324 (relating to scope; hearing 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) A party should use a logical and sequential numbering system for interrogatories.

**§ 5.342. Answers or objections to written interrogatories by a party.**

(a) *Form.* Answers to interrogatories must:

- (1) Be in writing.
- (2) Identify the name and position of the individual who provided the answer.
- (3) Be submitted as an answer and may not be submitted as an exhibit or in another form.
- (4) Answer each interrogatory fully and completely unless an objection is made.
- (5) Restate the interrogatory which is being answered or be inserted in the spaces provided in the interrogatories.
- (6) Be verified in accordance with § 1.36 (relating to verification).

(b) *Use.* An answer may be used by a party for an appropriate purpose, if admissible under the applicable rules of evidence. An answer may not be offered into evidence by the party who provided it, except through the sworn oral testimony of the person who provided the answer.

(c) *Objections.* An objection shall be prepared, filed and served in the same manner provided for an answer, except that an objection shall be contained in a document separate from an answer as required by the time provisions of subsection

(d) An objection must:

- (1) Restate the interrogatory or part thereof deemed objectionable and the specific ground for the objection.
- (2) Include a description of the facts and circumstances purporting to justify the objection.
- (3) Be signed by the attorney making it.
- (4) Not be valid if based solely on the claim that an answer will involve an opinion or contention that is related to a fact or the application of law to fact.
- (5) Not excuse the answering party from answering the remaining interrogatories or subparts of interrogatories to which no objection is stated.

(d) *Service of answer.* The answering party shall serve answers on the parties within 15 days for rate proceed-

ings, 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 parties.

(e) *Service of objections.* The objecting party shall serve objections within 10 days of service of the interrogatories.

(1) The objecting party shall serve copies of the objection on the parties, along with a certificate of service, which specifically identifies the objectionable interrogatories.

(2) The objecting party shall file a copy of the certificate of service with the Secretary.

(f) *Continuing obligation.* The objecting party shall remain under an obligation to timely provide answers to interrogatories or subparts of interrogatories that were not objected to.

(g) *Motion to compel.* Within 10 days of service of an objection to interrogatories, the party submitting the interrogatories may file a motion requesting the presiding officer to dismiss an objection and compel that the interrogatory be answered. If a motion to compel is not filed within 10 days of service of the objection, the objected to interrogatory will be deemed withdrawn.

(1) The party against whom the motion to compel is directed shall file an answer within 5 days of service of the motion absent good cause 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 will rule on the motion as soon as practicable. The motion should be decided within 15 days of its presentation, unless the motion presents complex or novel issues. If it does have complex or novel issues, the presiding officer will, upon notice to the parties, rule in no more than 20 days of its presentation.

**§ 5.343. Procedures in deposition by oral examination.**

(a) A party desiring to take the deposition of a person upon oral examination, other than under § 5.322 (relating to informal agreement regarding discovery or deposition procedure), shall give 20 days notice in writing to the active party and to the presiding officer. A party noticed to be deposed is required to appear without subpoena. A person who is not a party is not required to appear unless subpoenaed.

(b) The notice must conform with subsections (c)—(f) and § 5.344 (relating to approval by presiding officer) and 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 must include a brief statement of the matters for which inquiry is being made.

(d) If the person to be examined is a party, 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 party, 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 party 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 the persons designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make a designation. The person designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by other procedures authorized in this chapter.

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

(g) Subsections (a)—(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), constitutes 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 containing the following language: “Application granted. So Ordered this \_\_\_ day of \_\_\_\_\_. ” and bear a signature line for the presiding officer.

(b) The application will 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 § 5.343 or subsection (c), or if objected to within 10 days. The presiding officer will consider a timely filed objection and §§ 5.324(a)(3), 5.343 and subsection (c) before ruling upon the application.

(c) If a party provides notice scheduling the taking of a deposition prior to an expiration of 20 days after initiation of the proceedings, the party shall set forth the facts requiring the expedited discovery, and the presiding officer will consider whether expedited discovery is warranted.

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

**§ 5.345. Procedure on depositions by written questions.**

(a) A party taking a deposition by written questions shall serve the questions upon the deponent and serve a copy upon each other party or his attorney of record. Within 30 days thereafter the party served and other parties may serve cross questions upon the deposing party and upon each other party or the attorney of record. Reply questions shall be similarly served by a party within 10 days of the service of cross questions.

(b) The questions must contain a notice stating 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. A deposition upon written questions may be taken of a public or private corporation, a partnership or association, or a governmental agency in accordance with § 5.343(e) (relating to procedures in deposition by oral examination).

(c) Objections to the form of questions are waived unless filed and served upon the party propounding them within the time allowed for serving the succeeding cross or other questions or within 10 days after service of the last questions. Other objections may be made at the hearing except as otherwise provided by §§ 5.346—5.348 (relating to persons before whom depositions may be taken; taking of depositions-objections; and transcript of deposition, objections and filing).

(d) A copy of questions for the taking of a deposition, as well as a signature page and envelope bearing the caption and marked “Deposition of \_\_\_\_\_” (name of witness), shall be transmitted to the person being deposed who shall complete, certify and return the completed deposition to the sender.

(e) After the service of questions and prior to the taking of the testimony of the deponent, the presiding officer, on motion promptly made by a party or a deponent, may make an order in accordance with § 5.362 (relating to protective orders) or an order that the deposition may not be taken except upon oral examination.

**§ 5.347. Taking of depositions-objections.**

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

(b) Objections to the competency of a witness or to the competency, relevancy or materiality of the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground for the objection is one which was known to the objecting party and which might have been obviated or removed if made at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of oral questions or answers, in the oath or affirmation or in the conduct of parties and errors which might have been obviated, removed or cured if objections had been promptly made, are waived unless reasonable objection is made at the taking of the deposition.

(d) Errors and irregularities in the notice for taking a deposition are waived unless written objection is served upon the party giving the notice under § 5.344 (relating to approval by presiding officer).

(e) Subsections (a)—(d) supersede 1 Pa. Code § 35.151 (relating to status of deposition as part of record).

**§ 5.348. Transcript of deposition, objections and filing.**

(a) The person before whom the deposition is taken shall put the witness on oath or affirmation and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness.

(b) The testimony of the witness shall be transcribed. Objections to the manner of preparation or the correctness of the transcript are waived unless they are filed in writing with the presiding officer promptly after the grounds of objection become known or could have been discovered with reasonable diligence.

(c) When the testimony is fully transcribed, a copy of the deposition with the original signature page shall be submitted to the witness for inspection and signing and shall be read to or by him and shall be signed by him

unless the witness is ill or cannot be found or refuses to sign. Changes which the witness desires to make shall be entered upon the deposition by the person before whom it was taken with a statement of the reasons given by the witness for making the changes. If the deposition is not signed by the witness within 30 days of its submission to him, the person before whom the deposition was taken shall sign it and state on the record why it was not signed. The deposition may then be used as fully as though signed, unless the presiding officer holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(d) The person before whom the deposition is taken shall certify on the deposition that the witness was sworn by the person and the deposition is a true record of the testimony given by the witness.

(e) In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written questions to the person taking the deposition, who shall propound them to the witness and record the answers verbatim.

(f) Upon payment of reasonable charges, the person before whom the deposition was taken shall furnish a copy thereof to parties or to the deponent.

(g) Subsections (a)—(f) supersede 1 Pa. Code § 35.149 (relating to oath and reduction to writing).

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

(a) A party may serve on another party a request for either of the following:

(1) To produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy designated documents—including writings, drawings, graphs, charts, photographs, computer records and other compilations of data from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonable usable form—or to inspect a copy, test or sample tangible things which constitute or contain matters within the scope of §§ 5.321(b), 5.323 and 5.324 (relating to scope; hearing preparation material; and discovery of expert testimony) and which are in the possession, custody or control of the party upon whom the request is served.

(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing or sampling the property or a designated object or operation thereon, within the scope of §§ 5.321(b), 5.323 and 5.324.

(b) As an alternative to permission to inspect and copy, and if requested by the party seeking discovery, the party against whom discovery is sought shall reproduce the designated documents at the requesting party's expense. Regulated utilities shall provide copies of requested materials to Commission staff, which includes the Office of Trial Staff, the Office of Consumer Advocate and the Office of Small Business Advocate at no charge.

(c) The request must set forth the items to be inspected either by individual item or by category, describe items and categories with reasonable particularity, and specify a reasonable time, place and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall serve a written response within 10 days for rate proceedings, and 20 days after service of the request for all other

cases. Time periods may be modified by the presiding officer or by agreement of the parties. The response shall be verified or notarized, as permitted by § 1.36 (relating to verification), and state that inspection and related activities will be permitted as requested. If the request is objected to, the objection shall be made in the manner described in § 5.342 (relating to answers or objections to written interrogatories by a party). A party may request another party to produce or inspect documents as part of interrogatories filed under § 5.341 (relating to written interrogatories to a party). The party submitting the request may move for an order under § 5.342(e) with respect to an objection or to other failure to respond to the request or any part thereof, or failure to permit inspection as requested.

(e) This section does not apply to official files of the Commission, or materials which are the product of or within the control of Commission advisory or adjudicatory staff, but applies only to materials within the control of staff as may be participating in the action as a party. Access to official files of the Commission shall be as prescribed in §§ 1.71—1.77 (relating to public access to Commission records).

**§ 5.350. Request for admissions.**

(a) *General.* A party may serve upon another party a written request for the admission of the truth of any matters, within the scope of §§ 5.321—5.324 (relating to general discovery), set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness, authenticity, correctness, execution, signing, delivery, mailing or receipt of a document described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or available for inspection and copying.

(b) *Form.* Each matter of which an admission is requested shall be separately set forth.

(c) *Failure to admit.* The matter is admitted unless, within 20 days after service of the request, the party to whom the request is directed answers or makes an objection to the matter, signed by the party or by his attorney.

(d) *Response.*

(1) *Answer.* The answer must admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully do so.

(2) *Denial.* A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny.

(3) *Objection.* Grounds for objections must be specifically stated. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request.

(e) *Motion to determine sufficiency of response.* The party who has requested the admission may move to determine the sufficiency of the answer or objection. Unless the presiding officer determines that an objection is justified, the presiding officer will order that an answer



be served. If the presiding officer determines that an answer does not comply with this section, the presiding officer may order either that the matter is admitted or may determine that final disposition of the request be made at a prehearing conference or at a designated time prior to hearing.

(f) *Effect of admission.* A matter admitted under this section is conclusively established unless the presiding officer on motion permits withdrawal or amendment of the admission. An admission by a party under this section is for the purpose of the pending action only and is not an admission by him for another purpose. An admission may not be used against a party in another proceeding.

**§ 5.351. On the record data requests.**

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

(b) Answers shall be supplied as directed by the presiding officer. If no time period is set, the response period may be no later than 10 days after the request is made.

(c) Objections to a request shall be made at the time that the request is made.

**LIMITATIONS**

**§ 5.361. Limitation of scope of discovery and deposition.**

(a) Discovery or deposition is not permitted which:

- (1) Is sought in bad faith.
- (2) Would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent, a person or party.
- (3) Relates to matter which is privileged.
- (4) Would require the making of an unreasonable investigation by the deponent, a party or witness.

(b) In rate proceedings, discovery is not limited under subsection (a) solely because the discovery request requires the compilation of data or information which the answering party does not maintain in the format requested, in the normal course of business, or because the discovery request requires that the answering party make a special study or analysis, if the study or analysis cannot reasonably be conducted by the party making the request.

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

**§ 5.362. Protective orders.**

(a) Upon motion by a party 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 party or person from unreasonable annoyance, embarrassment, oppression, burden or expense, including one or more of the following:

- (1) The discovery or deposition shall be prohibited.
- (2) The discovery or deposition shall be only on specified terms and conditions, including a designation of the method, time or place.
- (3) The scope of discovery or deposition shall be limited and that certain matters may not be inquired into.
- (4) Discovery or deposition shall be conducted with no one present except persons designated by the presiding officer.

(5) A deposition shall be sealed and shall be opened only by order of the presiding officer.

(6) The parties simultaneously shall file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

(7) A trade secret or other confidential research, development or commercial information may not be disclosed or be disclosed only in a designated way. Protective orders to protect or limit this type of information shall be issued under § 5.423 (relating to orders to limit availability of proprietary information).

(b) If the motion for a protective order is denied in whole or in part, the presiding officer may order that a party or person provide or permit discovery.

(c) During the taking of a deposition on motion of a party or of the deponent, the presiding officer or other administrative law judge may order the officer conducting the examination to cease from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subsection (a). Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order and to obtain the presiding officer's ruling.

**§ 5.364. Use of depositions at hearing.**

(a) At hearing, part or all of a deposition, so far as admissible under 42 Pa.C.S. §§ 6101—6112 (relating to rules of evidence), may be used against a party who was present or represented at the taking of the deposition or who had notice thereof if required, in accordance with one of the following provisions:

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

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent of a party or a person designated under §§ 5.343(e) or 5.345(a)(2) (relating to procedures in deposition by oral examination; and procedure on depositions by written questions) to testify on behalf of a public or private corporation, partnership, association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness may be used by a party for a purpose if the presiding officer finds one of the following:

- (i) The witness is dead.
- (ii) The witness is outside this Commonwealth, unless it appears that the absence of the witness was procured by the party offering the deposition.
- (iii) The witness is unable to attend or testify because of age, sickness, infirmity or imprisonment.

(iv) The party offering the deposition has been unable to procure the attendance of the witness by subpoena.

(v) Upon application and notice that exceptional circumstances exist to make it desirable, in the interest of justice and with regard to the importance of presenting the witnesses in hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, another party may require him to introduce all of it which is relevant to the part introduced, and a party may introduce other parts.

(b) Subject to § 5.347(b) (relating to taking of depositions-objections), objection may be made at the hearing to receiving in evidence deposition for reasons which would require the exclusion of the evidence if the witness were then present and testifying.

(c) A party may not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or a part thereof for a purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. This does not apply to the use by an adverse party of a deposition as described in subsection (a)(2). At the hearing, a party may rebut relevant evidence contained in a deposition whether introduced by him or by another party.

### SANCTIONS

#### § 5.371. Sanctions—general.

(a) The Commission or the presiding officer may, on motion, make an appropriate order if one of the following occurs:

(1) A party fails to appear, answer, file sufficient answers, file objections, make a designation or otherwise respond to discovery requests, as required under this subchapter.

(2) A party deponent or an officer or managing agent of a party refuses to obey or induces another to refuse to obey an order of a presiding officer respecting discovery, or induces another not to appear.

(b) A motion for sanctions may be answered within 5 days of service or, in the alternative, the motion may be answered orally at a hearing if a timely hearing has been scheduled within the same 5-day period.

(c) The presiding officer will rule on the motion as soon as practicable. The motion should be decided within 20 days of its presentation.

(d) A failure to act described in subsection (a) may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has filed an appropriate objection or has applied for a protective order.

(e) If a deponent refuses to be sworn or to answer a question, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to persons affected thereby, the proponent may apply to the presiding officer for an order compelling the witness to be sworn or to answer.

#### § 5.372. Sanctions—types.

(a) The presiding officer, when acting under § 5.371 (relating to sanctions—general) may make one of the following:

(1) An order that the matters regarding which the questions were asked, the character or description of the thing or land, the contents of the paper, or other designated fact shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing in evidence designated documents, things or testimony.

(3) An order striking out pleadings or parts thereof, staying further proceedings until the order is obeyed, or entering a judgment against the disobedient party or individual advising the disobedience.

(4) An order with regard to the failure to make discovery as is just.

(b) In addition to the sanctions described in subsection (a), in rate proceedings, when a party fails to answer discovery requests on the date due, the presiding officer may issue an order that the hearing schedule be modified, that the deadline for the filing of other parties' written testimony be extended, or that provides other relief that will allow the other parties a sufficient and reasonable opportunity to prepare their cases.

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

#### § 5.373. Subpoenas.

(a) If issuance of a subpoena is required by operation of this chapter, or because a party or witness has not otherwise appeared, issuance of the subpoena shall be in accordance with § 5.421 (relating to subpoenas).

(b) Subsection (a) supersedes 1 Pa. Code § 35.142 (relating to subpoenas).

### Subchapter E. EVIDENCE AND WITNESSES

#### EVIDENCE

#### § 5.401. Admissibility of evidence.

(a) Relevant and material evidence is admissible subject to objections on other grounds.

(b) Evidence will be excluded if:

(1) It is repetitious or cumulative.

(2) Its probative value is outweighed by:

(i) The danger of unfair prejudice.

(ii) Confusion of the issues.

(iii) Considerations of undue delay or waste of time.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.161 (relating to form and admissibility of evidence).

#### § 5.402. Admission of evidence.

(a) A party shall move the admission of evidence into the record upon presentation of the sponsoring witness, and after opportunity for other parties to examine the witness.

(b) For an exhibit to be received into evidence, it shall be marked for identification and moved into evidence.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.162 (relating to reception and ruling on evidence).

#### § 5.404. Additional evidence.

(a) At any stage of the hearing or thereafter the Commission or the presiding officer may call for further admissible evidence upon an issue and require that the evidence be presented by the parties concerned, either at the hearing or at the adjournment thereof.

(b) Subsection (a) supersedes 1 Pa. Code § 35.128 (relating to additional evidence).

**§ 5.405. Effect of pleadings.**

(a) Pleadings listed in § 5.1 (relating to pleadings allowed) shall, without further action, be considered as part of the record as pleadings.

(b) Except as provided in subsection (c) and in the case of a noncontested proceeding, a pleading, or any part thereof may not be considered as evidence of a fact other than that of filing thereof unless offered and received into evidence.

(c) A fact admitted by a party 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.

(d) Subsections (a) and (b) supersede 1 Pa. Code § 35.125(d) (relating to order of procedure). Subsection (c) supersedes 1 Pa. Code § 35.35 (relating to answers to complaints and petitions).

**§ 5.406. Public documents.**

(a) A report, decision, opinion or other document or part thereof, need not be produced or marked for identification, but may be offered in evidence as a public document by specifying the document or part thereof and where it may be found, if the document is one of the following:

(1) A report or other document on file with the Commission.

(2) An official report, decision, opinion, published scientific or economic statistical data or similar public document which is issued by a governmental department, agency, committee, commission or similar entity which is shown by the offeror to be reasonably available to the public.

(b) Upon the request of a party and at the direction of the presiding officer or the Commission, a party who incorporates by reference a pleading shall provide a copy of the pleading to the party requesting one.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.165 and 35.166 (relating to public documents; and prepared expert testimony).

**§ 5.407. Records of other proceedings.**

(a) When a portion of the record in another proceeding before the Commission is offered in evidence and shown to be relevant and material to the instant proceeding, a true copy of the record shall be presented in the form of an exhibit, together with additional copies as provided in § 5.409 (relating to copies and form of documentary evidence), unless both of the following occur:

(1) The party offering the record agrees to supply, within a period of time specified by the Commission or the presiding officer, the copies at his own expense, if any, when so required.

(2) The portion is specified with particularity so as to be readily identified, and upon motion is admitted into evidence by reference to the records of the other proceedings.

(b) Subsection (a) is identical to 1 Pa. Code § 35.167 (relating to records in other proceedings).

**§ 5.408. Official and judicial notice of fact.**

(a) Official notice or judicial notice of facts may be taken by the Commission or the presiding officer.

(b) When the decision of the Commission or the presiding officer rests on official notice or judicial notice of a

material fact not appearing in the evidence in the record, the parties will be so notified.

(c) Upon notification that facts are about to be or have been noticed, a party adversely affected shall have the opportunity upon timely request to show that the facts are not properly noticed or that alternative facts should be noticed.

(d) The Commission or the presiding officer in its discretion will determine whether written presentations suffice, or whether oral argument, oral evidence or cross-examination is appropriate in the circumstances.

(e) The Commission or presiding officer may also give official notice as the term is defined in section 331(g) of the act (relating to powers of commission and administrative law judges).

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.173 (relating to official notice of facts).

**§ 5.409. Copies and form of documentary evidence.**

(a) Except as otherwise provided in this chapter, Chapters 1 and 3 (relating to rules of administrative practice and procedure; and special provisions), when exhibits of a documentary character are offered in evidence, copies shall be furnished to the presiding officer and to the parties present at the hearing, unless the presiding officer otherwise directs. Two copies of each exhibit of documentary character shall be furnished for the use of the Commission unless otherwise directed by the presiding officer.

(b) Whenever practicable, all exhibits of a documentary character received in evidence must be on paper of good quality and so prepared as to be plainly legible and durable, whether printed, typewritten or otherwise reproduced, and conform to Chapter 1, Subchapter D (relating to documentary filings) whenever practicable.

(c) Subsection (a) is identical to 1 Pa. Code § 35.169 (relating to copies to parties and agency). Subsection (b) is identical to 1 Pa. Code § 35.168 (relating to form and size of documentary evidence).

**WITNESSES**

**§ 5.412. Written testimony.**

(a) *General.* 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) *Use.* The presiding officer may direct that expert testimony to be given upon direct examination be submitted as prepared written testimony. A reasonable period of time will be allowed to prepare written testimony.

(c) *Rules regarding use.* Written testimony is 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) *Cross-examination.* Cross-examination of the witness presenting written testimony shall proceed at the hearing at which testimony is authenticated if service of the written testimony is made upon each party of record at least 20 days prior to the hearing, unless the presiding officer for good cause otherwise directs. In a rate proceeding, the presiding officer or the Commission will establish the schedule for the filing and authentication of written testimony, and for cross-examination by other parties.

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

(f) *Service.* Written testimony shall be served upon the presiding officer and parties in the proceeding in accordance with the schedule established by this chapter. At the same time the testimony is served, a certificate of service for the testimony shall be filed with the Secretary.

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

(h) *Supersession.* Subsections (a)—(g) supersede 1 Pa. Code §§ 35.138, 35.150 and 35.166 (relating to expert witnesses; scope and conduct of examination; and prepared expert testimony).

### SUBPOENAS AND PROTECTIVE ORDERS

#### § 5.421. Subpoenas.

(a) *Issuance.*

(1) A subpoena may be issued by the Commission upon its own motion.

(2) Other than under paragraph (1), a subpoena 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.

(b) *Form.* The written application:

(1) Must 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.

(2) Must list the facts to be proved by the documents in sufficient detail to indicate the necessity of the documents.

(3) Must contain a notice that a response or objection to the application shall be filed with the Commission and presiding officer within 10 days of service of the application.

(4) Must include a certificate of service.

(5) May attach the proposed subpoena to the application.

(c) *Service.* An application for a subpoena shall be filed with the Commission and copies served by the petitioner upon:

(1) The party, person or individual to be subpoenaed.

(2) The presiding officer.

(3) The parties.

(4) The Commission's Law Bureau, if the subpoena is directed to a Commission employee.

(5) The person or individual for whom the subpoena is sought when the person is not a party to the case. When the person or individual for whom a subpoena is sought is not a party to the case, the application must identify the persons—names and addresses—including the Secretary and presiding officer, to whom the answer or objection shall be sent.

(d) *Service and return.*

(1) *Personal service.* If service of the subpoena is made by a sheriff, like officer or deputy, service shall be evidenced by the return thereof. If made by another person, the person shall make affidavit thereof, describing the manner in which service was made, and 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.

(2) *Service by mail.* Service of a subpoena upon a party, person or individual may also be accomplished by mail under §§ 1.54 and 1.55 (relating to service by a party; and service on attorneys), or by a form of mail requiring a return receipt, postage prepaid, restricted delivery. Service is complete upon delivery of the mail to the party or the persons referred to in Pa.R.C.P. No. 402(a)(2) (relating to manner of service acceptance of service).

(e) *Fees of witnesses.* A witness subpoenaed by the Commission will be paid the same fees and mileage as paid for the like services in the courts of common pleas. A witness subpoenaed by a party shall be paid the same fees by the party. The Commission, before issuing a subpoena as provided in this section, may require a deposit of an amount adequate to cover the fees and mileage involved or require reasonable surety consistent with § 3.8 (relating to form of interim emergency orders).

(f) *Objections and decision.* A party, person or individual objecting to an application for a subpoena under this section may do so within 10 days in accordance with subsection (b)(3). The administrative law judge will address an objection within 10 days of the assignment of any objection filed under this section.

(g) *Supersession.* Subsections (a)—(e) supersede 1 Pa. Code § 35.142 (relating to subpoenas).

#### § 5.423. Orders to limit availability of proprietary information.

(a) *General rule for adversarial proceedings.* A petition for protective order to limit the disclosure of a trade secret or other confidential information on the public record will be granted only when a party demonstrates that the potential harm to the party of providing the information would be substantial and that the harm to the party 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 will 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 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 party and to the party's competitors.

(4) The degree of difficulty and cost of developing the information.

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

(b) *General rule for nonadversarial proceedings.* A petition for protective order limiting the disclosure of a trade secret or other confidential information in a nonadversarial proceeding shall be referred to the Law Bureau for recommended disposition by the Commission. The Commission will not disclose any material that is the subject of a protective order under this provision during the pendency of such a request.

(c) *Restrictions.*

(1) A protective order to restrict disclosure of proprietary information may require that a party 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 parts of the record of a proceeding which contain proprietary information including, but not limited to, exhibits, writings, direct testimony, cross-examination, argument and responses to discovery, will be sealed and remain sealed unless the 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) A public reference to proprietary information by the Commission or by a party 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 purposes of administrative or judicial review.

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

(5) A party receiving proprietary information under this section retains the right, either before or after receipt of the information, to challenge the legitimacy of the claim that the information is proprietary, and to challenge the admissibility of the proprietary information.

(d) *Access to representatives of parties.* Proprietary information provided to a party under this section shall be released to the counsel and eligible outside experts of the receiving party unless the party who is releasing the information demonstrates that the experts or counsel previously violated the terms of a recent protective order issued by the Commission. To be eligible to receive proprietary information, the expert, subject to the following exception, may not be an officer, director, stockholder, partner, owner or employee of a competitor of the producing party. An expert will not be ineligible on account of being a stockholder, partner or owner of a competitor or affiliate unless the ownership interest is valued at more than \$10,000 or constitutes a more than 1% interest, or both. No other persons may have access to the proprietary information except as authorized by order of the Commission or of the presiding officer.

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

(f) *Return of proprietary information.* A party providing proprietary information under this section may request that the parties receiving the information return the information and the copies thereof to the party at the conclusion of the proceeding, including appeals taken.

**CLOSE OF THE RECORD**

**§ 5.431. Close of the record.**

(a) The record will be closed at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission.

(b) After the record is closed, additional matter may not be relied upon or accepted into the record unless allowed for good cause shown by the presiding officer or the Commission upon motion.

(c) Subsections (a) and (b) supersede 1 Pa. Code §§ 35.231 and 35.232 (relating to reopening on application of party; and reopening by presiding officer).

**Subchapter F. PRESIDING OFFICERS**

**§ 5.481. Designation of presiding officer.**

(a) When evidence is to be taken in a proceeding, either the Commission or its representative appointed according to law, may preside at the hearing.

(b) Subsection (a) is identical to 1 Pa. Code § 35.185 (relating to designation of presiding officers).

**§ 5.482. Disqualification of a presiding officer.**

(a) A party may file a motion for disqualification of a presiding officer which shall be accompanied by affidavits alleging personal bias or other disqualification.

(b) A presiding officer may withdraw from a proceeding when deemed disqualified in accordance with law.

(c) A motion for disqualification shall be served on the presiding officer and the parties to the proceeding.

(d) The presiding officer will rule upon a motion for disqualification within 30 days of receipt. Failure to rule upon a motion for disqualification within 30 days of its receipt will be deemed to be a denial of the motion.

(e) The ruling of the presiding officer on a motion for disqualification is subject to the interlocutory appeal procedure in § 5.303 (relating to Commission action on petition for interlocutory review and answer).

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.186 (relating to disqualification of a presiding officer).

**§ 5.483. Authority of presiding officer.**

(a) The presiding officer 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, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding.

(b) Subsection (a) supersedes 1 Pa. Code § 35.187 (relating to authority delegated to presiding officers).

**§ 5.484. Restrictions on duties and activities.**

(a) Presiding officers will perform no duties inconsistent with the act, the rules of the Commission, or with their duties and responsibilities.

(b) Except as required for the disposition of ex parte matters not prohibited by the act, no presiding officer will consult a person or party on a fact in issue unless upon notice and opportunity for all parties to participate.

(c) Subsections (a) and (b) are identical to 1 Pa. Code § 35.188 (relating to restrictions on duties and activities).

**§ 5.485. Manner of conduct of hearings.**

(a) The presiding officer will conduct a fair and impartial hearing and maintain order.

(b) The presiding officer may note on the record a party's disregard of a ruling. When necessary, the presiding officer may submit a report to the Commission recommending suspension and disbarment of the offending person as provided by § 1.27 (referring to suspension and disbarment).

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.189 (relating to manner of conduct of hearings).

**§ 5.486. Unavailability of presiding officer.**

(a) If a presiding officer becomes unavailable, the Chief Administrative Law Judge may either designate another qualified officer to prepare the initial or recommended decision or cause the record to be certified to the Commission for decision.

(b) Subsection (a) is identical to 1 Pa. Code § 35.203 (relating to unavailability of presiding officer).

**Subchapter G. BRIEFS****§ 5.501. Content and form of briefs.**

(a) Briefs must contain the following:

(1) A concise statement or counter-statement of the case.

(2) Reference to the pages of the record or exhibits where the evidence relied upon by the filing party appears.

(3) An argument preceded by a summary. The party with the burden of proof shall, in its main or initial brief, completely address, to the extent possible, every issue raised by the relief sought and the evidence adduced at hearing.

(4) A conclusion with requested relief.

(b) Briefs must also contain the following, if and as directed by the presiding officer:

(1) A statement of the questions involved.

(2) Proposed findings of fact with references to transcript pages or exhibits where evidence appears, together with proposed conclusions of law.

(3) Proposed ordering paragraphs specifically identifying the relief sought.

(c) Exhibits should not be reproduced in the brief, but may, if desired, be reproduced in an appendix to the brief.

(d) Briefs of more than 20 pages must contain on their front leaves a table of contents with page references and a table of citations, which may be prepared without pagination.

(e) Briefs must be as concise as possible and, except for briefs in rate cases, be limited to 60 pages in length, unless some other limitation is imposed or allowed by the

presiding officer. The length of briefs in rate cases will be controlled by the presiding officer.

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.192 (relating to content and form of briefs).

**§ 5.502. Filing and service of briefs.**

(a) *Number of copies.* An original and nine copies of a brief shall be filed with the Commission under § 1.4 (relating to filing generally). Copies shall be served on the parties in accordance with § 1.59(b)(1) (relating to number of copies to be served).

(b) *Filing of briefs in nonrate proceedings.*

(1) *Initial brief.* An initial brief shall be filed by the party with the burden of proof except as provided by agreement or by direction of the presiding officer.

(2) *Response brief.* A party may file a response brief to the initial brief.

(c) *Filing of briefs in rate proceedings.*

(1) *Main brief.* A main brief may be filed by a party except as provided by agreement or by direction of the presiding officer.

(2) *Reply brief.* A party may file a reply brief to a main brief regardless of whether the party filed a main brief.

(d) *Filing of amicus curiae briefs.* A person interested in the issues involved in a Commission proceeding, although not a party, may, without applying for leave to do so, file amicus curiae briefs in regard to those issues. Unless otherwise ordered, amicus curiae briefs shall be filed and served in the manner and number required and within the time allowed by this section, absent good cause.

(e) *Deadlines.* Initial briefs, main briefs, responsive briefs and reply briefs shall be filed and served within the time fixed by the presiding officer. If no specific times are fixed, initial briefs or main briefs shall be filed and served within 20 days after the date of service of notice of the filing of the transcript and responsive briefs or reply briefs shall be filed within 40 days after date of service of the notice of the filing of the transcript.

(f) Briefs not filed and served on or before the dates fixed therefore will not be accepted, except by special permission of the Commission or the presiding officer as permitted under § 1.15 (referring to extensions of time and continuances).

(g) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.191 and 35.193 (relating to proceedings in which briefs are to be filed; and filing and service of briefs).

**Subchapter H. EXCEPTIONS, APPEALS AND ORAL ARGUMENT****§ 5.532. Oral argument before presiding officer.**

(a) When, in the opinion of the presiding officer, time permits and the nature of the proceedings, the complexity or importance of the issues of fact or law involved, and the public interest warrant, the presiding officer may, either on the presiding officer's own motion or at the request of a party, allow and fix a time for the presentation of oral argument, imposing limits on the argument that are deemed appropriate.

(b) Subsection (a) supersedes 1 Pa. Code § 35.204 (relating to oral argument before presiding officer).

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

(a) In a proceeding, exceptions may be filed by a party and served within 20 days after the initial, tentative or

recommended decision is issued unless some other exception period is provided. Exceptions may not be filed with respect to an interlocutory decision.

(b) Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision. Supporting reasons for the exceptions shall follow each specific exception.

(c) The exceptions must be concise. The exceptions and supporting reasons must be limited to 40 pages in length. Statements of reasons supporting exceptions must, insofar as practicable, incorporate by reference and citation, relevant portions of the record and passages in previously filed briefs. A separate brief in support of or in reply to exceptions may not be filed with the Secretary under § 1.4 (relating to filing generally).

(d) An original and nine copies of the exceptions shall be filed with the Secretary under § 1.4.

(e) Unless otherwise ordered by the Commission, the provisions of §§ 1.11(a)(2) and (3) and 1.56(b) (relating to date of filing; and date of service) will not be available to extend the time periods for filing exceptions.

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

**§ 5.535. Replies.**

(a) A party has the right to file a reply to an exception in proceedings before the Commission. Unless otherwise directed by the presiding officer or Commission, a reply shall be filed within 10 days of the date that an exception is due and be limited to 25 pages in length and in paragraph form. A reply must be concise and incorporate by reference relevant passages in previously filed briefs. A reply may not raise new arguments or issues, but be limited to responding to the arguments or issues in the exception.

(b) Unless otherwise ordered by the Commission, the provisions of §§ 1.11(a)(2) and (3) and 1.56(b) (relating to date of filing; and date of service) will not be available to extend the time periods for filing replies to an exception.

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.211 (relating to procedure to except to proposed report).

**Subchapter I. REOPENING, RECONSIDERATION AND REHEARING**

**§ 5.571. Reopening prior to a final decision.**

(a) At any time after the record is closed but before a final decision is issued, a party may file a petition to reopen the proceeding for the purpose of taking additional evidence.

(b) A petition to reopen must set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing.

(c) Within 10 days following the service of the petition, another party may file an answer thereto.

(d) The record may be reopened upon notification to the parties in a proceeding for the reception of further evidence if there is reason to believe that conditions of fact or of law have so changed as to require, or that the public interest requires, the reopening of the proceeding.

(1) The presiding officer may reopen the record if the presiding officer has not issued a decision or has not certified the record to the Commission.

(2) The Commission may reopen the record after the presiding officer has issued a decision or certified the record to the Commission.

(e) Subsections (a)—(e) supersede 1 Pa. Code §§ 35.231—35.233 (relating to reopening of record).

**§ 5.572. Petitions for relief.**

(a) Petitions for rehearing, reargument, reconsideration, clarification, rescission, amendment, supersedeas or the like must be in writing and specify, in numbered paragraphs, the findings or orders involved, and the points relied upon by petitioner, with appropriate record references and specific requests for the findings or orders desired.

(b) A copy of every petition covered by subsection (a) shall be served upon each party to the proceeding.

(c) Petitions for reconsideration, rehearing, reargument, clarification, supersedeas or others shall be filed within 15 days after the Commission order involved is entered or otherwise becomes final.

(d) Petitions for rescission or amendment may be filed at any time according to the requirements of section 703(g) of the act (relating to fixing of hearings).

(e) Answers to a petition covered by subsection (a) shall be filed and served within 10 days after service of a petition.

(f) Subsections (a)—(e) supersede 1 Pa. Code § 35.241 (relating to application for rehearing or reconsideration).

**Subchapter J. REPORTS OF COMPLIANCE**

**§ 5.591. Reports of compliance.**

(a) A person subject to the jurisdiction of the Commission who is required to do or perform an act by a Commission order, permit or license provision shall file with the Secretary a notice stating that the requirement has or has not been met or complied with.

(b) The notice shall be filed within 30 days following the date when the requirement becomes effective, unless the Commission, by regulation, by order or by making specific provision thereof in a license or permit, provides otherwise for compliance or proof of compliance. The notice shall be accompanied by a verification in accordance with § 1.36 (relating to verification and affidavit).

(c) Subsections (a) and (b) supersede 1 Pa. Code § 35.251 (relating to reports of compliance).

**§ 5.592. Compliance with orders prescribing rates.**

(a) When the Commission makes a final decision concerning a rate filing and permits or requires the adoption of rates other than the rates originally filed, the public utility affected shall file, within 20 days of entry of the final order, a tariff revision consistent with the Commission's decision together with a proof of revenues and supporting calculations. The utility shall simultaneously serve copies of the tariff revision, along with the proof of revenues and supporting calculations, on the parties in the proceeding. A utility may also be required to provide an electronic, red-lined copy of any filing made to assist the parties in promptly identifying and analyzing the filing.

(b) Unless otherwise specified in the order, the tariff revision shall be effective upon statutory notice to the Commission and to the public and, whether made effec-

tive on statutory notice or under authority granted in the order, shall bear under the effective date on the title page the following notation: "Filed in compliance with the order of Pennsylvania Public Utility Commission, entered \_\_\_\_\_, 2 \_\_\_\_ at \_\_\_\_\_."

(c) Exceptions to a tariff revision under this section may be filed by a party 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 5 days. No further pleadings will be permitted.

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

#### **Subchapter K. APPEALS TO COURT**

##### **§ 5.631. Notice of taking appeal.**

When an appeal is taken from an order of the Commission to the Commonwealth Court, the appellant shall immediately give notice of the appeal to all parties to the Commission proceeding as provided by § 1.54 (relating to service by a party).

##### **§ 5.632. Preparation and certification of records.**

A record will not be certified as complete until copies of exhibits or other papers have been furnished when neces-

sary to complete the Commission file. Copies will be requested by the Commission.

##### **§ 5.633. Certification of interlocutory orders.**

(a) When the Commission has made an order which is not a final order, a party 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 is 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 will be deemed denied.

(b) Neither the filing of a motion under subsection (a), nor the adoption of an amended order containing the requested finding, will stay a proceeding unless otherwise ordered by the Commission or Commonwealth Court.

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

[Pa.B. Doc. No. 06-746. Filed for public inspection April 28, 2006, 9:00 a.m.]