

STATEMENTS OF POLICY

PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

Practice and Procedure Before the Commission; Interpretation of Procedural Rules Regarding Party Status, Rights and Obligations

Public Meeting held
September 15, 2006

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

*Interpretation of Procedural Rules Regarding Party
Status, Rights and Obligations; Doc. No. M-00061975*

Proposed Policy Statement

By the Commission:

On April 29, 2006, the new Rules of Practice and Procedure of the Pennsylvania Public Utility Commission (New Rules), 52 Pa. Code Chapters 1, 3 and 5, became effective on publication in the *Pennsylvania Bulletin*. 36 Pa.B. 2097.

Among a myriad of changes made, the Commission's final rules eliminated the previous sub-classifications of "inactive" and "active" party in regard to general rate cases. The Commission made that change to address Independent Regulatory Review Commission concerns about the difficulty of differentiating between the two types of parties in Commission proceedings and to more closely mirror the civil procedural rules. Nevertheless, the Commission did not intend to disrupt or overturn existing case management practices that would allow some form of limited participation in complex multi-party proceedings.

The Commission has become aware that some recent interpretations of the intent behind this amendment to our final regulations have raised concerns, particularly as applied to individual consumer complaints in general rate case proceedings. These interpretations incorrectly presume that the Commission somehow abandoned the prior case management practices that would allow for more limited participation for some parties, particularly pro se complainants in multi-party consolidated proceedings.

As such, the Commission has determined that issuance of a policy statement is necessary and appropriate. A policy statement is proactive and provides our interpretation of this rule change. A policy statement also provides guidance to consumers, practitioners and our Administrative Law Judges (ALJs) on our interpretation of the new rules. Consistent with *Norristown*, this policy statement is intended to provide guidance on the interpretation of our procedural rules and to announce "the course which the agency intends to follow in future adjudications." *Pennsylvania Human Relations Comm'n v. Norristown Area Sch. Dist.*, 473 Pa. 334, 349, 374 A.2d 671, 679 (Pa. 1977) (citing *Pacific Gas & Electric Co. v. FPC*, 164 U.S.App.D.C. 371, 506 F.2d 33 (1974)).

The filing of a formal complaint by a consumer in a rate case or other type of proceeding is controlled by §§ 5.21 and 5.22. When properly accomplished, filing a formal complaint entitles the consumer to party status.

The Commission's prior regulations, at Section 1.8, had contained sub-definitions of "party" that differentiated between an "active party" and an "inactive party" in general rate case proceedings. An "active" party was a party that intended to fully participate in the litigation of the general rate case. An "inactive" party was one that would have the right to testify at a hearing or public input hearing, but not otherwise participate in the litigation of the case. The prior rules contemplated that only active parties would be served documents by other parties, thereby saving considerable time, resources and litigation costs for the active parties in large cases, but that the inactive parties would be served with the recommended decision and final Commission order.

The Commission's proposed order adopted in May 2004 preserved this distinction between active and inactive parties. However, the final rulemaking order adopted in December 2005 eliminated this distinction without expressing any intention to alter the prior practice or otherwise discussing the issue of participation rights in multi-party consolidated proceedings. As such, there is little discussion devoted to this provision in the final rulemaking order.

Under the Commission's prior and current procedural rules, party status confers participation rights in the administrative proceeding, including the right to present evidence, the right to cross-examine witnesses, the right to discovery, and the right to file motions, briefs and exceptions. But those full participation rights also carry obligations such as the obligation to serve all other parties with pleadings, the obligation to respond to discovery requests, the obligation to attend pre hearing conferences and hearings and the obligation to comply with the presiding ALJ's case management orders. Moreover, a party's participation rights can be waived or lost by unexcused failure to participate in administrative process, failure to obey case management order, and, ultimately, may result in dismissal of the formal complaint.

The relevant Commission procedural rules concerning this proposed policy statement are as follow:

Section 1.2(d). *Liberal construction.* The provision states that the liberal construction provisions shall apply with particularity in proceedings involving *pro se* litigants. This provision illustrates the intention that our rules be liberally construed in order to maximize the opportunity for consumer participation in rate cases and other types of proceedings before the Commission.

Section 1.8. *Definitions: Party.* This provision defines party in simple and direct terms as a person who appears in a proceeding before the Commission. The provision governs a person who "appears" before the Commission and does not and should not be interpreted to mean that a person must "appear and participate" in a proceeding. Consequently, the Commission did not intend, by eliminating the "active" and "inactive" distinction from the

prior rules, to require all parties to participate in every phase of the proceeding or face immediate dismissal. This definitional interpretation is especially applicable to *pro se* parties in multi-party consolidated proceedings.

Section 1.54(c). *Service by a party.* The provision states that 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 who state on the record or request in writing that they wish to be served.

This section provides that where a party has no expressed interest in full participation in all phases of the litigation, the other parties, with authorization by the presiding Administrative Law Judge, may delete those persons from the service list. This can be accomplished at the pre hearing conference and, in practice, saves considerable time, money and resources in the prosecution of major cases, without eliminating the right of the party to receive copies of any subsequently proposed settlement or the ALJ's decision and the right to file comments/exceptions thereto.

In this regard, the elimination of these parties from the service list in multi-party consolidated proceedings makes them the practical equivalent to what was termed an "inactive party" under the prior rules. This provision underscores that the final regulation was not intended to dramatically overturn the existence of prior case management practices that allowed limited participation for some parties in multi-party consolidated proceeding, such as general rate proceedings.

Alternatively, the party, especially a *pro se* consumer, may elect to withdraw the formal complaint and, instead, testify at a public input hearing. However, even if not withdrawn, the Commission's procedural rules do not preclude a *pro se* party from testifying at a public input hearing.

Section 5.224(d). *Pre hearing conferences in rate proceedings.* This provision states that following the first pre hearing 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. This provision defines the case management responsibilities of the presiding ALJ, but does not sanction a requirement that all parties must participate in all aspects of the litigation or face immediate dismissal, particularly in multi-party consolidated proceedings. The Commission expects the presiding ALJ to use existing case management practices to delete from the service list those parties, particularly, *pro se* complainants who have not expressed interest in full participation or are not expected to be active participants.

Section 5.32. *Complaints in rate proceedings.* Section 5.32(a) provides that 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. Section 5.32(b) provides that, after suspension, a person filing a complaint during the suspension of the proposed general rate increase shall take the record of the suspended rate proceeding as it stands at the time of the complaint's filing.

This provision illustrates the intention that our rules be liberally construed in order to maximize the opportunity for consumer and *pro se* participation in rate cases and other types of multi-party consolidated proceedings before the Commission. This provision also comports with the Public Utility Code's statutory provisions governing complaints in general rate increases. Moreover, the provision balances rights and duties by requiring that where a party enters a case after the litigation has commenced, that party must take the case, especially the procedure and schedule, as it has been developed to date both as to procedural and substantive matters. This provision, however, cannot be interpreted to mean that late intervention is never permitted.

Section 5.245. *Failure to appear, proceed or maintain order in proceedings.* Section 5.245(a) states that, after being notified, a party who fails to be represented at a scheduled conference or hearing in a proceeding is deemed to have waived the opportunity to participate in the conference or hearing, is not permitted thereafter to reopen the disposition of a matter accomplished at the conference or hearing, or is not to be permitted to recall witnesses who were excused for further examination. Section 5.245(b) does not apply these punitive measures 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."

This section provides that where a party fails to appear at a pre hearing conference, the party has waived the opportunity to so participate and is bound by the decisions made in that pre hearing conference. The pre hearing conference will typically determine, among other things, the list of witnesses, the procedural schedule hearings, ground rules for discovery, and the service list. Parties not appearing at the pre hearing, absent valid excuse, would be bound by those determinations, including, for example, their deletion from the service list.

This section also provides that where a party fails to appear at a hearing, the party will not have the right to recall for further examination the witnesses who appeared and were excused, unless authorized by the presiding ALJ. Thus, where a party fails to attend a scheduled hearing, that party will not have the right to recall the witnesses who appeared, absent a determination 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."

At the same time, where the consumer or *pro se* complaint is one of many complainants in a multi-party consolidated proceeding, the Commission does not interpret this section to sanction the dismissal of a party before the entire proceeding is concluded solely for failure to attend a pre hearing conference or hearing. The language does not support such a draconian result. Therefore, any letters or communications that suggest or imply that a party must attend all scheduled conferences and hearings, or face dismissal on that basis alone, are an overbroad and unduly restrictive interpretation of this section. Rather, we expect that if a party has failed to participate in the process, that failure will be reflected in its disposition of the party's concerns at the conclusion of the consolidated proceeding.

In sum, the Commission's rules are intended and are to be interpreted to maximize the opportunity for members of the public to file formal complaints, and to participate in the adjudicatory proceedings if they so choose. The rights to fully participate may be waived by failures to attend pre hearing conferences and hearings, but, in multi-party consolidated proceedings, such failures do not in and of themselves warrant dismissal of consumer complaints before the consolidated proceeding is concluded.

By the same token, because the rights and corresponding obligations of full participation may be daunting for most individual consumer or *pro se* complainants in multi-party consolidated proceedings, their deletion from the service list at the pre hearing conference may be the best approach for these complaints and should be actively encouraged. Alternatively, the consumer may withdraw the complaint and, instead, testify at the public input hearings scheduled for that matter. The testimony pre-

sented at public input hearings may be used by the parties to support their positions; *Therefore,*

It Is Ordered That,

1. This proposed policy statement be published for comment in the *Pennsylvania Bulletin* and placed in the Rulemaking Record at L-00020156.

2. Interested persons may file comments to this proposed policy statement within 30 days of its publication.

3. The Law Bureau review the filed comments and prepare a recommendation on a final policy statement.

JAMES J. MCNULTY,
Secretary

Fiscal Note: 57-253. No fiscal impact; (8) recommends adoption.

[Pa.B. Doc. No. 06-2266. Filed for public inspection November 17, 2006, 9:00 a.m.]