

WEST VIRGINIA  
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

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OFFICE OF THE SECRETARY OF STATE  
WEST VIRGINIA

NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE  
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW

AGENCY: Public Service Commission of West Virginia TITLE NUMBER: 24-1

CITE AUTHORITY: §§24-1-1; 24-2-1, 2, 7, 8 and 9; 49 U.S.C. §11501;  
Ex Parte No. 388A, ICC, July 24, 1989.

RULE TYPE: PROCEDURAL \_\_\_\_\_ INTERPRETIVE \_\_\_\_\_

EXEMPT LEGISLATIVE RULE X

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§24-1-7 of the West Virginia Code

AMENDMENT TO AN EXISTING RULE: YES X, NO \_\_\_\_\_

IF YES, SERIES NUMBER OF RULE BEING AMENDED: XII

TITLE OF RULE BEING AMENDED: Rules & Regulations for the  
Government of Intrastate Rail Transportation

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: \_\_\_\_\_

TITLE OF RULE BEING ADOPTED: \_\_\_\_\_

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE  
EFFECTIVE DATE OF THIS RULE IS \_\_\_\_\_ March 5, 1990

Otis D. Castro

ABSTRACT OF PROMULGATION HISTORY

This rulemaking amends the Commission's Rules and Regulations for the Government of Intrastate Rail Transportation to incorporate changes in federal statute and in decisions of the Interstate Commerce Commission (ICC) since the original adoption of said rules. These amendments are mandatory if the Commission is to retain its certification by the ICC to regulate intrastate rail rates, classifications, rules and practices pursuant to 49 U.S.C. §11501(b)(5)(A).

PUBLIC SERVICE COMMISSION  
 OF WEST VIRGINIA  
 LEGISLATIVE RULE  
 CHAPTER 24-1  
 SERIES XII

TITLE: Rules and Regulations for the Government of Intrastate  
 Rail Transportation

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1.00 GENERAL

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1.01 SCOPE

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- (1) Public Law 96-448, "The Staggers Rail Act of 1980", requires the states which wish to retain jurisdiction over intrastate rail transportation to bring their standards and procedures for regulating railroad rates, classifications, rules and practices into conformity with the Interstate Commerce Act. It is the intent of Congress that railroad companies receive adequate revenues through regulatory encouragement of model competition, rate flexibility, and relaxed rate reasonableness standards.
- (2) Mindful of this Commission's obligations to safeguard the public's interests; it shall henceforth be the policy of the Public Service Commission of West Virginia to regulate railroad matters in a manner consistent with the standards and procedures set forth by Congress in the Interstate Commerce Act.

1.02 AUTHORITY

West Virginia Code §§24-1-1, 24-1-7, 24-2-1, 24-2-2, 24-2-7, 24-2-8, 24-2-9; 49 United States Code §11501; and Ex Parte 388, State Intrastate Rail Rate Authority \_\_\_ I.C.C. \_\_\_ (February 10, 1984).

1.03 FILING DATE - May , 1985

1.04 EFFECTIVE DATE - July , 1985

1.05 STANDARDS AND PROCEDURES

- (1) The Staggers Act requires the state to adopt uniform standards and procedures for regulating railroad rates, rules and practices which are in accord with the provisions of the Interstate Commerce Act. The standards and procedures contained in these rules are intended to satisfy the federal requirements. To that extent these rules and regulations supersede any previous rules or regulations which are in conflict with them. All standards and procedures shall be interpreted to be consistent with the goal of revenue adequacy.
- (2) The Public Service Commission of West Virginia hereby expressly adopts the following sections of the Interstate Commerce Act as amended by the Staggers Rail Act of 1980 for purposes of determining intrastate rail rates:

Section 10505	- Exemption
Section 10701a	- Standards for rates for rail carriers
Section 10704(a)(2)(3)(4)	- Adequate revenues
Section 10705	- Authority; through routes, joint classifications, rates, and divisions
Section 10705a	- Joint rate surcharges and cancellations
Section 10706	- Rate agreements; exemption from antitrust laws
Section 10707	- Investigation and suspension of rates
Section 10707a	- Zone of rail carrier rate flexibility
Section 10709	- Determination of market dominance
Section 10712	- Inflation based rate increases
Section 10713	- Contracts
Section 10726	- Long and short haul transportation
Section 10730	- Rates and liability based on value
Section 10731(e)	- Transportation of recyclable materials
Section 10741	- Rate discrimination
Section 10751	- Business entertainment expenses
Section 10762	- General tariff requirements

## 2.00 FILING OF RAILROAD RATES

### 2.01 NOTICE PERIOD FOR FILING RAILROAD TARIFFS

In accordance with 49 U.S.C. §10762(c)(3) the notice period for filing railroad tariffs with the Public Service Commission of West Virginia which contain new or changed rates, classifications, rules, practices or other provisions shall be as follows:

- (1) The tariff shall be on file with this Commission at least 20 days prior to its effective date for rates or provisions published in connection with new service or changes resulting in increased rates or decreased value of service.
- (2) The tariff shall be on file with this Commission at least 10 days prior to its effective date for changes resulting in decreased rates or increased value of service, or changes resulting in neither increases nor

reduction, except that independently filed new or reduced rates may become effective on one-day's notice.

- (3) The tariff shall be on file with this Commission at least 45 days prior to its effective date for joint rate surcharges and cancellations filed pursuant to the provisions of 49 U.S.C. §10705a.
- (4) A railroad or its publishing agent may present a petition to the Commission seeking to depart from the provisions of (1), (2) or (3) if good cause can be shown.
- (5) The notice period for railroad rate contracts filed with this Commission is set forth at Rule 7.02(6) of these rules.

## 2.02 CONTENT OF NOTICE

Each rate publication filed with the Commission shall be on forms prescribed by the Commission in Rules 2 through 7 of its Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers by Motor Vehicle and shall contain such information as the Commission may require, including but not limited to:

- (1) a tariff containing all relevant and material provisions relating to the rate and its application; and
- (2) a statement of the effect which the rate shall have on the carrier's revenue (increase, decrease, no change)

## 2.03 DEFECT IN NOTICE

No rate shall be considered published under the provisions of the Staggers Act unless notice has been given in compliance with this section. However, if a tariff is filed and becomes effective despite some defect the rates, charges, fares, classifications, rules, etc., in that tariff are in effect and will be applied until cancelled or amended or until they are stricken from the files by the Public Service Commission of West Virginia in accordance with the Rules of the Commission and the relevant provisions of the Interstate Commerce Act.

## 3.00 INVESTIGATION AND SUSPENSION OF RAILROAD RATES

### 3.01 COMMENCEMENT OF PROCEEDINGS

- (1) When a new individual or joint rate (except general rate increases, inflation-based increases, or fuel

adjustment surcharges filed under the provisions of 49 U.S.C. §11501(b)(6) over which the Public Service Commission of West Virginia has no jurisdiction) or an individual or joint classification, rule, or practice related to a rate is filed with the Public Service Commission of West Virginia by a rail carrier the Commission may:

- (a) on its own initiative, commence an investigation proceeding, or
  - (b) upon protest of an interested party commence an investigation proceeding, or
  - (c) upon protest of an interested party commence an investigation and suspension proceeding to determine whether the proposed rate classification, rule or practice is discriminatory, unreasonable, or in any other way violates applicable law.
- (2) Rates based on limited carrier liability may be published and filed with the Commission, without prior approval, pursuant to 49 U.S.C. §10730. However, such rates will be subject to protest on grounds such as unreasonableness or nonconformance with the tariff publication requirements found in 49 CFR 1300.4(i)(ii).
  - (3) The Commission shall give reasonable notice to interested parties before beginning a proceeding. However, the Commission may begin the proceeding without allowing an interested party to file an answer.

### 3.02 DURATION OF SUSPENSION PERIOD

- (1) The Commission shall complete a proceeding commenced under Rule 3.01(1)(a) or (b) or (c) of these Rules within five months from the effective date of the proposed rate, classification, rule or practice except that if the Commission reports to the Interstate Commerce Commission that it cannot make a final decision within that time and explains the reason for the delay, it may then take an additional three months to complete the proceeding and make a final decision.
- (2) If the Commission does not render a final decision within the applicable time period the rate, classification, rule or practice shall become effective immediately or, if already in effect, shall remain in effect.
- (3) However, if a railroad makes a tariff filing to adjust an intrastate rate, rule or practice under 49 U.S.C.

§11501(d) to that of similar traffic moving in interstate commerce, and the Commission investigates such tariff in accordance with Rule 3.01 or suspends such tariff filing in accordance with Rule 3.03, the carrier may apply to the Interstate Commerce Commission to review the matter if the Public Service Commission of West Virginia has not acted with finality by the 120th day after the tariff was filed. If the carrier elects not to refer the matter to the Interstate Commerce Commission the Public Service Commission of West Virginia may decide the issue within five months, as provided for in Rule 3.02(1).

### 3.03 GROUNDS FOR SUSPENSION

- (1) The Commission may not suspend a proposed rate, classification, rule, or practice unless it appears from the specific facts shown by the verified statement of a person that:
  - (a) there is a substantial likelihood that the protestant will prevail on the merits;
  - (b) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and
  - (c) because of the peculiar economic circumstances of the protestant, the provisions of Rule 3.08 of these rules do not protect the protestant.
- (2) The Commission will not suspend rates upon its own motion.

### 3.04 MARKET DOMINANCE

- (1) When the new individual or joint rate is alleged to be unreasonably high, the Commission, within 90 days after the start of a proceeding under these rules, shall determine whether or not the railroad proposing the rate has market dominance over the transportation to which the rate applies.
- (2) If the Commission finds that:
  - (a) the railroad proposing the rate has market dominance over the transportation to which the rate applies, it shall then proceed to determine whether or not the proposed rate exceeds a maximum reasonable level for that transportation.

- (b) the railroad proposing the rate does not have market dominance over the transportation to which the rate applies, it shall ~~not-- make-- a determination-en-the-issue-of-reasonableness-~~ make such a finding pursuant to 49 U.S.C. §10709(d).
- (3) A finding by the Commission that the proposed rate has a revenue-variable cost percentage which is equal to or greater than the percentages found in 49 U.S.C. §10709(d)(2) does not establish a presumption that:
- (a) the railroad has or does not have market dominance over such transportation, or
- (b) the proposed rate exceeds or does not exceed a reasonable maximum level.
- (4) Evidentiary guidelines for the determination of whether or not the railroad has market dominance over the transportation to which the rate applies shall be found under Rule 5.00.

### 3.05 REASONABLENESS

- (1) Except for nonferrous recyclables, the Commission shall evaluate the reasonableness of a rate only after market dominance has been established. Moreover, the Commission shall evaluate the reasonableness of rates following the decisional standards applied by the Interstate Commerce Commission in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985); and Ex Parte No. 347 (Sub-No. 2) Rate Guidelines -- Non Coal Proceedings (April 8, 1987). In determining whether a rate is reasonable, the Commission shall consider among other factors, evidence of the following:
- (a) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;
- (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and
- (c) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.
- (2) The Commission will evaluate the reasonableness of rates for nonferrous recyclables in accordance with Ex Parte No. 394 (Sub-No. 5), Cost Ratio for

Recyclables - 1988, served September 15, 1988, Ex-Parte 3947- Cost-Ratio-fer-Recyclables---1980-Determination, decided-December-307-19807-364-ICC-425-431 and other future adjustments to these criteria which are adopted by the Interstate Commerce Commission.

### 3.06 BURDEN OF PROOF

- (1) General - The burden shall be on the protestant to prove the matters described in Rule 3.03(1)(a)-(c) of these rules.
- (2) Market Dominance:
  - (a) Jurisdiction - The respondent railroad shall bear the burden of showing that the Commission lacks jurisdiction to review the proposed rate because the rate produces a revenue-variable cost percentage that is less than the percentages found in 49 U.S.C. §10709(d)(2). The railroad may meet its burden of proof by showing the revenue-variable cost percentage for that transportation to which the rate applies is less than the threshold percentage cited in 49 U.S.C. §10709(d) (2). The protestant may rebut the railroad's evidence with a showing that the revenue-variable cost percentage is equal to or greater than the threshold percentage in 49 U.S.C. §10709 (d)(2).
  - (b) Intramodal and intermodal competition - The protestant shall bear the burden of demonstrating that there exists no effective intramodal or intermodal competition for the transportation to which the rate applies. Respondent railroad may rebut the protestant's showing with evidence that effective intramodal or intermodal competition exists.
  - (c) Product and geographic competition - If intramodal or intermodal competition is shown not to exist, the respondent railroad shall have the burden of proving that either product or geographic competition for the involved transportation does exist. The protestant shall have the burden of proving that such competition is not effective.
- (3) Reasonableness:
  - (a) Rate Increases:
    - I. Protestant's burden of proof - A party protesting a rate increase shall bear the

burden of demonstrating its unreasonableness if such rate:

- (i) is authorized under 49 U.S.C. §10707a; and
- (ii) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of 49 U.S.C. §10707a(e)(2)(A).

II. Respondent's burden of proof - The respondent railroad shall bear the burden of demonstrating the reasonableness of a rate increase if such rate:

- (i) is greater than that authorized under 49 U.S.C. §10707a, or
- (ii) results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of 49 U.S.C. §10707a(e)(2)(A); and

(iii) the Commission initiates an investigation under 49 U.S.C. §10707.

- (b) Rate Decreases A party protesting a rate decrease shall bear the burden of demonstrating that the rate does not contribute to the going concern value of the railroad, and it therefore unreasonably low. A party may meet its burden by making a showing that the rate is less than the variable cost for the transportation to which the rate applies.

### 3.07 ZONE OF RATE FLEXIBILITY

- (1) A rail carrier may raise any rate pursuant to the limitations described in 49 U.S.C. §10707a. Base rates increased by the quarterly rail cost adjustment factor will not be investigated or suspended. In addition, a railroad may increase any rate by 6% per annum (to a maximum of 18%) over the four year period following enactment of the Staggers Act. Thereafter, railroads not earning adequate revenues, as defined by the Interstate Commerce Commission, may raise rates 4% per year. Neither the 6% nor 4% increase shall be

suspended. If the increase results in a revenue to variable cost ratio that equals or exceeds 190%, the Commission may investigate the rate either on its own motion or on complaint of an interested party.

- (2) In determining whether or not to investigate the rate this Commission shall consider:
  - (a) the amount of traffic which the railroad transports at revenues which do not contribute to going concern value and efforts made to minimize such traffic;
  - (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which rates on such traffic can be changed to maximize the revenues from such traffic;
  - (c) the impact of the challenged rate on national energy goals;
  - (d) state and national transportation policy; and
  - (e) the revenue adequacy goals incorporated in the Interstate Commerce Act.

### 3.08 MONETARY ADJUSTMENTS FOR SUSPENSION ACTIONS

- (1) Rate Increases with No Suspensions - In the event the Commission does not suspend but investigates a proposed rate increase under Rule 3.03, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under Rule 3.02. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield of marketable securities or the United States Government having a duration of 90 days, said interest rate to be fixed on the date the Commission's order becomes final.
- (2) Rate Increases with Suspension - If a rate is suspended under Rule 3.03 and any portion of such rate is later found to be reasonable, the carrier shall collect from each person the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the

average yield of marketable securities of the United States Government having a duration of 90 days, said interest rate to be fixed on the date the Commission's order becomes final.

(3) Rate Decreases with Suspension - In the event the Commission suspends a proposed rate decrease under Rule 3.03 which is later found to be reasonable, the rail carrier may refund any part of the decrease found to be reasonable if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

(4) Except as provided in subsection (5) of this rule, when the Commission finds that a railroad shall make refunds or is entitled to collect additional freight charges, but the amount cannot be ascertained upon the record before it, the party entitled to the refund shall file a statement showing details of the shipments involved in the Commission's findings. The statement must be submitted to the carrier for verification and certification. The Statement shall present the following information for each shipment and grouped by routes, and accompanied by the paid freight bills or copies thereof.

_____	Date of shipment.
_____	Date of delivery or tender of delivery.
_____	Date charges were paid.
_____	Car initials.
_____	Car number.
_____	Origin.
_____	Destination.
_____	Route.
_____	Commodity.
_____	Weight.
_____	Rate.
_____	Amount.
_____	Refund (or monies due) on basis of
_____	Commission's decision.
_____	Charges paid by (1).

The Commission shall consider such statement in its entry of order thereupon.

(5) If the railroad wishes to waive collection of amounts due under Rule 3.08(2) and the amount to be collected is:

(a) under \$2,000 - Then the railroad may waive collection without notice to the Commission, provided that the rule shall only apply once to

any person who used the original rate during the suspension period.

- (b) \$2,000 or more - then the railroad shall petition the Commission for authority to waive collection. The petition shall contain the following information:
- names and addresses of the customer for whom collection is to be waived.
  - certification that all railroads (if more than one is involved in the movement) concur in the waiver.
  - amount to be waived.
  - information identifying the original case to which the rate adjustment applies.
  - a brief statement or justification for the intended waiver.
- (c) Any person wishing to protest a waiver proposed under Rule 3.08(5)(b) may do so by filing a protest within 30 days of the Commission's receipt of the petition for waiver. The petition shall identify the investigation and suspension docket number, shall clearly state the reasons for the objection and shall certify that copies have been served upon all parties. Railroads shall have 45 days to file a response to a protest.
- (d) If the Commission receives a letter of protest, it will notify all parties to the proceeding and the railroad shall not be permitted to take any further action until the Commission makes its findings and enters its order.
- (e) If no protests are received pursuant to Rule 3.08(5)(c), then the waiver of collection shall be considered approved without further action from the Commission. If protests are received the Commission shall issue a decision, set the matter for hearing, or take whatever other action is warranted by the circumstances.

### 3.09 REPARATION BASED ON COMMISSION FINDINGS

When the Commission finds that damages are due, but that the amount cannot be ascertained upon the record before it, the complainant shall immediately prepare a statement showing details

of the shipments on which reparations are claimed, in accordance with Rule 3.08(4)(b)(i).

This statement, together with the paid freight bills on the shipments or true copies thereof, shall then be forwarded to the carrier which collected the charges for verification and certification as to its accuracy. All discrepancies, duplications, or other errors in the statements shall be adjusted by the parties and corrected agreed statements submitted to the Commission.

This statement will be certified by all parties and submitted to the Commission for consideration in entry of its order.

#### 4.00 PROCEDURAL REQUIREMENTS FOR PROTESTS AND REPLIES REGARDING PROPOSED RAIL RATES, CLASSIFICATION, RULE OR PRACTICE

##### 4.01 LIBERAL CONSTRUCTION

These rules shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

##### 4.02 DEFINITIONS

- (1) "Proceeding" - an investigation instituted by the Commission.
- (2) "Protestant" - means a person opposed to any tariff or schedule becoming effective.
- (3) "Respondent" - means the railroad and/or their agent against whom the protest is filed or any other person designated by the Commission to participate in the proceeding.
- (4) "Party" - shall include the "Protestant" and "Respondent" or others permitted or directed by the Commission to participate in the proceeding.
- (5) "Pleading" - means a protest, reply to protest, a motion or any other written comment relating to the proceeding.
- (6) "person" - shall include individuals as well as corporations, companies, associations, firms, partnerships, co-partnerships, societies, joint stock companies, or a trustee, receiver, assignee, or personal representative of another individual.

##### 4.03 COMMUNICATIONS

- (1) The protest, reply and any other pleadings relating to the proceeding will not be considered unless made in writing and filed with the Commission.
- (2) All pleadings shall be addressed to:  

Executive Secretary  
Public Service Commission of West Virginia  
201 Brooks Street  
P. O. Box 812  
Charleston, West Virginia 25323
- (3) All pleadings relating to the proceeding must be received for filing at the Commission's office in Charleston, West Virginia, within the time limits, if any, for such filing. The date of receipt at the Commission, and not the date of deposit in the mails, is determinative.
- (4) If, after examination, the Commission finds that the protest, reply, or other pleading relative to the proceeding is not in substantial compliance with the provisions of these Rules:
  - (a) The Commission may decline to accept the documents and may return them unfiled, or
  - (b) The Commission may accept the documents for filing and advise the party tendering them of the deficiencies and require that they be corrected.

#### 4.04 SIGNATURE AND VERIFICATION

- (1) The protest, reply or other pleading relating to the proceeding shall be signed in ink and the signer's address and telephone number shall be stated.
- (2) The facts alleged in a protest, reply or other pleading shall be verified by the person on whose behalf it is filed. If a protest, reply or other pleading is filed on behalf of a corporation or other organization, it shall be verified by an officer or such corporation or organization.

#### 4.05 COPIES AND SERVICE OF DOCUMENTS

- (1) Protest - The original and two copies shall be filed with the Commission and one copy shall be simultaneously served upon the publishing railroad or its publishing agent and upon other parties known by the protestant to be interested in the proceeding.

- (2) Reply to Protest - The original and two copies shall be filed with the Commission and one copy shall be simultaneously served upon the protestant and upon the other parties named in the protest.
- (3) Pleadings - The original and two copies shall be filed with the Commission and one copy shall be simultaneously served upon all parties to the proceeding.
- (4) Certificate of Service - When a protest, reply or pleading is filed with the Commission it shall include a certificate showing simultaneous service upon all parties to the proceeding. Such service shall be made by delivery in person, or by first class mail, certified mail, registered mail, or by express or equivalent parcel delivery service, properly addressed with charges prepaid, one copy to each party. Service upon the parties shall be by the same means of communication and class of service employed in making delivery to the Commission: Provided, however, that when delivery is made to the Commission in person, and it is not feasible to serve the other parties in person, service shall be made by first class or express mail.

#### 4.06 CONTENT AND TIMING OF PROTEST

(1) Content:

- (a) Identification - The protested tariff should be identified by making reference to the name of the railroad or its publishing agent, to the Public Service Commission of West Virginia tariff number, to the specific items or particular provisions protested and to the effective date of the protested publication. Reference should also be made to the tariff and specific provisions thereof that are proposed to be superseded.
- (b) Grounds for Suspension - The protest shall incorporate sufficient facts to:
  - (i) meet the criteria for suspension as set forth in Rule 3.03, and
  - (ii) to sustain the applicable burdens of proof as set forth in Rule 3.06. Further, the protest should include any additional information that would support suspension of the proposed rate.

- (2) Timing: A protest against and a request for suspension of a tariff by a railroad or its publishing agent shall be received by the Commission at least:
- (a) ten days prior to the effective date when the proposed change is to become effective upon not less than 20 days notice.
  - (b) five days prior to the effective date, when the proposed change is to become effective upon not less than 10 days notice.

#### 4.07 CONTENT AND TIMING OF REPLY TO PROTEST

- (1) Content - The reply should adequately identify the protested tariff. Further it shall contain sufficient facts to rebut the allegations made in the protest and to sustain the applicable burdens of proof as set forth in Rule 3.06.
- (2) Timing - A reply to a protest must be received by the Commission not later than:
- (a) the fourth working day prior to the effective date when the proposed change is to become effective upon not less than 20 days notice.
  - (b) the second working day prior to the effective date when the proposed change is to become effective upon not less than 10 days notice.

#### 4.08 EMERGENCY PROTESTS AND REPLIES

In emergencies, telegraphic protests and replies are acceptable, provided that the provisions of Rules 4.03 and 4.06(1) are complied with. The telegrams shall include statements to the effect that they are copies of original protests or replies which have been signed, verified, and mailed to the Commission. The telegrams shall also indicate the method of verification (e.g., by statements sworn before a notary public). The telegrams shall also include a certification that copies either have been, or will be immediately, telegraphed to the proponent carriers or their publishing agents in the case of protests, or to the protestants in case of replies.

#### 4.09 NONSUSPENSION OR INVESTIGATION

Should a protestant desire to proceed further against a tariff which is not suspended or investigated or which has been suspended and the suspension vacated and the

investigation discontinued, a separate complaint should later be filed.

5.00 RULES RELATING TO DETERMINATION OF MARKET DOMINANCE IN COMMISSION PROCEEDINGS - MARKET DOMINANCE GUIDELINES

5.01 INTRAMODAL COMPETITION

(1) Intramodal competition refers to competition between two or more railroads transporting the same commodity between the same origin and destination. A shipper has rail alternatives when, for a given purpose, he can be served by more than one railroad or combination of different railroads. The degree to which these alternatives compete with one another depends on such factors as:

- (a) the number of rail alternatives;
- (b) the feasibility of each alternative as evidenced by:
  - (i) physical characteristics of the route associated with each alternative that are indicative of the feasibility of using that alternative for the traffic in question (e.g., circuitry, track conditions, etc.); and
  - (ii) the direct access of both the shipper and the receiver to each of the rail alternatives as evidenced by individual rail sidings, neutral terminal companies or reciprocal switching; or if direct access is not available, then the feasibility of using local trucking to transport the commodity to or from terminals;
- (c) the transportation costs associated with each alternative (to determine if actual use of alternatives is due to excessive rates charged by the rail carrier in question);
- (d) collective ratemaking among the railroads in question as evidenced by rate bureau involvement; and
- (e) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

(2) These factors should be considered in connection with the preparation and submission of evidence pertaining

to the presence or absence of effective intramodal competition. This list is neither exhaustive nor mandatory but provides a general indication of the type of evidence that would be appropriate.

## 5.02 INTERMODAL COMPETITION

(1) Intermodal competition refers to competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination. Motor and water carriage are the main sources of intermodal competition for railroads.

(a) Water Carriage - Water carriage is restricted to certain geographic areas and is generally used for commodities bulk. The evidence required to demonstrate effective competition between rail and water alternatives is in many respects similar to that required for intramodal competition among rail carriers. Parties in a rate case should provide evidence along the following lines:

(i) the number of alternatives involving different carriers;

(ii) the feasibility of each alternative as evidenced by:

(A) pertinent physical characteristics, for the product in question, of the transportation of routing associated with each alternative;

(B) the access of both shipper and receiver to each alternative; and

(iii) the transportation costs of each alternative.

(iv) The factors set forth in this rule are not meant to be exhaustive.

(b) Motor Carriage - Unlike rail or water alternatives, the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted. Therefore, the feasibility of using motor carriage as an alternative to rail may be viewed as depending exclusively on the nature of the product and the needs of the shipper or receiver. Effective competition from motor carriage may be deduced from the following types of evidence:

- (i) the amount of the product in question that is transported by motor carrier where rail alternatives are available;
- (ii) the amount of the product that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail;
- (iii) physical characteristics of the product in question that may preclude transportation by motor carrier;
- (iv) the transportation costs of the rail and motor carrier alternatives; and
- (v) other types of evidence on the feasibility or nonfeasibility of motor carriage as an alternative to rail will also be considered.

### 5.03 GEOGRAPHIC COMPETITION

- (1) Geographic competition may be described as a restraint on rail pricing stemming from a shipper's or receiver's ability to get the product to which the rate applies from another source, or ship it to another destination. Because shippers and receivers can obtain the product from an alternate source and ship it to another destination, the railroad must compete with the railroad serving the alternate source or destination. Geographic competition among rail carriers is usually present where transportation costs account for a substantial portion or the delivered price of the subject commodity. To establish the potential for geographic competition, evidence should be submitted concerning the following:
  - (a) the number of alternative geographical sources of supply or alternative destinations available to the shipper or receiver for the product in question;
  - (b) the number of these alternative sources or destinations served by different carriers; and
  - (c) that the product available from each source or required by each destination is the same.
- (2) Evidence presented under Rule 5.03(1) is sufficient only to indicate whether effective geographic competition is possible. To determine whether effective geographic competition actually exists,

evidence showing the feasibility of each source or destination and the likelihood of competition should be presented. This evidence may be as follows:

- (a) the distance associated with each alternative source or destination;
- (b) relevant physical characteristics of the route associated with each alternative;
- (c) the access of the shipper or receiver to each transportation alternative;
- (d) the capacity of each source to supply the product in question or the capacity of each destination to absorb the product in question;
- (e) the transportation costs associated with each alternative;
- (f) collective ratemaking among the railroads in question as evidenced by rate bureaus; and
- (g) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

(3) It is to be emphasized that these guidelines are not intended to encompass all pertinent evidence.

#### 5.04 PRODUCT COMPETITION

(1) Product competition occurs when a receiver or shipper can use a substitute(s) for the product covered by the rail rate. In that case, the railroad must compete with the railroad or other mode which carries that other product, and again, must keep its rate competitive if it wants the traffic. Evidence as to the existence of product competition should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost, transportation or otherwise. To demonstrate whether a feasible substitute exists, the following types of evidence, among others, may be submitted:

- (a) use of a substitute product(s) by the receiver or shipper in question or by others with similar needs and under similar conditions;

- (b) the prices of the substitute product(s) relative to the product in question;
- (c) the efficiency of the substitute product(s) relative to the product in question; and
- (d) the explicit and implicit transportation costs of the substitute product(s) and the product in question.

(2) the above factors are not intended to be exhaustive.

6.00 RULES REGULATIONS AND REQUIREMENTS RELATIVE TO COMPLAINTS AGAINST THE REASONABLENESS OF INTRASTATE RAILROAD RATES

6.01 FORMAL COMPLAINTS - GENERAL ALLEGATIONS

A formal complaint shall be so drawn as to fully and completely advise the parties, defendant and the Commission in what respects the provisions of the Interstate Commerce Act ("the Act") have been or are being violated or will be violated, and shall set forth briefly and in plain language the facts claimed to constitute such violations. If two or more sections or subsections of the Act or requirements established pursuant thereto are alleged to be violated, the facts claimed to constitute violation of one section, subsection, or requirement shall be stated separately from those claimed to constitute a violation of another section, subsection, or requirement whenever that can be done by reference or otherwise without undue repetition.

6.02 FORMAL COMPLAINTS - WHEN MONETARY RELIEF SOUGHT

- (1) A formal complaint seeking monetary relief, when permitted under the Act, shall be filed within the statutory period, and shall contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which monetary relief is sought. Such complaint shall state:
  - (a) that complainant makes claim for monetary relief;
  - (b) the name of each individual seeking monetary relief;
  - (c) the names of defendants against which claim is made;
  - (d) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne;

- (e) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery;
  - (f) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination and, if know, the routes of movement; and
  - (g) the nature and amount of the injury sustained by each claimant.
- (2) If a complaint seeking the award of monetary relief contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint shall be given.

#### 6.03 FORMAL COMPLAINTS - COPIES

The original of each formal complaint, amended or supplemental formal complaint, or cross complaint, shall be accompanied by copies in sufficient number to enable the Commission to serve one upon each defendant, including each receiver or trustee, and retain seven copies in addition to the original.

#### 6.04 FORMAL COMPLAINTS - TARIFF OR SCHEDULE REFERENCES

The several rates, charges, schedules, classifications, regulations, or practices on which complaint is made shall be set out by specific reference to the tariffs or schedules in which they appear whenever that is feasible.

#### 6.05 FORMAL COMPLAINTS - PRAYERS FOR RELIEF

- (1) Generally - A formal complaint in which relief is sought should contain a detailed statement of relief desired. Relief in the alternative or of several different types may be demanded, but the issues raised in the formal complaint should not be broader than those to which complainant's evidence is to be directed at the hearing.
- (2) Specific Prayer for Monetary Relief - Except under unusual circumstances, and for good cause shown, monetary relief will not be awarded upon a complaint unless specifically prayed for, or upon a new complaint by or for the same complainant which is based upon any finding in the original proceeding.

- (3) Awards for monetary relief can be awarded by this Commission only insofar as the relief relates to payment(s) for rail transportation service. Claims for damage to goods during shipment must be brought in the appropriate courts having jurisdiction to award damages.

#### 6.06 AMENDED AND SUPPLEMENTAL FORMAL COMPLAINTS

An amended or supplemental complaint may be tendered for filing by a complainant against a defendant or defendants named in the original complaint, stating a course of action alleged to have occurred within the statutory period immediately preceding the date of such tender, in favor of complainant and against the defendant or defendants.

#### 6.07 ANSWERS AND CROSS COMPLAINTS TO FORMAL COMPLAINTS

- (1) Generally - An answer may simultaneously be responsive to a formal complaint and to any amendment or supplement thereof. It shall be drawn so as to fully and completely advise the parties and the Commission of the nature of the defense and shall admit or deny specifically and in detail each material allegation of the pleading answered. An answer may embrace a detailed statement of any counter proposal which a defendant may desire to submit. Unless the issue is such that separate answers are required, answer for all defendants may be filed on their behalf by one defendant in one document, in which event the answer must show clearly the names of all defendants joining therein, and their concurrence.
- (2) Cross Complaints - A cross complaint, alleging that other persons, parties to the proceeding, having violated the Interstate Commerce Act or requirements established pursuant thereto, or seeking relief against them under the Interstate Commerce Act, may be tendered for filing by a defendant with its answer.
- (3) Time for Filing Answers - Unless otherwise directed by the Commission, an answer to a complaint shall be filed within 20 days after the date on which the complaint was served. The original and seven copies of an answer shall be filed with the Commission.
- (4) When Issue Joined - If any defendant answers or fails to file and serve an answer within the period specified in paragraph (3), the issue thereby is joined as to such defendant.

#### 6.08 SATISFACTION AND COMPLAINT

If a defendant satisfies a formal complaint, either before or after answering, a statement to that effect signed by the opposing parties shall be filed (original only need be filed), setting forth when and how the complaint has been satisfied. This action should be taken as expeditiously as possible.

#### 6.09 SIGNATURE AND VERIFICATION

The complaint, answer and other pleadings relating to a complaint proceeding shall be signed in ink and the signer's address and telephone number shall be stated.

The facts alleged in a complaint, answer or other pleadings shall be verified by the person on whose behalf it is filed. If a complaint, answer or other pleading is filed on behalf of a corporation or other organization, it shall be verified by an officer of such corporation or organization.

#### 6.10 CERTIFICATE OF SERVICE

Proof of service of any paper shall be by certificate of attorney, affidavit or acknowledgement.

#### 6.11 ZONE OF RATE FLEXIBILITY

Base rates increased by the quarterly rail cost adjustment factor may not be found to exceed a reasonable maximum for the transportation involved. Complaints rate increases effected under subsections (c) and (d) -- S.C. §10707a shall be considered pursuant to provisions of subsection (e) of said Section.

#### 6.12 MARKET DOMINANCE

- (1) The Commission shall determine within 90 days of the start of a complaint proceeding whether the carrier has market dominance over the transportation to which the rate applies. If the Commission finds that the carrier has market dominance, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. In making a determination of market dominance, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applied if the rail carrier proves that the rate charged results in a revenue-variable cost percentage which is less than that stated in 49 U.S.C. §10709(d)(2).
- (2) Evidentiary guidelines for the determination of whether or not the railroad has market dominance over the

transportation to which the rate applies shall be found under Rule 5.00.

- (3) If the Commission determines that a rail carrier does not have market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation shall be reasonable.

#### 6.13 REASONABLE RATES

- (1) Rail rates shall not be established below a reasonable minimum. Any rate for transportation by a rail carrier that does not contribute to the going concern value for such carrier is presumed to be unreasonable.
- (2) Rail rates which equal or exceed the variable cost of providing the transportation are conclusively presumed to contribute to the going concern value of that rail carrier, and are therefore presumed not to be below a reasonable minimum.
- (3) In determining whether a rate is reasonable, the Commission shall consider the policy that railroads earn adequate revenues as well as evidence of the following:
  - (a) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;
  - (b) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and
  - (c) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

#### 6.14 BURDEN OF PROOF

- (1) Jurisdiction - The defendant railroad shall bear the burden of showing that the Commission lacks jurisdiction to review a rate because the rate produces a revenue-variable cost percentage- that is less than the percentages found in 49 U.S.C. §10709(d)(2). The railroad shall meet its burden of proof by showing the revenue-variable cost percentage for the transportation to which the rate applies is less than the threshold percentage cited in 49 U.S.C. §10709(d)(2). A complainant may rebut the railroad's evidence with a

showing that the revenue-variable cost percentage is equal to or greater than the threshold percentage cited in 49 U.S.C. §10709(d)(2).

(2) Reasonableness of Existing Rates:

- (a) A party complaining that an existing rate is unreasonably high shall bear the cost of proving that such rate is unreasonable.
- (b) A party complaining that an existing rate is unreasonably low shall bear the burden of demonstrating that the rate does not contribute to the going concern value of the carrier, and is therefore unreasonably low.
- (c) Savings Provisions - Any interested party may file a complaint alleging that an intrastate railroad rate which was in effect on the effective date of the Staggers Act (October 1, 1980) is subject to market dominance under the provisions of 49 U.S.C. §10709 and is unreasonable under the provisions of 49 U.S.C. §10709a. Any rate which is not challenged in a complaint filed by March 30, 1981, or which is challenged in such a complaint but
  - (i) the rail carrier is found not to have market dominance over the transportation to which the rate applies, or
  - (ii) the rate is found to be reasonable, shall be deemed to be lawful and may not thereafter be challenged in the Commission or in any court other than an appeal from a decision of the Commission. These provisions shall not apply to any rate under which the volume of traffic transported during the twelve-month period immediately preceding the effective date of the Staggers Act did not exceed 500 net tons and has increased tenfold within the three year period immediately preceding the bringing of a challenge to the reasonableness of such rate. The complainant shall bear the burden of proving that a rate in effect on October 1, 1980, as described in this section, is unreasonable.

6.15 NONAPPLICABILITY

Complaints shall not be entertained by the Commission to the extent that they challenge the reasonableness of the following rate adjustments:

- (1) general rate increases;
- (2) inflation-based rate increases; or
- (3) fuel adjustment surcharges.

7.00 RULES, REGULATIONS AND REQUIREMENTS RELATED TO INTRASTATE RAILROAD TRANSPORTATION CONTRACTS

7.01 DEFINITION OF THE TERM "CONTRACT"

- (1) a contract subject to this section is a written agreement, including any amendment, entered into by one or more rail carriers with one or more purchasers of rail services, to provide specified services under specified rates, charges and conditions.
- (2) A contract filed under this section shall:
  - (a) specify that the contract is made pursuant to 49 U.S.C. §10713, and
  - (b) be signed by duly authorized parties.
- (3) the term "amendment" includes written contract modifications signed by the parties.
- (4) An amendment is treated as a new contract. An amendment is lawful only if it is filed and approved in the same manner as a contract. To the extent terms affecting the lawfulness of the underlying contract are changed, remedies are revived and review is again available.

7.02 FILING AND APPROVAL

- (1) Rail carriers Providing transportation subject to the jurisdiction or the Public Service Commission of West Virginia shall file with the Commission an original and one copy of a contract entered into with one or more purchasers of intrastate rail service. The contract shall be accompanied by five copies of a summary of the nonconfidential elements of the contract in the format specified in 49 CFR §§1300.300 - 1300.315. A contract and contract summary (and amendments and supplements) may be rejected for noncompliance with applicable statutes and regulations.
- (2) Grounds for review of contract - Within 30 days of the filing date of a contract, the Commission may, on its own motion or on complaint, begin a proceeding to review it. Review can be based only on an allegation of violations as described in subsection (3) below.

- (3) Grounds for complaints - A contract may be reviewed by the Commission on its own motion, or upon complaint, only on the following grounds:
- (a) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed.
- (i) By a shipper on the grounds that the shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet common carrier obligations under 49 U.S.C. §11101; or
- (ii) By a port only on the grounds that the port individually will be harmed because the proposed contract will result in unreasonable discrimination against that port.
- (b) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in paragraph (e)(1) of this section, a complaint may be filed by a shipper on the grounds that the shipper individually will be harmed because:
- (i) the rail carrier(s) unreasonably discriminated by refusing to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue and the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract was offered; or
- (ii) the proposed contract constitutes a destructive competitive practice.
- (c) "Unreasonable discrimination" as used in these rules, means, when applied to agricultural shippers, that the railroad has refused to enter into a contract with the shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that the shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period

during which the contract at issue was offered; and, when applied to a port, has the same meaning as the term has under 49 U.S.C. §10741.

- (d) The definitions for "agricultural commodities," "forest products," and "paper" will be decided on a case-by-case basis.

(4) Filing and service of complaints:

- (a) A complaint shall be filed with the Commission by the 18th day after the filing date of the contract.
- (b) A reply shall be filed by the 23rd day after the filing of the contract.
- (c) An original and 6 copies of each shall be filed with the Commission.
- (d) A copy of the complaint shall be served by the complainant on each railroad participating in the contract and replies shall be served on complainant by each railroad. Complaints shall be served by hand, express mail, or other overnight delivery service.
- (e) An appeal of a Commission decision will be made in accordance with 49 C.F.R. 1100.200(c), subject to the following exception:
  - (A) An appeal must be made at least two work days prior to the contract approval date as set out in Rule 7.02(6).

(5) Commission decision upon review of contract. Within 30 days after the date a proceeding is commenced to review a contract upon the grounds specified in subsection (3), the Commission shall decide whether the contract violates the provisions of 49 U.S.C. §10713. If the Commission finds that the contract violates the provisions of 49 U.S.C. §10713, it will:

- (a) disapprove the contract; or
- (b) in the case of agricultural contracts where the Commission finds unreasonable discrimination by a carrier in accordance with subsection (3)(c), allow the carriers the option to:
  - (i) provide rates and services substantially similar to the contract at issue, with such

differences in terms and conditions as are justified by the evidence; or

(ii) cancel the contract.

(6) Approval date of contract.

(a) If the Commission does not institute a proceeding to review the contract, it shall be approved on the 30th day after the filing of the contract. The contract shall be considered "expressly approved" by the Commission.

(b) If the Commission institutes a proceeding to review a contract, the contract is approved:

(i) on the date the Commission approves the contract if the date of approval is 30 or more days after the filing date of the contract;

(ii) on the 30th day after the filing date of the contract if the Commission denies the complaint against the contract-prior to the 30th day after the filing date or the contract; or

(iii) on the 60th day after the filing date of a contract, if the Commission fails to disapprove the contract.

(7) Limitation of rights of rail carrier to enter into future contracts - The commission may limit the right of a rail carrier to enter into future contracts if the

Commission determines that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under 49 U.S.C. §11101. The Commission will handle these determinations on a case-by-case basis and may investigate either upon its own initiative or upon the filing of a verified complaint by a shipper which demonstrates that it individually had been or will be harmed by a carrier's inability to fulfill its common carrier obligations as a result of existing contracts.

#### 7.03 COMMON CARRIER RESPONSIBILITY

(1) The terms of a contract approved by the Commission determine completely the duties and service obligations of the parties to the contract with respect to the services provided under the contract. The contract

does not affect the parties' responsibilities for any services which are not included in the contract.

- (2) Service under a contract approved by the Commission is deemed a separate and distinct class of service.

#### 7.04 ENFORCEMENT

The exclusive remedy for an alleged breach of a contract approved by the Commission shall be an action in an appropriate State Court or United States District Court, unless the parties otherwise agree in the contract.

#### 7.05 LIMITATION ON AGRICULTURAL EQUIPMENT; AND RELIEF

- (1) A rail carrier may enter into contracts for the transportation of agricultural commodities (including forest products but not including wood pulp, wood chips, pulpwood, or paper) that involve the use of carrier owned or leased equipment not in excess of 40 percent of the total number or the carrier's owned or leased equipment by major car type, except as provided in paragraph (2) of this section.
- (2) In the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment used on the average during the prior 3-year period may be used for the contract without prior authorization by the Commission.
- (3) The Commission may grant relief from the limitations of paragraphs (1) and (2) of this section if:
  - (a) A rail carrier or other party requests such relief; or the Commission on its own initiative considers granting such relief; and
  - (b) The Commission determines that making additional equipment available does not impair the rail carrier's ability to meet its common carrier obligations under 49 U.S.C. §11101.

#### 7.06 SIZE OF CONTRACT FILINGS

All contracts, amendments, contract summaries and supplements shall be of a size 8-1/2 by 11 inches; all shall be clear, legible, and on durable paper.

7.07 FILING AND AVAILABILITY OF CONTRACT, CONTRACT AMENDMENTS,  
CONTRACT SUMMARY AND CONTRACT SUMMARY SUPPLEMENTS

- (1) A railroad or railroads entering into a contract for railroad transportation services with one or more purchasers of rail service shall file with the Commission the original and one copy of the contract and five copies of the contract summary.
  - (a) Contracts and contract summaries shall not be filed in the same packages with standard tariff filings.
  - (b) The confidential contract shall not be attached to the contract summary.
  - (c) The envelope or wrapper containing the contract and summary shall be marked "Confidential, Rail Contract."
  - (d) A contract and summary shall be accompanied by a transmittal letter identifying the submitted documents, and the name and telephone number of a contract person.
- (2)
  - (a) The contract filed under these rules will not be available for inspection by persons other than the parties to the contract and authorized Commission personnel, except by petition demonstrating a likelihood of succeeding on the merits of the complaint and that the matter complained of could not be proven without access to additional contract information. The Commission's action in any contract-disclosure matter, including a petition filed under this subparagraph is subject to the limitations imposed by the West Virginia Freedom of Information Act (Chapter 29B of the West Virginia Code) and any other applicable statutes including 5 U.S.C. 522(b) and 18 U.S.C. 1905.
  - (b) A contract and its summary may be labeled "Nonconfidential". Such a designation will permit the general public to inspect the entire contract.
- (3) The contract summary filed under these rules shall include the information specified in Rule 7.10 of this part. The contract summary shall be made available for inspection by the general public.

- (4) The contract summary filed under these rules shall not be required to be posted in any stations, but shall be made available from carriers participating in the contract upon reasonable request.

#### 7.08 CONTRACT AND CONTRACT SUMMARY TITLE PAGES

- (1) The title page of every contract and amendment shall contain only the following information:
- (a) In the upper right corner, the contract number (see Rule 7.09).
  - (b) In the center of the page, the issuing carrier's name, followed by the word "CONTRACT" in large print.
  - (c) Amendments to contracts shall also show, in the upper right corner, the amendment number (see Rule 7.09).
  - (d) A solid one-inch black border down the right side of the title page.
  - (e) Date of issue and date to be effective.
- (2) The title page of every contract summary and supplement shall contain only the following information:
- (a) In the upper right corner, the contract summary number (see Rule 7.09).
  - (b) In the center of the page, the issuing carrier's name, followed by the words "CONTRACT SUMMARY" in large print.
  - (c) Date of issue and date to be effective.
  - (d) In the center lower portion, the issuing individual's name and address.
  - (e) Supplements to contract summaries shall also show, in the right upper corner, the supplement number (see Rule 7.09).

#### 7.09 CONTRACT AND CONTRACT SUMMARY NUMBERING SYSTEM

- (1) Each issuing carrier shall sequentially number the contract and contract summary it issues. The contract and contract summary identification number shall include the letters "PSCWV", the industry standard alphabet code for the issuing railroad (limited to four

letters) the letter "C", and the sequential number, with each separated by a hyphen. The following example: the 357th contract filed by the Norfolk & Western Railway Company would have the following tariff identification number: "PSCWV-NW-C-0357".

- (2) Any amendment to a contract shall be reflected in a corresponding supplement to the contract summary. If the change in the contract is only in confidential matter, a statement to that effect will be made in the supplement.
- (3) At the carrier's option, the carrier's tariff publishing officers may reserve blocks of numbers if tariffs are issued from different departments. An index to the blocks of reserved numbers shall be filed with the Commission.
- (4) Contract amendments and contract summary supplements shall be sequentially numbered.

#### 7.10 CONTENT OF CONTRACT SUMMARY

- (1) Contract summaries for agricultural commodities, forest products or paper shall contain the following terms in the order named:
  - (a) Name(s) of the participating carrier(s). A list, alphabetically arranged, of the corporate names of all carriers that are parties to the contract plus their addresses for service of complaints.
  - (b) The commodity or commodities to be transported under the contract.
  - (c) The duration of the contract.
  - (d) Rail car data as specified by 49 C.F.R. 1300.313 (a) (5).
  - (e) If applicable, identification of existence (but not the terms or amount) of special features such as transit time commitments, guaranteed car supply, minimum percentage of traffic requirements, credit terms, discount, etc.
  - (f) Rates and charges as specified in 49 U.S.C. 1300.313(a)(6).
  - (g) Special features as specified in 49 U.S.C. 1300.313(a)(7).

- (2) The contract summary and supplements shall enumerate and have each item completed. Where the item does not pertain to the contract or amendment, the term "Not applicable" ("NA") shall be used.
- (3) Contract summaries for other commodities or services not involving a port shall contain the information in subsections(1)(a), (1)(b), (1)(c), and (1)(d) of this Rule. Subsection (1)(g) shall be applicable to the extent that service requirements are placed in the contract.

#### 7.11 AVAILABILITY OF CONTRACT SUMMARY

Copies of contract summaries shall be available from the Commission's Finance and Special Studies Division.

#### 7.12 STATUTORY NOTICE

All filed contracts (and amendments) and contract summaries (and supplements) shall provide 30-days notice to the public as required by 49 U.S.C. §10713(e).

#### 7.13 CONTRACT IMPLEMENTATION DATE

The Commission adopts the Interstate Commerce Commission's terms regarding the effective date of rail contracts, as set forth in 49 C.F.R. §1039.2. That section permits implementation of rail transportation contracts on the date filed, provided certain conditions are met.

#### 8.00 EXEMPTION OF PARTICULAR RAIL TRANSPORTATION FROM REGULATION UNDER 49 U.S.C. §10505

##### 8.01 STATE EXEMPTIONS TO BE CONTEMPORANEOUS WITH FEDERAL EXEMPTIONS

- (1) From time to time the Interstate Commerce Commission, pursuant to 49 U.S.C. §10505, may exempt certain classes of traffic from interstate regulations. In instances where interstate traffic is exempted from regulation, intrastate traffic of the same nature shall contemporaneously be exempted from regulation by this Commission.
- (2) This Commission, any interested West Virginia State agency, a railroad, a shipper or any interested third party may present its reasons to the Interstate Commerce Commission why exempted intrastate traffic should continue to be subject to regulation. The ICC has pledged to consider such petitions on a case-by-case basis.

## 9.00 DISCRIMINATION

### 9.01 DISCRIMINATION FOR RAIL CARRIERS DEFINED

Differences between rates, classification, rule and practices of rail carriers providing transportation subject to the jurisdiction of the Commission are expressly not discriminatory under West Virginia or Federal law if such differences result from different services provided by rail carriers.

### 9.02 SPECIFIC INSTANCES OF ABSENCE OF DISCRIMINATION

Rail rates are specifically not unlawfully discriminatory if they arise from:

- (1) contracts approved under Rule 7.00,
- (2) surcharges or cancellations under 49 U.S.C. §10705a,
- (3) separate rates for distinct rail services under 49 U.S.C. §10728,
- (4) rail rates applicable to different routes,
- (5) business entertainment expenses authorized under 49 U.S.C. §10751.

## 10.00 LIMITED LIABILITY RATE

### 10.01 RAIL RATE LIMITING LIABILITY OF CARRIER

A rail carrier providing transportation of service subject to the jurisdiction of the Commission may establish rates for transportation of property under which the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier, and may provide in such written declaration or agreement for the specified amounts to be deducted from any claim against the carrier for loss or damage to the property or for delay in the transportation of such property.