

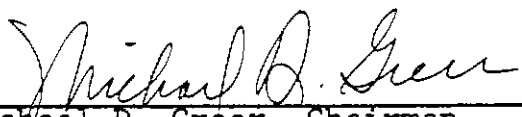
FILED
1987 FEB 23 11 43 37
U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

NOTICE OF PUBLIC HEARING OR COMMENT ON PROPOSED RULE
COMMENT PERIOD

AGENCY: Public Service Commission of West Virginia
RULE TYPE: Legislative
RULE TITLE: Rules and Regulations for Carrier Access to the Lines
and Facilities of Other Carriers

A COMMENT PERIOD ON THE ABOVE PROPOSED RULE HAS BEEN SCHEDULED
AND WILL END ON March 23, 1987 AT 12:00 p.m. . WRITTEN
COMMENTS ARE TO BE MAILED TO THE FOLLOWING ADDRESS: Howard M.
Cunningham, Executive Secretary, Public Service Commission of
West Virginia, Post Office Box 812, Charleston, West Virginia,
25323.

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THE PROPOSED RULE.


Michael D. Greer, Chairman



KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

RICHARD S. STEPHENSON
Deputy Secretary of State

Telephone: (304) 345-4000
Corporations: 345-8000

WILLIAM H. HARRINGTON
Chief of Staff

RICH O. HARTMAN
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

VIRGINIA SKEEN
Special Assistant

(Plus all the volunteer
help we can get)

STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

PROPOSED RULES

STATE REGISTER FILING

=====

AGENCY Public Service Commission of West Virginia

CONTACT PERSON Howard M. Cunningham PHONE 340-0426

TYPE OF RULE Legislative

TITLE OF RULE Rules and Regulations for Carrier Access to the Lines and
Facilities of Other Carriers

CHAPTER 24 ARTICLE 3 SERIES XVIII

AUTHORITY 24-1-1, 24-1-7, 24-2-7, 24-3-3b

+++++

CHECK APPLICABLE ITEMS BELOW TO SHOW KIND OF ACTION BEING TAKEN

NEW RULE

NOTICE OF HEARING COMMENT

AMENDMENTS TO EXISTING RULE

NOTICE OF AGENCY APPROVAL
(legislative rules only)

REPEAL OF EXISTING RULE

NOTICE OF AGENCY ADOPTION
(interpretive & procedural
rules only)

NOTE: ALL FILINGS REQUIRE ONLY
ONE COPY, EXCEPT FINAL
FILING OF RULES WHICH
REQUIRES AN ORIGINAL AND
A COPY.

FINAL FILING

FIRST EMERGENCY FILING

SECOND EMERGENCY FILING

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 20th day of February 1987.

GENERAL ORDER NO. 237

IN THE MATTER OF Rules and Regulations
Governing Access by Rail Carriers
to the Lines and Facilities of
Another Rail Carrier.

Proceeding on the Commission's Own Motion.

COMMISSION ORDER PROMULGATING PROPOSED RULES

On February 25, 1986, the West Virginia Legislature passed Enrolled Senate Bill 278 (S.B. 278). Article 3 of S.B. 278 adds a new Section 24-3-3b to the West Virginia Code, requiring railroads in West Virginia to provide open access to their tracks and facilities to other rail carriers and to private shippers. The purpose of S.B. 278 is to promote the economic well being of the citizens of West Virginia by assuring, by all available means not in conflict with authority exercised by the federal government, the availability of rail transportation services. Code §24-3-3b.

S.B. 278 directs the Public Service Commission to promulgate regulations providing for the establishment of reasonable fees to be paid to the carrier whose tracks and facilities are to be made available, and for the orderly, efficient and safe utilization of those facilities.

The Commission today is proposing regulations governing (1)

the terms and conditions for use by one carrier of the lines and facilities of another carrier, and (2) the procedures to be followed by a rail carrier seeking to use the lines and facilities of another rail carrier. These proposed regulations do not eliminate the need for the accessing carrier to seek and obtain federal authority or exemption before commencing rail service over the lines and facilities of another carrier.

Because of the complexity of the issues addressed in these proposed regulations we will summarize our proposed approach here in detail.

COMPENSATION

The proposed regulations address two major economic issues relating to compensation for use by one rail carrier of lines and facilities of another rail carrier. First, they propose to establish the total compensation that the accessed carrier is entitled to receive for its investment in the lines and facilities in question. Second, they propose a means of obtaining this level of compensation through a system of shipper and commodity-specific access charges to be paid by all carriers using the access facilities to serve the shippers.

The proposed regulations afford the accessed carrier two options to determine its overall compensation for use of its lines and facilities. First, it may use as its rate base the depreciated historical cost of the lines and facilities to be accessed and may recover a return on that rate base equal to the most recent current nominal cost of capital determined by the Interstate Commerce Commission. As an alternative, the accessed carrier may elect to use the net liquidation value of

the access facilities as its rate base, in which case it may earn a return equal to the current real cost of capital in the railroad industry, and may periodically adjust its net liquidation value to account for inflation.

In addition to permitting the accessed carrier a return on its investment, the proposed regulations permit the accessed carrier to recover those other costs it incurs in maintaining and operating the lines and facilities in question that do not vary with the level of traffic. The proposed regulations provide that such non-traffic sensitive costs can be recovered in the same manner as the accessed carrier's return on its rate base.

We are proposing that the accessed carrier recover its allowed fixed costs (return on rate base plus non-traffic sensitive costs) through a schedule of shipper and commodity-specific access charges. The proposed regulations contemplate that the schedule of access charges will reflect the demand for rail service of each commodity and shipper benefitting from the access facilities in question. The proposed regulations do not authorize the accessed and accessing carriers to impose a new charge on the shippers. The access charges will be recovered from the carrier moving traffic to and from the shipper's facility.

The proposed regulations also provide for the accessed carrier to recover from the accessing carrier those costs of operating the lines and facilities in question that are caused by the operations of the accessing carrier.

We are specifically requesting comments on the following

subjects:

1. Whether the return on the depreciated historical cost of the access facilities should be adjusted from time to time, and if so how frequently and by what method;

2. The most appropriate method of determining the current real cost of capital in the railroad industry;

3. The most appropriate method of making periodic adjustments to the net liquidation value of the access facilities;

4. Which costs should be recovered through the "fixed cost" access charge and which through the "traffic-sensitive" access charge;

5. Whether the proposed method of recovering the fixed costs is feasible, and if so, with respect to which types of access facilities; and

6. Whether there is any legal impediment to making available to the accessing carrier information regarding shippers on the access facilities.

Commenters are free to comment on any other part of the access charge proposal.

APPLICATION PROCEDURES

If the accessing and accessed carrier can reach an agreement regarding the terms of access, they need only seek appropriate federal authority or exemption to commence service. However, in the event that the carriers cannot reach an agreement regarding the terms of access, the proposed regulations provide a comprehensive scheme for the accessing carrier to obtain an access authority to enter onto the accessed

carrier's lines.

The proposed regulations require the accessing carrier to file with the Commission and serve on the accessed carrier an application that describes its proposed service, identifies the facilities it proposes to use, and contains a certification that it will comply with the accessed carrier's operating rules while using its facilities. The accessed carrier is required to file with the Commission a response to the application that contains exceptions to the accessing carrier's application, and a compensation proposal. Differences between the parties regarding compensation and other matters will be resolved by the Commission on the basis of a written record developed in accordance with the regulations.

The proposed regulations require the accessed carrier to propose a schedule of access charges. The accessing carrier will be permitted to propose modifications or an alternative schedule. The Public Service Commission, on the basis of the record before it, will select either the accessing carrier's schedule or the accessed carrier's schedule as the applicable schedule of access charges. The Commission specifically requests comments on the feasibility of using a "best offer" approach for selecting an appropriate access charge schedule. We are also specifically requesting comments regarding any potential impediments that might be presented to the functioning of the proposed access charge plan by any other laws, including the antitrust laws.

OPERATIONS

The proposed regulations contemplate that the accessing

carrier will undertake to comply with the operating rules of the accessed carrier. In order to ensure that this can be done, the accessed carrier is required to provide training to personnel of the accessing carrier on a fully compensated basis that will permit them to use the access facilities safely. The proposed regulations prohibit the accessed carrier from discriminating against the traffic of the accessing carrier.

MISCELLANEOUS

The proposed regulations address a number of matters we are directed to consider, such as affording the accessed carrier a right of first refusal when the accessed and accessing carrier have been negotiating for a contract with a shipper, and providing compensation to the accessed carrier for labor protection expenses incurred.

FINDINGS OF FACT

1. On February 25, 1986, the West Virginia Legislature passed Enrolled Senate Bill 278.

2. S.B. 278 requires the Public Service Commission to promulgate regulations to govern the terms and conditions of access by one rail carrier to the lines and facilities of another rail carrier. West Virginia Code §24-3-3b.

CONCLUSION OF LAW

In order to comply with the statutory rulemaking provisions of Chapter 29A and give effect to the legislative mandate of West Virginia Code §24-3-3b, it is necessary to promulgate the attached legislative rule regarding access by one rail carrier to the lines and facilities of another rail carrier.

ORDER

IT IS, THEREFORE, ORDERED that:

1. A proceeding be, and the same is hereby, initiated for the purpose of promulgating a rule to effectuate the legislative mandate contained in West Virginia Code §24-3-3b;

2. The Executive Secretary of the Commission file one copy of the proposed rule attached hereto in the State Register in the Office of the Secretary of State as a proposed legislative rule of the Commission, together with the Notice and Fiscal Note, all attached hereto, as required by the West Virginia Code §§29A-3-4 through 9;

3. Any interested party desiring to comment on the proposed rule should do so by filing written comments and/or testimony with the Commission on or before March 23, 1987, at 12:00 noon, directed to: Public Service Commission, Mr. Howard M. Cunningham, Executive Secretary, P.O. Box 812, Charleston, West Virginia 25323;

4. Any party desiring to file reply comments or testimony should do so by filing written comments and/or testimony with the Commission on or before March 27, 1987, at 12:00 noon, directed to: Public Service Commission, Mr. Howard M. Cunningham, Executive Secretary, P. O. Box 812, Charleston, West Virginia 25323;

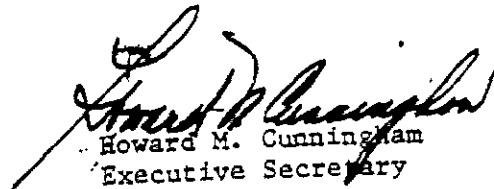
5. A public hearing shall be held to consider further comments, testimony and other matters as may be permitted by the Commission shall be held in Hearing Room No. 1 at the offices of the Public Service Commission of West Virginia at 201 Brooks Street, Charleston, Kanawha County, West Virginia on the 30th day of March, 1987 at 9:30 a.m. and at such other times and

places as may be ordered by the Commission; and

6. The Executive Secretary serve copies of this order, together with all attachments, on all railroads operating in West Virginia, on the Association of American Railroads, on the West Virginia Mining and Reclamation Association, on the West Virginia Coal Association, on the Consumer Advocate of the Public Service Commission, and on the Interstate Commerce Commission by United States First Class Mail, and such other notice as he deems necessary.

A TRUE COPY

TESTE:


Howard M. Cunningham
Executive Secretary

GENERAL ORDER NO. 237

IN THE MATTER OF Rules and Regulations
for Carrier Access to the Lines and
Facilities of Other Carriers.

Proceeding on the Commission's Own Motion

FISCAL NOTE

This is a Fiscal Note issued pursuant to §§29A-3-4, 29A-3-5, 29A-3-9, and 24-1-7 of the West Virginia Code, relating to General Order No. 237, In the Matter of Rules and Regulations for Carrier Access to the Lines and Facilities of Other Carriers.

I. OBJECTIVES OF THE RULE

The purpose of these rules and regulations is to establish the requirements and procedures for providing access to the lines of rail carriers in the State of West Virginia by other rail carriers as mandated by West Virginia Code 24-3-3b.

II. COST OF IMPLEMENTING THE ATTACHED PROPOSED RULES

A. Cost of Implementation for the State

The cost of implementation of these proposed rules to the State will depend upon the number of proceedings that are brought pursuant to them before the Public Service Commission of West Virginia. It is impossible to estimate this number precisely because we anticipate that most access matters will be resolved by the accessing carrier and the accessed carrier by agreement.

B. Cost of Implementation for Persons Affected by the Proposed Rule

Under the proposed rule accessed carriers and accessing carriers will incur certain expenses in determining appropriate levels of compensation for the use of access facilities. We do not anticipate that such expenses will exceed administrative expenses normally incurred in conducting business or pricing property for rental.

III. THE EFFECT THIS MEASURE WILL HAVE ON THE COSTS AND REVENUES OF STATE GOVERNMENT

The rules proposed herein will have no effect on the costs and revenues of state government other than the possible costs identified in Section II above.

IV. ECONOMIC IMPACT OF THE RULES ON THE STATE OR ITS RESIDENTS

It is anticipated that these rules will have a positive economic impact on the State and its residents. The rules will ensure that all shippers in the State have access to competitive rail service which will lead to greater efficiency in rail operations and lower costs of providing service which should be translated into lower prices for rail shippers in West Virginia.

DATE February 20, 1987 AGENCY Public Service Commission

SIGNATURE OF AUTHORIZED REPRESENTATIVE

Michael D. Guer

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

FILED
1987 FEB 20 4:38
SECRETARY OF STATE

RULES AND REGULATIONS FOR CARRIER ACCESS
TO THE LINES AND FACILITIES OF OTHER CARRIERS

1.0 GENERAL

1.1 SCOPE - This legislative rule establishes the procedures and requirements and the terms of compensation for a rail carrier to obtain access to the lines and facilities of other rail carriers located in the State of West Virginia pursuant to the legislative mandate in Code §24-3-3b.

1.2 AUTHORITY - West Virginia Code §§24-1-1, 24-1-7, 24-2-7, 24-3-3b.

1.3 FILING DATE - February 20, 1987

1.4 EFFECTIVE DATE -

2.0 PROCEDURES FOR CARRIER ACCESS

2.1 Carrier Access By Agreement -- If two or more rail carriers enter into an access agreement the parties may, but are not required to, file that agreement with the Commission. Service may begin under that agreement when authorized by the Interstate Commerce Act and the regulations and orders of the Interstate Commerce Commission.

2.2 Carrier Access by Authority

2.2.1 A rail carrier that has requested the use of access facilities of another rail carrier but which has been unable to reach an access agreement with the rail carrier owning the access facilities may file with the Commission an application for access authority.

2.2.2 An application for access authority shall be supported by sworn affidavits, including the affidavit of the accessing carrier's chief executive officer, and shall contain:

(a) a certification by the accessing carrier that it has made a good faith effort to negotiate an access agreement with the accessed carrier, and a summary of the efforts it has made to enter into such an agreement;

(b) a description of the accessing carrier's proposed operations and of the access facilities it is seeking to use;

(c) a certification that in using the access facilities the accessing carrier will comply with the accessed carrier's operating rules, and with all state and federal safety and environmental laws and regulations.

2.2.3 The accessing carrier shall serve a copy of the application on the accessed carrier.

2.2.4 Within 30 days of service of the application for access authority, or such additional time as the Commission for good cause allows, the accessed carrier shall file with the Commission and serve on the accessing carrier a response to the application which shall:

(a) set forth in detail its exceptions to the application;

(b) propose specific alternative provisions to those portions of the application to which it takes exception;

(c) set forth a detailed statement of the reasons for its exceptions to the application and of the reasons for its proposed alternatives;

(d) propose a schedule of access charges for the use of the access facilities sought by the accessing carrier calculated in accordance with these regulations; and

(e) be supported by sworn affidavits, including the affidavit of the accessed carrier's chief executive officer.

2.2.5 Exceptions shall be directed to the operational feasibility of making the access facilities available to the accessing carrier to perform the services described in the application. Adequacy of service by the accessed carrier or the economic impact on the accessed carrier of operations by the accessing carrier shall not constitute grounds for exception. If the accessed carrier proposes specific alternatives to the access facilities specified by the accessing carrier, they must provide at least the same extent and quality of access as the facilities requested by the accessing carrier.

2.2.6 Upon execution of a confidentiality agreement by the accessing carrier, the accessed carrier shall supply to the accessing carrier traffic data covering the most recent three preceding years for each shipper originating or terminating traffic on the access facilities, and data showing the volume

PSC
LEGISLATIVE RULE/CHAPTER 24-1
SERIES XVIII

and nature of overhead traffic on the access facilities in the three preceding years.

2.2.7 The accessing carrier may file a reply within 30 days of service of the accessed carrier's response which shall be supported by sworn affidavits, including the affidavit of the accessing carrier's chief executive officer. If the accessing carrier contests any of the access charges proposed by the accessed carrier, it shall propose its own schedule or schedules of such charges.

2.2.8 The Commission may submit to the accessing carrier and to the accessed carrier written questions regarding any matter material to the issuance of an access authority under these regulations, which shall be answered in writing under oath within the time established by the Commission.

2.2.9 If the application, the response, the reply, the affidavits in support, and the sworn answers to the Commission's written questions establish that there exists a disputed issue of fact material to the issuance of an access authority under these regulations, the Commission will permit the accessing carrier, the accessed carrier, the Commission's Staff and any intervenor to take depositions on oral examination for the purpose of cross-examining the opposing party's affiants. The depositions shall be filed with the Commission and, together with the application, the response, the reply, the affidavits in support, and the sworn answers to the Commission's written questions shall constitute the record on which the Commission will base its decision unless modified as herein provided.

2.2.10 The Commission may modify the procedures for developing the record on which to consider an application for a carrier access authority, to include, but not limited to, oral proceedings.

2.2.11 If the Commission finds that the accessing carrier's use of the access facilities will not unduly interfere with the accessed carrier's own operations, and if the Commission further finds that the accessing carrier has complied with these regulations, it shall issue an access authority directing the accessed carrier to permit the accessing carrier to use the access facilities identified in the access authority, under the terms and conditions set forth in the access authority.

2.2.12 The access authority shall contain

(a) a requirement that the accessing carrier obtain appropriate authority or exemption from the Interstate Commerce Commission before exercising its rights under the access authority;

(b) a designation of the access facilities the accessing carrier can use and any limitations or conditions on such use; and

(c) a schedule of access charges.

2.2.13 The Commission will select either the schedule of access charges proposed by the accessed carrier or the schedule proposed by the accessing carrier, and will make only such prorata adjustments to the selected schedule of charges as are necessary to ensure that the accessed carrier can recover the fixed costs of the access facilities. The Commission will not change the relative distribution of access charges in the schedule of access charges it selects and will not devise its own schedule of access charges.

3.0 DETERMINATION OF AN ACCESS CHARGE SCHEDULE

3.1 Costs to be Recovered Through Scheduled Access Charges

3.1.1 The accessed carrier shall be entitled to recover the fixed costs of the access facilities which shall include:

(a) non-traffic sensitive costs that the accessed carrier incurs in maintaining and operating the access facilities; plus, at the election of the accessed carrier, either:

(b) a return on the depreciated historical cost of the access facilities equal to the current nominal cost of capital for the railroad industry, as most recently determined by the Interstate Commerce Commission; or

(c) a return on the net liquidation value of the access facilities, determined in accordance with Interstate Commerce Commission regulations, equal to the current real cost of capital in the railroad industry.

3.1.2 The accessed carrier shall be entitled to recover from the accessing carrier traffic-sensitive costs that it incurs as a result of the use of the access facilities by the accessing carrier.

3.2 Method of Recovering Costs

3.2.1 The accessed carrier shall recover its fixed costs for the access facilities through a schedule of shipper and commodity-specific access charges to be applied to traffic to and from each shipper whose traffic uses the access facilities. The access charge schedule shall be designed such that the total access charges on an annual basis will not exceed the accessed

carrier's fixed costs for the access facilities. The schedule of shipper and commodity-specific charges should reflect the relative demand for use of the access facilities by the shippers and commodities using the line.

3.2.2. The accessed carrier shall recover the traffic sensitive costs associated with operations of the accessing carrier's trains over the access facilities by a traffic sensitive charge applied to accessing carrier's trains that reflects the costs caused by such operations.

4.0 OPERATIONS BY THE ACCESSING CARRIER OR SHIPPER

4.1 Accessing Carrier Obligations

4.1.1 In using the access facilities, the accessing carrier shall comply with the accessed carrier's operating rules and regulations.

4.1.2 Prior to commencing operations, and at such additional times as the accessed carrier may request, the accessing carrier shall provide to the accessed carrier evidence of insurance covering liabilities resulting from its use of the access facilities, which shall show the accessed carrier as a coinsured.

4.1.3 Prior to commencing operations, the accessing carrier shall provide to the accessed carrier an indemnity against all liabilities resulting from use of the access facilities by the accessing carrier, except to the extent that the injury is caused by the fault of the accessed carrier or its agents or employees. The indemnity shall extend to liabilities that arise under state and federal environmental legislation.

4.1.3 The accessing carrier shall comply with all state and federal safety and environmental laws and regulations.

4.1.4 The accessing carrier shall pay access charges due on or before the date established by the access authority issued by the Commission.

4.2. Accessed Carrier's Obligations

4.2.1 The accessed carrier, upon request by the accessing carrier, shall provide training to the personnel of the accessing carrier to permit use of the access facilities in a safe and non-disruptive manner. The accessed carrier may charge the accessing carrier the actual cost of such training.

4.2.2 In the absence of an agreement to the contrary, the accessed carrier shall be responsible for maintaining the

continuing utility of the access facilities for providing substantially the same quality of access as they provided on the date the Commission issued the carrier access authority. This shall not preclude the accessed carrier from changing the access facilities to incorporate new technology or to lower the cost or improve the safety of operations or improve the quality of service.

4.2.3 In the absence of an agreement to the contrary, the accessed carrier shall be responsible for dispatching and operation of the train control system on the access facilities. These services shall be provided to the accessing carrier on a non-discriminatory basis.

5.0 MISCELLANEOUS PROVISIONS

5.1 Modification of Access Agreement or Access Authority

5.1.1 Modification by Agreement --

5.1.1.1 An accessing carrier and an accessed carrier that have agreed to modifications in the access authority governing the use of access facilities shall jointly file such proposed modifications with the Commission, together with an explanation of the purpose and effect of the proposed modifications.

5.1.1.2 The Commission may submit written questions to the applicants which shall be answered in writing and under oath within the time established by the Commission.

5.1.1.3 The Commission may request public comments on the proposed modification.

5.1.1.4 The Commission shall issue an order approving the proposed modification if it finds the modification to be in the public interest and consistent with the purposes of these regulations.

5.1.1.6 This subsection does not relieve the applicants of the need to obtain any required federal regulatory approval prior to implementing the proposed modification.

5.1.2. Modification by Order --

5.1.2.1 An accessing carrier or an accessed carrier may file with the Commission a petition requesting the issuance of an order modifying a previously issued carrier access authority or a previously negotiated carrier access agreement.

PSC
LEGISLATIVE RULE/CHAPTER 24-1
SERIES XVIII

5.1.2.2 The petition shall set forth the proposed modification, the reasons therefor, and the efforts that the petitioner has made to obtain an agreement with respect to the modifications proposed.

5.1.2.3 The petition shall be supported by affidavits, including the affidavit of the petitioner's chief executive officer.

5.1.2.4 The petition and the supporting affidavits and workpapers shall be served upon all other parties to the agreement or authority that the petitioner is requesting be modified.

5.1.2.5 Within 30 days of service of the petition, each party to the agreement or authority to be modified may file with the Commission a response to the petition, stating its objections to the proposed modification, its reasons therefor, proposed alternative modifications, and its reasons therefor.

5.1.2.6 The response shall be supported by affidavits, including the affidavit of the respondent's chief executive officer.

5.1.2.7 The response and the supporting affidavits and workpapers shall be served on the petitioner and all other parties to the agreement or authority to be modified.

5.1.2.8 The Commission may submit written questions to the petitioner and to the responding parties which shall be answered under oath and in writing.

5.1.2.9 If the Commission determines that there is a disputed issue of fact material to the issuance of a modification order, it may permit the parties to take the depositions on oral examination of the opposing party's affiants for the purpose of cross-examination. The depositions shall be filed with the Commission and, together with the petition, the response, the affidavits in support, and the sworn answers to the Commission's written questions, shall constitute the record on which the Commission will base its decision.

5.1.2.10 The Commission may modify the procedures for developing the record on which to consider a petition for modification of a carrier access authority or carrier access agreement, to include, but not limited to, requiring oral proceedings.

5.1.2.11 The Commission will issue an order modifying or denying modification of the access agreement, or access authority.

5.1.2.12 The Commission will not, by order, except in extraordinary circumstances modify any access agreement or access authority that was modified by order within the 12 months preceding the filing of the petition for modification.

5.1.2.13 The Commission will not issue a modification order:

i. in which the Commission constructs its own schedule of carrier access charges; or

ii. which authorizes or requires any person to take any action without prior Interstate Commerce Commission approval, if such approval is properly required by federal law or regulation.

5.1.2.14 The issuance of a modification order does not relieve the parties of the need to obtain approval (or exemption) from the Interstate Commerce Commission for any acts permitted or prohibited by the modification order where such approval (or exemption) is required by federal law.

5.2 Confidentiality Agreements --

5.2.1 A person requesting or opposing the issuance or modification by the Commission of any access authority or access agreement under these regulations shall execute an agreement meeting the criteria of this sub-part.

5.2.2 The agreement shall provide, inter alia, that:

(a) the signatory party will not disclose to any person not a party to the proceeding, or to any party to the proceeding that has not executed a confidentiality agreement, any information supplied to it by any other party to the proceeding which that party has designated as confidential commercial information concerning itself, its customers, or any other party to the proceeding or its customers;

(b) the signatory party agrees to pay damages to any person, whether or not a party to the proceeding or a signatory of a confidentiality agreement, that is injured in its business or property by the signatory party's disclosure of confidential commercial information in violation of the agreement;

PSC
LEGISLATIVE RULE/CHAPTER 24-1
SERIES XVIII

(c) that the damages in the event of such disclosure will be measured by the lost profits resulting from disclosure of the confidential commercial information which shall be conclusively presumed to be at least \$10,000; and

(d) that if the signatory party is found to have made a disclosure in breach of the agreement, it will pay to the injured person, in addition to the presumptive or actual damages determined, the costs of suit and a reasonable attorney's fee.

5.2.3 -- The signatory party shall serve a copy of the confidentiality agreement on each party to the proceeding, the Commission, and on each shipper concerning which the party has received or will receive confidential commercial information from another party to the proceeding; provided, however, that the confidentiality agreement need not be served on any shipper whose traffic does not originate or terminate on the access facilities in question in the proceeding.

5.2.4 If any party to a proceeding under these regulations fails or refuses to execute a confidentiality agreement, that party shall not be entitled to receive from any other party or from the Commission any materials containing confidential commercial information, but the Commission may decide the issues before it as if such party had received such information.

5.3. Definitions -- As used in these regulations, the following terms shall have the meanings set forth below:

5.3.1 "Access Agreement" means an agreement between an accessing carrier and an accessed carrier that permits the accessing carrier to use access facilities owned by the accessed carrier, and contains the conditions of such use and a provision for an access charge for use of such facilities.

5.3.2 "Access Authority" means an order issued by the Commission authorizing an accessing carrier to use access facilities of an accessed carrier and establishing the terms and conditions for such use.

5.3.3 "Access Facilities" means track, switches, signal equipment, communications equipment and any other facilities necessary and appropriate to move trains from one or more points on the lines of the accessed carrier designated by the accessing carrier, including the premises of a shipper or shippers, to any other point on the lines of the accessed carrier designated by the accessing carrier, including such facilities as are necessary to move trains from the lines of the accessed carrier to the lines of another carrier.

5.3.4 "Accessed Carrier" means a carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission that is the subject of a request for access facilities that is being processed under these regulations.

5.3.5 "Accessing Carrier" means a carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission, or a person that intends to become a carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission, that has made a request for access facilities pursuant to these regulations.

5.3.6 "Application" means an application for access authority made pursuant to these regulations.

5.3.7 "Commission" means the Public Service Commission of West Virginia.

5.3.8 "Confidentiality Agreement" means a confidentiality agreement meeting the requirements of these regulations.

5.3.9 "Workpapers" means documentation necessary to understand the means of calculation of a number that is contained in an affidavit or filing made with the Commission pursuant to these regulations, and includes inter alia accounting work sheets, computer output, listings of computer programs used to analyze data, traffic data.

5.4 Contracts --

5.4.1 If an accessing carrier has negotiated a contract with a shipper for transportation of goods from or to a point located on an access facility, and if the accessed carrier has engaged in good faith negotiations with the shipper for a contract to transport the same goods between the same end points, the accessed carrier shall have the right, as a condition to any access authority issued under these regulations, to assume the contract negotiated by the accessing carrier.

5.4.2 Before an accessing carrier may file a contract with Interstate Commerce Commission for transportation of goods from or to a point located on an access facility it shall present such contract to the accessed carrier which shall have three business days to notify the shipper and the accessing carrier that it is able to transport the goods between the same end points and to satisfy all other terms of the contract and has elected to assume the contract.

5.4.3 An accessed carrier that elects to assume a contract shall notify the accessing carrier and the shipper in writing and thereafter shall be bound by each term of the contract and

entitled to the benefits of the contract to the same extent as if it had signed the agreement.

5.4.4 This Section does not relieve the accessed carrier of the obligation to file the contract with the Interstate Commerce Commission.

5.5. Labor Protection Expenses --

5.5.1 If an accessed carrier anticipates that it will incur labor protection expenses as a result of the operations of an accessing carrier, it may seek as an additional traffic-sensitive cost of access chargeable to the accessing carrier, an amount equal to the anticipated labor protection expense it will incur.

5.5.2 Amounts collected by the accessed carrier under paragraph 5.5.1 shall be deposited in an interest bearing escrow account, and shall not be comingled with the accessed carrier's other funds.

5.5.3 At the end of each 12-month period following Interstate Commerce Commission authorization of operations by the accessing carrier, the accessed carrier shall prepare a report and accounting showing whether it has incurred labor protection expenses as a direct consequence of the operations of the accessing carrier and the amount of such expenses. Any lump sum severance payment made by the accessed carrier to its employees shall be prorated over six years. The report and accounting shall be served on the accessing carrier and shall be filed with the Commission. The report and accounting shall be supported by sworn affidavits.

5.5.4 The accessing carrier shall file any exceptions and a statement of reasons for such exceptions with the Commission and serve them on the accessed carrier within thirty days of service of the report and accounting, and the accessed carrier may reply thereto within fifteen days, filing its reply with the Commission and serving it on the accessing carrier. Exceptions and Replies shall be supported by sworn affidavits.

5.5.5 The Commission will issue an order determining the amount of labor protection payments paid by the accessed carrier as a direct consequence of the operations of the accessing carrier and authorizing the accessed carrier to draw from the escrow account an amount equal to the lesser of (a) the amount of such payments established in the order, or (b) the amount in the account. The balance of the escrow account existing as of the date of the accessed carrier's report and accounting after subtracting the authorized distribution to the accessed carrier shall be returned to the accessing carrier.