

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #5

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**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: 150

CITE AUTHORITY: W.Va. Code §§24-1-1, 24-1-2, 24-2-7, 24-3-3b

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE X
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

§24-1-7

AMENDMENT TO AN EXISTING RULE: YES _____, NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: 18

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

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS December 12, 1987

Michael D. Green
CHAIRMAN.

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

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

ABSTRACT OF PROMULGATION HISTORY

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.

By order entered on February 20, 1987, the Commission initiated a proceeding for the purpose of promulgating rules to effectuate the legislative mandate contained in West Virginia Code §24-3-3b. Interested parties desiring to comment on the proposed rule were provided an opportunity to file written comments and/or testimony with the Commission on or before March 23, 1987. Parties desiring to file reply comments or testimony were provided an opportunity to file written comments and/or testimony with the Commission on or before March 27, 1987. Pursuant to this order, the Commission scheduled a public hearing on March 30, 1987.

In response to the February 20, 1987 order, comments were filed by the American Association of Railroads, the West Virginia Coal Association and the Consumer Advocate Division. Reply comments were filed by the American Association of Railroads and the West Virginia Coal Association. At the public hearing, oral comments were presented by the West Virginia Mining and Reclamation

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Association, the United Small Coal Operators, the Brotherhood of Locomotive Engineers and the Brotherhood of Maintenance and Way Employees.

Upon review of the comments submitted, the Commission has modified the proposed rule as detailed in the order which promulgates and adopts final rules. Therefore, on October 13, 1987, the Commission adopted the rules hereinafter set forth as Rules and Regulations Governing Access by Rail Carriers to the Lines and Facilities of Another Rail Carrier and Rules and Regulations Governing Access by Shippers to the Lines and Facilities of A Rail Carrier as final rules to become effective sixty days after promulgation, in accordance with West Virginia Code §24-1-7.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
LEGISLATIVE RULE
CHAPTER 24-1
SERIES 18

TITLE: Rules and Regulations for Carrier Access to the Lines and
Facilities of Other Carriers.

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TITLE 150
WEST VIRGINIA LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION
CHAPTER 24-1
SERIES XVIII

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

1.0 GENERAL

CARRIER

1.1 SCOPE - This legislative rule establishes the procedures and requirements and the terms of compensation for a ~~shipper~~ to obtain access to the lines and facilities of a rail carrier 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 - October 13, 1987

1.4 EFFECTIVE DATE - December 12, 1987

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 a shipper access order.

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

(d) a confidentiality agreement meeting the standards of section 5.2.2 of these 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;

(e) contain traffic data covering the most recent three preceding years for each shipper originating or terminating traffic on the access facilities, and traffic data showing the volume

(f) be supported by sworn affidavits, including the affidavit of the accessed carrier's chief executive or chief operating 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 over the access facilities 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

takes exception to all or part of the accessing carrier's proposal, it shall propose specific alternatives to the access facilities specified by the accessing carrier, that provide at least the same extent and quality of access and at no greater cost as the facilities requested by the accessing carrier, within the limits of operational feasibility.

2.2.6 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 or chief operating 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.

2.2.7 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.

2.2.8 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.

2.2.9 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.

2.2.10 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.

2.2.11 The access authority shall contain

(a) a requirement that the accessing carrier obtain appropriate federal operating 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.

2.2.12 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 ACCESS CHARGES

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) the prudently incurred 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 nominal cost of capital in the railroad industry.

3.1.2 The accessed carrier shall be entitled to recover from the accessing carrier prudently incurred traffic-sensitive costs that are caused by the use of the access facilities by the accessing carrier.

3.1.3 Depreciation for track and facilities shall be recovered by a method that accurately reflects the reduction in useful life of the asset caused by use and the passage of time.

3.1.4 A cost shall be considered prudently incurred if it does not exceed the price that would be charged by a third party for performing substantially the service or goods (or both).

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 projected access charges on an annual basis will not exceed the accessed carrier's projected 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 projected 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 in whole or in part by the fault of the accessed carrier or its agents or employees in which event the financial responsibility shall be divided in accordance with the relative fault of the accessed and accessing carriers. The

indemnity shall extend to liabilities that arise under state and federal environmental legislation.

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

4.1.5 The accessed carrier shall bill the accessing carrier for access charges no more frequently than monthly, and the accessing carrier shall pay access charges properly due within thirty days of billing.

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.

4.2.4 The accessed carrier shall not require the accessing carrier to comply with work rules or other requirements not required by the Federal Railroad Administration or the Commission.

4.2.5 The accessed carrier shall not require that the trains of the accessing carrier be manned by employees of the accessed carrier.

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 The Commission's order shall 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.

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 or chief operating 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 or chief operating 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 Commission's order shall not relieve any party of the need to obtain any exemption from the Interstate Commerce Commission for any acts permitted or prohibited by the modification order where such approval (or exemption) requires federal regulatory approval prior to implementing the modification approved by the Commission.

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;

(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 imposed pursuant to the Interstate Commerce Act 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.

5.5.6 If the balance in the escrow account at the end of each 12-month period exceeds 110% of the labor protection expenses incurred during such period and allowed by the Commission, the Commission may order a reduction in the traffic-sensitive charge designed to cover labor protection costs. If the escrowed funds available are insufficient to cover the accessed carrier's labor protection expenses incurred in any 12 month period, the Commission may order an increase in the traffic-sensitive charge, if it finds that the accessed carrier has taken reasonable measures to minimize its labor protection expenses, and the shortfall may be recovered by the accessed carrier at the end of the following 12 month period.

5.5.7 Any agreement between the accessing and the accessed carrier with respect to labor protection payments, either in an access agreement or supplementary to access authority issued under these regulations shall supersede the provisions of this Section if the parties agree.