

Public Service Commission

Richard E. Hitt, General Counsel



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April 20, 1999

Judy Cooper, Director
Administrative Law Division
Secretary of State's Office
Building 1, Suite 157K
1900 Kanawha Blvd. E.
Charleston, WV 25305-0771

Re: Cable Television Rules

Dear Judy:

We weren't able to spend a great deal of time making changes to the existing cable television rules. Generally, all references to the Board in the existing rules should be changed to the Public Service Commission. All references to Chapter 5, Article 18, Section 1 et seq. of the West Virginia Code should be changed to West Virginia Code Section 24D-1-1 et seq. I have tried to make all these changes throughout the rules but I may have missed a couple of spots.

After these rules have been revised, I would appreciate a diskette that contains the rules. During the process of reviewing these rules, it is apparent to the Commission that we will need to engage in a fairly comprehensive rulemaking in the near future.

Sincerely,

A handwritten signature in cursive script that reads "Richard E. Hitt".

Richard E. Hitt
General Counsel

REH/cbd
Enclosure
rickmisc.cooper17.wpd

TITLE 150
PROCEDURAL RULE

PSC ~~CABLE TELEVISION ADVISORY BOARD~~

I have several suggested substantive changes for this series - will hold till later.

SERIES 28

ADMINISTRATIVE PROCEDURES FOR CONSUMER COMPLAINT RESOLUTION UNDER THE WEST VIRGINIA CABLE TELEVISION SYSTEMS ACT

Oct 7, '91

Ed Note: HB 2453 passed March 13, 1999 and effective June 11, 1999 authorizes the PSC to adopt rules concerning cable television. In §24D-1-23(b) the bill states: "The rules and regulations promulgated by the cable advisory board pursuant to repealed §5-18-1 and in effect on December 31, 1997, shall remain in effect and hereby become the rules and regulations of the commission." This was 187CSR3.

§150-28-1. General Provisions.

1.1. Scope. -- This rule shall apply to practice before the ~~West Virginia Cable Television Cable Advisory Board~~ *Commission* in contested cases brought through the Administrative Procedures Act under the West Virginia Cable Television Systems Act.

1.2. Authority. -- W. Va. Code ~~§§ 5-18-26(b) and 5-28-25(c) and (d)~~ *§ 24D-1-1 et seq*

1.3. Filing Date. -- June 11, 1999.

1.4. Effective Date. -- June 11, 1999.

1.5. Construction -- This rule shall be liberally construed to effectuate the purposes of the underlying statutory enactments.

(APA doesn't apply to PSC)
1.6. Application of Rules of Evidence -- The West Virginia Rules of Evidence shall apply to proceedings under this rule to the same extent that the Administrative Procedures Act requires such application unless otherwise provided.

1.7. Severability -- If any provision of any section, subsection, sentence, phrase, clause or provision of this rule shall be held to be unconstitutional or invalid, such unconstitutionality or invalidity shall not effect the application of such section, subsection, sentence, phrase, clause or provision of this rule to any other person or circumstance and, to that end, each and every sec-

tion, subsection, sentence, phrase, clause, or provision of this rule shall be severable from every other section, subsection, sentence, phrase, clause, or provision.

§150-28-2. Definitions.

2.1. Act shall mean the West Virginia Cable Television Systems Act.

2.2. "Answer" shall mean that response to the complaint which is filed by the respondent in conformity with these rules.

2.3. "Board" shall mean the duly appointed, qualified, and constituted Cable TV Advisory Board of the State of West Virginia or its designate.

2.4. "Complaint" shall mean that written statement which contains the requisite elements set forth in W. Va. Code ~~§5-18-25(b)~~ *§ 24D-1-1 et seq*

2.5. "Consent order" shall mean a final order of the ~~Cable TV Advisory Board~~ *Commission* which is entered into by the parties with their consent.

2.6. "Contested cases" shall mean proceedings in which the legal rights, duties, interests or privileges of specific parties arising under W. Va. Code 18-5; the legislative rules thereunder; or the pertinent franchise agreement are determined after a hearing under these rules subject to a subsequent

appeal to the proper Circuit Court by any party aggrieved by the outcome of such a hearing.

2.5 "Findings" shall mean the presiding officer's findings of fact and law, together with any proposed order and statement of rationale set forth in his decision.

2.6 "Motion" shall mean any application by either party for an order.

2.7 "Order" shall mean any order of the presiding officer, and "final order" shall mean the final dispositive order of the Board whether such order is adjudicated or entered by consent.

2.10 "Party" or "parties" shall mean the parties to the case, including any respondent, and any intervenor.

2.11 "Pleading" shall include any complaint, answer, motion, or other document filed in a contested case.

2.12 "Presiding officer" shall mean that designate of the Cable TV Advisory Board who is assigned to hear any evidence in any contested case, to make decisions in any contested case, and sign any orders in any contested case; the term includes any hearing examiner appointed or designated by the Board.

2.13 "Respondent" shall mean any cable operator who is alleged to have engaged in conduct violative of the act, the rules thereunder, the pertinent franchise agreement; or is otherwise engaged in conduct which the Board has authority to proscribe by order.

§150-28-3. Institution of Contested Cases.

3.1. A contested case shall commence upon the filing of a formal request in the form of a verified complaint with the Cable TV Advisory Board. The complaint shall contain the name(s) of the respondent(s), a short statement of facts supporting the complaint, a statement of the laws, rules, or franchise terms purported to be violated,

or cite to law giving the Board the authority to proscribe the conduct by an order, and the signature of the complainant or his or her counsel. In addition, the complainant must set forth the affirmative relief which he or she desires.

3.2. The complaint shall be numbered upon filing with the appropriate officer designated by the Cable TV Advisory Board for that purpose. Such numbers shall be in consecutive order commencing with the last two digits of the calendar year in which the contested case was commenced.

3.3. The complainant shall upon filing supply the Board with the identities and, if known, the addresses of the persons to be served. The Board upon receiving the filing shall promptly complete and serve upon respondent(s) a Notice designating a date not less than thirty days after service by which any respondent must answer, along with a statement that a failure to answer the attached complaint may result in a default order being entered, and the name and address of the complainant or his or her counsel upon whom such respondent shall make his answer.

3.4. If any person fails to answer the complaint within thirty days, or otherwise inhibits the proceedings, the presiding officer may upon motion by complainant or complainant's counsel deem that a decision by default shall be entered either with or without additional evidence, depending upon the matter, in conformity with the provisions of Rule 55 of the West Virginia Rules of Civil Procedure.

§150-28-4. Answer in Contested Cases.

4.1. Within thirty (30) days after being served, a respondent shall file an answer with the Board and the complainant or complainant's counsel unless an agreement has been reached with complaint counsel or the presiding officer, after considering a motion, grants additional time to answer the complaint. The answer shall contain admissions of or denials of facts as alleged within the complaint. However, if after reasonable investigation, respondent determines that he or she

has no knowledge of the facts as presented in the complaint, the respondent may answer accordingly. The answer shall be signed by the respondent or authorized officer or counsel thereof, be sworn to, and contain the signature and address of the attorney of record if such may be the case. In addition, the respondent may set forth any affirmative defenses or other defenses to the complaint if he may so desire.

4.2. In addition to or in lieu of any answer, a respondent may make any motion to dismiss, motion for more definite statement, or motion to strike. However, if the presiding officer postpones ruling on such motions or deny such motions, the respondent shall answer the complaint within ten (10) days after denial of such motion, or written notice from the presiding officer of such postponement.

4.3. Motions to dismiss shall include motions based upon (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; (3) failure to state a claim upon which relief may be granted; (4) res judicata; or (5) other motions available under Rule 12 of the West Virginia Rules of Civil Procedure. The presiding officer must rule on these motions before any final order can be entered by the Board, and may hold a preliminary hearing and issue a finding on any such motion prior to the hearing of the case-in-chief.

§150-28-5. Service of Complaint.

The complaint in any contested case may be served upon any respondent in a manner consistent with W. Va. Code §29A-7-2 or Rule 4 of the West Virginia Rules of Civil Procedure as existing at the time of institution of the action. As a general rule of practice the Board shall first attempt to make service by certified mail, return receipt requested.

§150-28-6. Style of Contested Case to be on Each Pleading.

Each pleading in any action shall contain a caption setting forth the agency before whom the

action is commenced, the caption of the case as presented in the complaint, a case number as assigned by the officer designated by the ~~Cable TV Advisory Board~~ ^{Commission} to maintain the record, and a designation of the type of pleading which is presented. Board employees may add such captions when they are not properly included by a party or petitioner.

§150-28-7. Filing of Pleadings in Contested Cases.

7.1. The original of any complaint, answer, motion, pleading, affidavit, or other matter shall be filed with with the Executive Secretary of the ~~Board~~ ^{Commission}, unless otherwise directed.

7.2. Each original item, other than the complaint, filed with the Executive Secretary of the ~~Board~~ ^{Commission} or other person designated to receive such filings shall contain a certificate of service certifying that a true copy of the item had been served upon the party or the party's counsel, the date of such service, the manner of service, and the signature of the party or the party's counsel obtaining such service. The complaint, together with the required notice, shall be served by the ~~Board~~ ^{Commission} upon the respondent.

7.3. When service of pleadings other than a complaint is obtained by any method other than personal delivery, three (3) additional days shall be allowed for delivery by that means.

§150-28-8. Amendment of Complaint or Answer.

8.1. A party may amend a pleading once as a matter of right at any time before a responsive pleading is served. If the pleading is one to which no responsive pleading is permitted, a party may amend it at any time within twenty (20) days after it is served. Otherwise a party may only amend a pleading after motion and hearing pursuant to Rule 10 below. Permission to amend shall be freely given so long as it permits presentation of the merits of the action, the adverse party is not prejudiced by the sudden assertion of the

amended pleading, and the adverse party is given sufficient time to meet the issue.

8.2. Any amendments to any complaint or answer shall relate back to the original date of institution of proceedings unless such relation back prejudices the rights of the other party to the action or the law otherwise will not permit such relation back.

8.3. When any amended complaint is properly allowed, filed and served the respondent shall answer such complaint within ten days, or within the time remaining for answer to the original pleading, whichever is longer.

§150-28-9. Scheduling Conference.

Not earlier than thirty days after the issues have been joined, the presiding officer may set a scheduling conference to set forth critical dates and times for certain proceedings and to set a tentative hearing date. The dates and times shall not be altered unless good cause is shown by the party seeking adjustment.

§150-28-10. Motion Practice.

10.1. Any person who files a motion to dismiss, a motion for more definite statement, motion to strike, or any other motion shall deliver to the presiding officer, the officer designated to maintain the record, and to all other parties who may be affected a copy of the motion and a memorandum in support of such motion which sets forth the factual and legal basis of such motion. Failure to provide a memorandum in support of the motion may result the denial of such motion without hearing.

10.2. Any person who may be affected by a motion by another party should file a response to such motion within fourteen (14) days after service of such motion by filing a memorandum setting forth such party's legal and factual position. Any failure to file a response or memorandum may be deemed a waiver of right to oppose

such motion and may result in the entry of the motion as prayed.

10.3. The presiding officer may rule on such motions with or without hearing. Setting a hearing on such motions shall be in the discretion of the presiding officer.

§150-28-11. Discovery.

11.1. Discovery in contested cases shall be conducted in the manner as provided for within the West Virginia Rules of Civil Procedure except as otherwise stated herein. The time periods for discovery as contained in the West Virginia Rules of Civil Procedure shall be shortened as follows:

11.1.1. To the extent that discovery requests are made in conjunction with the complaint or prior to the filing of a responsive pleading, the party shall have a period of forty-five (45) days to respond; and

11.1.2. To the extent that general discovery requests are made otherwise, the time periods shall be shortened to fifteen (15) days rather than the thirty (30) days as provided for in the West Virginia Rules of Civil Procedure.

11.1.3. Notwithstanding the prior positions, the presiding officer shall be empowered to shorten or enlarge time limitations upon a showing of good cause.

11.2. No respondent shall fail to respond to discovery on the basis of a pending motion to dismiss, motion to strike, or motion for more definite statement filed in response to a complaint unless a motion to quash the discovery or a motion for a protective order against the discovery has been filed.

11.3. No person may utilize a deposition upon written or oral questions in any proceeding as a substitute for actual testimony unless the presiding officer approves after motion.

11.4. Any party who fails to comply with discovery requests may be subject to an order of the presiding officer compelling discovery or, after such an order has been granted, sanctions which may include, but may not be limited to the following:

11.4.1. Dismissal of the action or entry of default judgment;

11.4.2. An order prohibiting the use of such evidence in the proceeding;

11.4.3. An order requiring the offending party to reimburse the aggrieved party for costs and expenses, including attorney fees if permitted under state law; or

11.4.4. Any other relief which may be just and proper under the circumstances.

§150-28-12. Issuance of Subpoena by ~~Cable TV~~ ^{Commission} ~~Advisory Board.~~

12.1. Any party in any contested case may seek a subpoena to compel the presence of any person or to compel the production of any evidence. The party requesting such a subpoena shall provide a written statement to the person designated by the ~~cable TV Advisory Board~~ ^{Commission} to maintain the record setting forth the number of subpoenas requested, the types of each subpoena requested, the date and location at which the person who is subject to the subpoena shall appear, and the name and address of such person if the party desires the ~~Cable TV Advisory Board~~ ^{Commission} to make service.

12.2. Any party other than the ~~Cable TV~~ ^{Commission} ~~Advisory Board~~ shall provide, upon request of a subpoena, a separate check payable to the person who is subject to the subpoena in an amount to reimburse such person who is subject to the subpoena for his or her expenses in an amount not greater than that amount which may be paid to witnesses in actions in the courts of this state, or alternatively, a sworn statement obligating the party to such payment.

§150-28-13. Prehearing Conference.

13.1. The presiding officer may conduct a prehearing conference before a hearing in any contested case. At such hearing, the presiding officer may: require the parties to brief him regarding the evidence and law concerning all relevant issues; rule on outstanding motions; and set forth other matters which may be necessary to dispose of prior to hearing.

13.2. The presiding officer may require briefs or memoranda from the parties setting forth any matters which the hearing officer deems relevant.

§150-28-14. Order by Default or Summary Judgment.

14.1. Any person who fails to answer any complaint may be subject to an order by default in accordance with the provisions of Rule 55 of the West Virginia Rules of Civil Procedure. A copy of the final order issued by the ~~Board~~ ^{Commission} shall be served upon the defaulting party and shall be final ten (10) days after such service.

14.2. After the issues have been joined and discovery has closed, the parties may file motions for summary judgment setting forth by affidavit, law, and evidence the reasons summary judgment must be granted. Grant of a summary judgment shall be reviewed by the ~~Board~~ ^{Commission} for issuance as a final order. The presiding officer and Board shall be guided by the provisions of Rule 56 of the West Virginia Rules of Civil Procedure in making their determination.

14.3. If summary judgment fails to resolve all issues, the presiding officer shall conduct a hearing and, after hearing evidence and argument, shall issue his findings, which findings shall include a decision as to all remaining issues to the complaint. Within ten (10) days after the entry of such findings and decision, the parties may file exceptions and ask for reconsideration. The presiding officer may schedule oral argument regarding the motion for reconsideration, may rule on the briefs filed in support of the motion, or may

deny such motion and affirm the findings and decision. Such findings, including the decision therein, shall be certified to the Board for final order upon ten days after its issuance or, if reconsideration is requested, immediately upon denial of reconsideration.

14.4. The presiding officer may set forth and recommend in his findings, and the Board may require in its final order, restitution to consumers who have been adversely affected by the actions of the respondent, provided the respondent received notice that such restitution was being sought.

§150-28-15. Intervention.

15.1. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

15.2. Upon timely application anyone may be permitted to intervene in an action: (1) when a state of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or may pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the presiding officer shall consider whether the intervention will unduly delay or prejudice and adjudication of the right of the original parties.

15.3. Intervention under sections 15.1 and 15.2 shall be by motion filed pursuant to sections 7 and 10 of this rule.

§150-28-16. Entry of Findings and Final Order.

16.1. Within fourteen (14) days of any hearing on a motion, the presiding officer shall issue his decision granting or denying the motion and set forth his findings supporting the decision.

16.2. Within thirty (30) days of the close of the hearing on the merits of the case, the presiding officer shall issue and report in writing his findings to the Board and the parties thereto. The findings shall state the various findings of fact and conclusions of law relied upon by the presiding officer and set forth a proposed order together with the reasons for the decision.

16.3. Within forty-five (45) days the Board shall adopt, reject, or modify the proposed order by issuance of a final order, which final order shall be in conformity with W. Va. Code §29A-5-3; or alternatively shall, by order, set aside the proposed order and schedule a hearing on the matter before the full Board.

16.4. The adoption of a final order or order to hold further hearings on the matter shall be by a majority of the Board, such majority being a majority of the Board's quorum when the decision is rendered at a public hearing. The names of each Board member and their position in support of, in opposition to, or not voting on, the adoption of such orders shall be noted thereon.

§150-28-17. Judicial Review.

17.1. Any party adversely affected by a final order of the Board in a contested case is entitled to judicial review or other relief as provided by W. Va. Code §29A-5-4.

§150-28-16. Arbitration Alternative.

(Contrary to 24-1-9 PSC law)

Contrary to 24-1-9 PSC law

Contrary to 24-5-1 and new legislation.

18.1. Parties may agree to waive their right to a hearing in conformity with W. Va. Code §29A- and instead elect to submit the matter to binding arbitration.

(PSC
Reams are not governed
by APA)

18.2. Appeal to the ~~Board~~ ^{Commission} from the arbitration decision must be made within thirty (30) days of the decision. The ~~Board~~ in its discretion may choose to grant or deny an appeal petition.

18.3. Any party adversely affected by a denial of an arbitration appeal, or by a final order of the Board concerning an arbitration decision is entitled to judicial review or other relief as provided by W. Va. Code §29A-5-4.