

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #5

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2006 JAN 23 P 1:15

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

AGENCY: Public Service Commission TITLE NUMBER: 150

CITE AUTHORITY: W. Va. Code 24F-1-1, et seq.

RULE TYPE: PROCEDURAL _____ INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____ _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

W. Va. Code, Sections 24-1-7 and 29A-1-3(b)

AMENDMENT TO AN EXISTING RULE: YES _____ NO _____

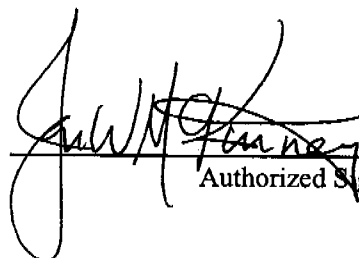
IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 28

TITLE OF RULE BEING PROPOSED: Rules to Govern Fees for Installatin of United States
Department of Veterans Affairs Grave Markers

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS March 24, 2006


Authorized Signature

#9.00

**TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION**

**SERIES 28
RULES TO GOVERN FEES FOR INSTALLATION OF
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS
GRAVE MARKERS**

OFFICE OF THE
SECRETARY OF STATE

2006 JAN 23 P 1:15

FILED

§150-28-1. General.

1.1. Scope. -- These Rules govern fees for installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Service veterans.

1.2. Authority. -- W. Va. Code §24F-1-1 et seq.

1.3. Filing Date. -- January 23, 2006.

1.4. Effective Date. March 24, 2006.

1.5. Purpose. -- These Rules establish maximum fees that may be charged by service providers, as defined herein, for the setting and installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Services veterans.

1.6. Application.

1.6.a. These Rules apply to service providers as defined herein.

1.6.b. If hardship results from the application of any rule or if unusual difficulty is involved in immediately complying with any rule, application may be made to the Commission for the modification of the rule or for temporary or permanent exemption from its provisions. Provided, that no application for modification or exemption will be considered by the Commission unless there is submitted therewith a full and complete justification for such action.

1.6.c. The Service Provider may make application for modification of these Rules. Grounds for modification may include, but are not limited to, changes in cost, market forces, price fluctuations, labor costs, and/or any other relevant market conditions.

1.7. Definitions.

1.7.a. Basic Installation - The permanent installation of a Veteran's Marker on a concrete base not to exceed 28 x 16 inches.

1.7.b. Granite Installation - The permanent installation of a Veteran's Marker on a granite slab with or without a concrete base, where the customer provides the granite, which granite shall not exceed 28 x 16 inches.

1.7.c. Granite Purchase Installation - The permanent installation of a Veteran's Marker mounted on a granite slab with or without a concrete base, where the granite is purchased by the customer from the Service Provider, which granite shall not exceed 28 x 16 inches and be of industry standard color.

1.7.d. Market Price - The price that is listed on a Service Provider's standard price list kept on record, as part of the normal course of business by a Service Provider at the date of the installation of the Veteran's Marker.

1.7.e. Customer - A person or entity requesting installation of a Veteran's Marker as described in 1.7.a. at the grave of a deceased United States Veteran.

1.7.f. Perpetual Care Fee - A Service Provider charge to a Customer to pay for perpetual care of an installed Veteran's Grave Marker.

1.7.g. Service Provider - Any cemetery, cemetery association, cemetery company, and perpetual care cemetery company, irrespective of how each may be defined in W. Va. Code §§ 35-5-1 et seq., 35-5A-1 et seq. and 35-5B-1 et seq., and any company that sets and installs memorial monument markers, that operates within the State of West Virginia, and provides Customers with installation and/or perpetual care of Veterans' Markers.

1.7.h. Veteran's Marker - A marker given to the deceased veteran by the United States Government free of charge. According to the United States Department of Veterans Affairs, the style chosen must be consistent with existing monuments at the place of burial.

This free marker shall consist of either of the following:

- i. A flat marker in granite, marble, or bronze
- ii. Upright headstones in either granite or marble.

§150-28-2. Prices.

2.1. Price.

2.1.a. Basic Installation - A Service Provider may charge a Customer no more than \$100.00 for Basic Installation of a Veteran's Marker.

2.1.b. Granite Installation - A Service Provider may charge a Customer no more than \$250.00 for Granite Installation of a Veteran's Marker.

2.1.c. Granite Purchase Installation - A Service Provider may charge a Customer no more than \$380.00 for Granite Purchase Installation of a Veteran's Marker including purchase of granite for a Veteran's Marker.

2.1.d. Extras - Those items requested by a Customer, in addition to Basic Installation, Granite Installation, and/or Granite Purchase Installation shall not be included in the maximum fee.

2.1.e. The maximum fee set forth herein does not preclude the addition of legally applicable incremental, revenue based taxes, which are submitted by a Service Provider to a federal, state or local taxing entity.

2.1.f. A Service Provider may not assess a separate or perpetual care fee for care of a Veteran's Marker over and above a perpetual care fee that would otherwise be applicable to a grave site.

§150-28-3. Discrimination.

3.1. Service Providers shall not discriminate against Customers requesting the installation of Veterans' Markers pursuant to these Rules by requesting terms and conditions of service, or additional fees, that would not be equally applicable to other customers.

§150-28-4. Procedure.

4.1.a. All Customer complaints shall be processed in accordance with the existing complaint procedures of the Public Service Commission.

4.1.b. Service Provider's Records - In order to assist the Commission and Commission Staff in the handling of these matters, it is necessary that the Service Provider maintain records that would assist in the resolution of these matters in a timely and orderly fashion. Service Provider should maintain copies of the standard price list for a period of two (2) years. Additionally, each standard price list should also clearly indicate on the document the effective dates for that particular list.

§150-28-5. Billing Statements.

5.1. A Service Provider must include on any contract or addendum thereto for installation of a Veteran's Marker, the following language prominently displayed in bold type:

The Pricing for the installation of Veterans' grave markers must comply with the Rules of the Public Service Commission. If you believe that these charges are in violation of those Rules, you may contact the Public Service Commission at the following address:

***Public Service Commission
201 Brooks Street
P. O. Box 812
Charleston, WV 25323***

**TITLE 150
LEGISLATIVE RULE
PUBLIC SERVICE COMMISSION**

**SERIES 28
RULES ~~FOR THE GOVERNMENT OF~~ TO GOVERN FEES FOR
INSTALLATION OF UNITED STATES DEPARTMENT
OF VETERANS AFFAIRS GRAVE MARKERS**

§150-4A ~~28-1.~~ 28-1. General.

1.1. Scope. -- These Rules govern fees for installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Service veterans.

1.2. Authority. -- W. Va. Code §24F-1-1 et seq.

1.3. Filing Date. -- ~~December 16, 2003.~~ January 23, 2006.

1.4. Effective Date. ~~February 17, 2004.~~ March 24, 2006.

1.5. Purpose. -- These Rules establish ~~price ceilings~~ maximum fees that may be charged by service providers, as defined herein, for the setting and installation of United States Department of Veterans Affairs Grave Markers provided free of charge to families of deceased United States Armed Services veterans.

1.6. Application.

1.6.a. These Rules apply to service providers as defined herein.

1.6.b. If hardship results from the application of any rule or if unusual difficulty is involved in immediately complying with any rule, application may be made to the Commission for the modification of the rule or for temporary or permanent exemption from its provisions. Provided, that no application for modification or exemption will be considered by the Commission unless there is submitted therewith a full and complete justification for such action.

1.6.c. The Service Provider may make application for modification of these Rules. Grounds for modification may include, but are not limited to, changes in cost, market forces, price fluctuations, labor costs, and/or any other relevant market conditions.

1.7. Definitions.

1.7.a. Basic Installation - The permanent installation of a Veteran's Marker on a concrete base ~~without a stone slab~~ not to exceed 28 x 16 inches.

1.7.b. Stone Granite Installation - The permanent installation of a Veteran's Marker on a stone granite slab with or without a concrete foundation base, where the Customer provides the stone slab granite, which granite shall not exceed 28 x 16 inches.

1.7.c. Stone Granite Purchase Installation - The permanent installation of a Veteran's Marker mounted on a stone granite slab; with or without a concrete foundation base, when where the stone slab granite is purchased by the Customer from the Service Provider, which granite shall not exceed 28 x 16 inches and be of industry standard color.

1.7.d. Market Price - The price that is listed on a Service Provider's standard price list kept on record, as part of the normal course of business by a Service Provider at the date of the installation of the Veteran's Marker.

~~1.7.d.~~ 1.7.e. Customer - The A person or entity requesting installation of a Veteran's Marker as described in 1.7.a. at the grave of a deceased United States Veteran.

~~1.7.e.~~ 1.7.f. Permanent Perpetual Care Fee - A Service Provider charge to a Customer to pay for perpetual care of an installed Veteran's Grave Marker.

~~1.7.f.~~ 1.7.g. Service Provider - Any cemetery, cemetery association, cemetery company, and perpetual care cemetery company, irrespective of how each may be defined in W. Va. Code §§ 35-5-1 et seq., 35-5A-1 et seq. and 35-5B-1 et seq., and any company that sets and installs memorial monument markers, that operates within the State of West Virginia, and provides Customers with installation and/or perpetual care of Veterans' Markers.

~~1.7.g. Stone Slab - A granite or marble slab measuring no more than 28" by 16" on its face, and 4" high.~~

1.7.h. Veteran's Marker - ~~means a 24" by 12" bronze grave marker provided by A~~ marker given to the deceased veteran by the United States Government free of charge. According to the United States Department of Veterans Affairs, the style chosen must be consistent with existing monuments at the place of burial. This free marker shall consist of either of the following:

- i. A flat marker in granite, marble, or bronze
- ii. Upright headstones in either granite or marble.

§150-4A 28-2. Prices.

2.1. ~~Price Ceilings~~ Price.

2.1.a. Basic Installation - A Service Provider may charge a Customer no more than ~~\$50.00~~ \$100.00 for Basic Installation of a Veteran's Marker.

2.1.b. ~~Stone Granite~~ Installation - A Service Provider may charge a Customer no more than ~~\$200.00~~ \$250.00 for ~~Stone Granite~~ Installation of a Veteran's Marker.

2.1.c. ~~Stone Granite~~ Purchase Installation - A Service Provider may charge a Customer no more than \$380.00 for ~~Stone Granite~~ Purchase Installation of a Veteran's Marker including purchase of ~~stone granite~~ for a Veteran's Marker.

~~2.1.d. Permanent Care Fee - For purposes of these rules, when a cemetery, cemetery association, cemetery company, or perpetual care company, does not charge a pre-paid perpetual care fee for all grave sites, the price ceilings set forth herein are deemed to include costs for perpetual care of Veterans' Markers. A Service Provider may not assess a separate or periodic permanent care fee for care of a Veteran's Marker over and above a permanent care fee that would otherwise be applicable for a grave site.~~

2.1.d. Extras - Those items requested by a Customer, in addition to Basic Installation, Granite Installation, and/or Granite Purchase Installation shall not be included in the maximum fee.

2.1.e. The ~~price ceilings~~ maximum fee set forth herein does not preclude the addition of legally applicable incremental, revenue based taxes, which are submitted by a Service Provider to a federal, state or local taxing entity.

2.1.f. A Service Provider may not assess a separate or perpetual care fee for care of a Veteran's Marker over and above a perpetual care fee that would otherwise be applicable to a grave site.

§150-4A ~~28~~-3. Discrimination.

3.1. Service Providers shall not discriminate against Customers requesting the installation of Veterans' Markers pursuant to these Rules by requesting terms and conditions of service, or additional fees, that would not be equally applicable to other customers.

§150-4A 28-4. Petitions for Relief. Procedure.

~~4.1. Any customer aggrieved by a Service Provider's alleged failure to comply with these Rules may file a signed petition requesting Commission review of the alleged non-compliance.~~

4.1.a. All Customer complaints shall be processed in accordance with the existing complaint procedures of the Public Service Commission.

4.1.b. Service Provider's Records - In order to assist the Commission and Commission Staff in the handling of these matters, it is necessary that the Service Provider maintain records that would assist in the resolution of these matters in a timely and orderly fashion. Service Provider should maintain copies of the standard price list for a period of two (2) years. Additionally, each standard price list should also clearly indicate on the document the effective dates for that particular list.

§150-28-5. Billing Statements.

5.1. A Service Provider must include on any contract or addendum thereto for installation of a Veteran's Marker, the following language prominently displayed in bold type:

The Pricing for the installation of Veterans' grave markers must comply with the Rules of the Public Service Commission. If you believe that these charges are in violation of those Rules, you may contact the Public Service Commission at the following address:

Public Service Commission
201 Brooks Street
P. O. Box 812
Charleston, WV 25323

**STATEMENT OF CIRCUMSTANCES WHICH
REQUIRE THE RULE**

On March 8, 2003, the West Virginia Legislature passed Senate Bill No. 494, codified as Chapter 24F of the West Virginia Code, authorizing the West Virginia Public Service Commission to regulate transactions among cemeteries, companies that set and install memorial head markers and veterans or their survivors concerning fees for setting United States Department of Veterans Affairs' grave markers at the graves of deceased veterans. This rulemaking is responsive to that legislation.

Previously adopted Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, 150 CSR 28, adopted by the Commission by order issued on December 16, 2003, never became final due to an appeal filed by one of the parties to the rulemaking proceeding. Following a remand order issued by the West Virginia Supreme Court on January 7, 2005, the Commission conducted further proceedings, and the attached rules resulted.



Public Service Commission

Richard E. Hitt, General Counsel

201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

Phone: (304) 340-0317
FAX: (304) 340-0372

January 23, 2006

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

Re: Series 28
Rules to Govern Fees for
Installation of United States
Department of Veterans Affairs
Grave Markers

Dear Judy:

Enclosed for filing is a copy of the Commission's final rules in the referenced series. Included is a fiscal note, a summary of the rule, Form No. 5, and the statement of circumstances.

In addition, a diskette has been enclosed containing the final rules in both the strike-through and underlined version as well as a clean version. If there are any problems with the submittal, please bring them to my attention immediately. Thank you for your consideration.

Sincerely,

Richard E. Hitt
General Counsel

REH/ljm

Enclosure

FISCAL NOTE

**P.S.C.
Series 28**

In the matter of a rulemaking to institute the Commission's Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, 150 C.S.R. 28.

I. OBJECTIVES OF THE RULE

The purpose of this rulemaking is to carry out the Commission's statutory duties pursuant to W.Va. Code 24F-1-1 et seq., and to comply with a remand order issued by the West Virginia Supreme Court of Appeals on January 7, 2005.

II. COST OF IMPLEMENTING THE PROPOSED RULE

There will be no significant implementation cost relating to this rulemaking for the State of West Virginia. The Commission does not anticipate additional costs to be incurred as a result of the rulemaking.

III. THE EFFECT THIS MEASURE WILL HAVE ON THE COSTS OR REVENUES OF STATE GOVERNMENT (Information required by fiscal notes for either house of the Legislature.)

This rulemaking will have no effect on the costs or revenues of state government.

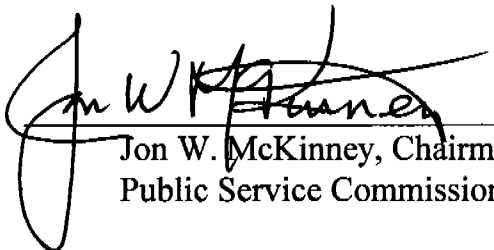
IV. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS

This rulemaking will have no significant economic impact on the state or its residents.

DATE: 1-20-06

AGENCY: Public Service
Commission

**SIGNATURE OF
AUTHORIZED REPRESENTATIVE**


Jon W. McKinney, Chairman
Public Service Commission

SUMMARY OF RULE

The Commission adopts Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, 150 C.S.R. 28. The new rules are responsive to Chapter 24F of the West Virginia Code, which authorized the West Virginia Public Service Commission to regulate transactions among cemeteries, companies that set and install memorial head markers and veterans or their survivors concerning fees for setting United States Department of Veterans Affairs grave markers at the graves of deceased veterans. The Rules set forth price ceilings on basic, granite, and granite purchase installation of Veterans' markers. The Rules prohibit the charging of a perpetual care fee for a Veteran's marker, over and above the perpetual care fee that is otherwise applicable for a grave site.

Previously adopted Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, 150 C.S.R. 28, adopted by the Commission by order issued on December 16, 2003, never became final due to an appeal filed by one of the parties to the rulemaking proceeding. Following a remand order issued by the West Virginia Supreme Court on January 7, 2005, the Commission conducted further proceedings, and the attached rules resulted.

**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 23rd day of January, 2006.

GENERAL ORDER NO. 257.00

IN THE MATTER OF A PROCEEDING FOR THE ADOPTION OF
RULES GOVERNING FEES FOR THE SETTING OF UNITED
STATES VETERANS AFFAIRS GRAVE MARKERS AND
RELATED TRANSACTIONS; SERIES 28

COMMISSION ORDER

By this Order, the Commission adopts final rules.

Background

On March 8, 2003, the West Virginia Legislature passed Senate Bill No. 494, codified as Chapter 24F of the *West Virginia Code*, authorizing the West Virginia Public Service Commission to regulate transactions among cemeteries, companies that set and install memorial head markers and veterans or their survivors concerning fees for setting United States Department of Veterans Affairs' grave markers at the graves of deceased veterans. Pursuant to this new authority, the Commission instituted this General Order on June 2, 2003.

The Commission held a hearing in this case on July 9, 2003, and heard comments and proposals from interested persons as to the procedures to be adopted by the Commission, if any, pursuant to Senate Bill No. 494.

Based on the testimony presented at the July 9, 2003, hearing, by Order issued October 7, 2003, the Commission issued proposed rules setting forth price ceilings for various installations of free United States Veterans' Markers. The Commission provided a comment period which expired on November 7, 2003. The following parties filed comments to the proposed rules: the West Virginia Cemetery and Funeral Association; Wallace Memorial Cemetery, Inc.; Stewart Enterprises, Inc.; Spring Hill Cemetery; Sears Monument Co.; Cornerstone Family Services, Inc.; Valley View Memorial; Senator Jon Blair Hunter;

Veteran Hershel Woody Williams; West Virginia Veterans Coalition; and the American Legion Department of West Virginia, Inc.

By Order issued December 16, 2003, the Commission approved final *Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers*, 150 C.S.R. 28.

On January 15, 2004, the West Virginia Cemetery & Funeral Association, Beverly Hills Memorial Gardens, Inc., Palm Memorial Gardens, Inc., Forest Lawn Cemetery, Inc., Mountain View Memorial Park, and Sears Monument Co., Inc. (collectively, the Association), filed an appeal with the West Virginia Supreme Court of Appeals. The issues on appeal were:

1. Whether the West Virginia Legislature properly and constitutionally delegated its authority in enacting *W. Va. Code § 24F-1-1, et seq.*
2. Whether the West Virginia Public Service Commission satisfied its due process requirements when it conducted one hearing and issued the December 16, 2003, Order, which such hearing was not noticed as the final hearing regarding the Commission's power granted it by virtue of *W. Va. Code § 24F-1-1*.
3. Whether the Commission's order and findings of fact conform with the lack of evidence presented at the hearing conducted.
4. Whether the Commission exceeded its Legislative mandate since *W. Va. Code § 24F-1-1*, as interpreted by the Commissioners, does not allow for the regulation of tangible items, but the Commission's order specifically regulates tangible items.

By Order issued January 15, 2004, the Supreme Court set the appeal for oral argument on March 31, 2004.

Following oral argument, by Order issued March 31, 2004, the Supreme Court granted the Association's petition for appeal, and established a briefing schedule.

On December 8, 2004, the Supreme Court of Appeals filed its decision affirming in part, reversing in part, and remanding the Commission's final order in this proceeding (hereinafter, the "Remand Order"). The Court found the statute to be constitutional, but agreed with the appellant that the Commission failed to follow procedure when creating its

rules. In so ruling, the Court noted that the one hearing held by the Commission was deficient in itself because “[n]o testimony was taken under oath. The appellants did not have the opportunity to cross-examine those who spoke at the hearing. . . the Commission did not consider the location of any specific cemetery, price fluctuations in materials, or the differences in labor costs between small and large cemeteries.” Order, p. 7-8. Furthermore, the Court found that the Commission failed to follow the statutory requirement that: “Any fees established under this section shall consider regional market forces and may consider classes of veterans’ markers or any other relevant conditions.” *W. Va. Code* § 24F-1-2 (2003).

The Court ordered that the Commission hold a new hearing within 180 days, and at that hearing consider relevant market forces, and any other considerations required by statute. The Court also ordered that the previously issued rules remain in effect while the Commission considers these issues on remand.

By Order issued January 7, 2005, the Court issued its Remand Order to the Commission.

By Order issued January 27, 2005, the Commission required interested parties to file statements listing the relevant market forces they believe the Commission must consider at the hearing and how the current rules should be amended. The Commission also established a procedural schedule. The Commission stated that following the hearing, the Commission would determine whether and how the rules should be amended. Any amendments to the rules would be filed as final rules and would be effective sixty (60) days after issuance.

By Order issued February 7, 2005, the Commission amended the procedural schedule and set a new hearing date of May 10, 2005.

Affidavits of publication evidencing statewide publication of the procedural schedule were filed.

A Commission hearing convened as scheduled in this matter on May 10, 2005. The two party participants at the hearing were the Association and Commission Staff. During the evidentiary portion of the hearing, counsel for the Association requested a recess for the purpose of discussing a possible resolution of this matter with Commission Staff. Following a brief recess, the parties made a joint motion that the hearing again be recessed pending the

filing by the parties of new proposed Rules. The Commission granted the motion, and it was agreed that the parties would file a draft of proposed rules on or before May 31, 2005.¹

By Order issued May 17, 2005, the Commission set a reconvened hearing date of June 30, 2005, for the purpose of hearing evidence in support of the draft proposed rules.

On June 10, 2005, the Association filed draft Rules. The draft Rules would have required customers to pay the cemeteries'/installers' various scheduled installation rates less a 15% discount. This proposal differed from the Commission's proposed rules which attempted to set a state-wide maximum rate. The June 10, 2005, filing did not indicate that Staff had agreed in advance with the proposed rules.

By Order issued June 24, 2005, the Commission required that any stipulation between the Association and Staff be filed by 4:00 p.m. on June 28, 2005, in advance of the June 30, 2005, hearing date. The Commission further advised the parties that at the June 30, 2005, hearing, the Commission expected the parties to show, by presentation of evidence, and/or argument of counsel, that the proposed rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, as well as the West Virginia Supreme Court's Remand Order in this case.

On June 28, 2005, Staff filed proposed, stipulated rules, agreed to between Staff and the Cemetery Association. These rules provided a 20% discount from market prices for marker installation.

On June 29, 2005, Senator Jon Blair Hunter, Chair, Senate Committee on the Military, filed a letter formally requesting a continuance of the hearing scheduled for the next day. Senator Hunter noted that he was instrumental in passage of Senate Bill No. 494, codified as Chapter 24F of the *West Virginia Code*, authorizing the West Virginia Public Service Commission to regulate transactions among cemeteries, companies that set and install memorial head markers and veterans or their survivors concerning fees for setting United States Department of Veterans Affairs' grave markers at the graves of deceased veterans. Senator Hunter opined that the Cemetery Associations' proposed rules overlooked the purpose of the legislation.

By Order issued June 29, 2005, the Commission granted Senator Hunter's request and continued the hearing generally until further Commission Order.

¹This filing date was later extended by Commission Order to June 10, 2005.

By Order issued July 5, 2005, the Commission required each person on the service list who intended to participate at the hearing to contact the Commission's Law Clerk to state such person's or party's availability on three potential hearing dates. The Commission stated that by further order, the Commission would schedule the hearing on the date that the majority of participants would be available.

By Order issued July 15, 2005, the Commission scheduled the continued hearing on August 16, 2005, beginning at 9:30 a.m. in Hearing Room No. 2, at the offices of the Public Service Commission. The Commission again reminded the parties of the Commission's requirement, stated in its June 24, 2005, Order, that at the hearing, proponents of the proposed rules filed with the Commission on June 28, 2005, were to show, by presentation of evidence, and/or argument of counsel, that the proposed rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, as well as the West Virginia Supreme Court's Remand Order in this case.

On July 18, 2005, Senator Hunter filed a letter commenting on, and opposing, the industry's proposal that the rules provide a percentage decrease from market prices set by individual cemeteries.

On August 1, 2005, the Office of the West Virginia Attorney General filed a Petition to Intervene on behalf of the West Virginia Division of Veterans Affairs. The Division asserted that it has a vital interest in this proceeding as it is the state agency overseeing the "John F. 'Jack' Bennett Fund" established by the Legislature to assist with the costs of veteran grave marker placement. Citing, *W. Va. Code* § 29-22A-10(9).

On August 5, 2005, the Association objected to the petition to intervene. The same day, the Association objected to the August 16, 2005, hearing date, advising of a conflict.

By Order issued August 11, 2005, the Commission, pursuant to Rule 12.6 of the Commission's *Rules of Practice and Procedure*, and citing the Division of Veterans Affairs statutory duties under *W. Va. Code* § 29-22A-10(9), granted the Division of Veterans Affairs' petition to intervene. The Commission also granted the Association's request to reset the hearing and set a new date of 1:00 p.m., Wednesday, August 31, 2005. Finally, the Commission ordered statewide publication of a notice regarding the new hearing date. Affidavits evidencing such publication are lodged in the case file.

A hearing in this matter convened on August 31, 2005, at 1:00 p.m. Present at the hearing were Commission Staff, represented by Cassius Toon, Esquire; Senator Jon Blair Hunter, Chairman of the Senate Committee on Military Affairs, represented by Jann Hoke, Esquire; the West Virginia Cemetery and Funeral Association, represented by Dennis R.

Vaughan, Jr. Esquire, and Troy Giatras, Esquire; and the West Virginia Division of Veterans Affairs, represented by Darlene Ratliff-Thomas, Esquire. One person made public comment at the hearing.

At the outset of the hearing, counsel for the Cemetery Association objected to the Commission taking testimony from either the West Virginia Division of Veterans Affairs, or Senator Jon Blair Hunter. Counsel noted that the Cemetery Association and Commission Staff had pre-filed direct testimony in advance of the Commission's May 10, 2005, hearing in this matter, and that the August 31, 2005, hearing was a continuation of that hearing. Neither Veterans Affairs, nor the Senator had pre-filed testimony. Further, the Senator had not requested, nor been granted, party status to this case. Tr. pp. 10-11, 13-15. Counsel also argued that the hearing following the Supreme Court remand of this case is a *de novo* hearing meaning that parties would be prohibited from merely arguing in favor of the previously adopted Commission rules. Tr. pp. 12-13.

The Commission concluded the hearing and indicated that it would issue a further procedural order. Tr. p. 19, 21.

By Order issued September 22, 2005, the Commission affirmed the identity of the parties to this case as Commission Staff, the Cemetery Association, and the Division of Veterans Affairs; determined that no additional parties would be permitted to intervene at that point in the case; scheduled a new hearing to occur on November 1, 2005; and required that pre-filed testimony be filed.

On October 5, 2005, the Cemetery Association and the Division of Veterans Affairs filed pre-filed testimony. The Cemetery Association's testimony listed the topics that would be addressed by their various witnesses, but did not state positions in narrative question and answer format.

On October 5, 2005, the Division of Veterans Affairs filed the pre-filed direct testimonies of Larry Lynch and The Honorable Jon Blair Hunter.

Also on October 5, 2005, the West Virginia Cemetery and Funeral Association filed what it styled as pre-filed direct testimony of Brent Sears, Timothy Beavers, Chad Robinson, Mike Ash, Ken Fec, Ruth Ann Walker, Bob Fells, Lajeana Aldredge, Harold Powell, Kaye Ballard, and James Aliff.

On October 19, 2005, counsel for the Division of Veterans Affairs filed a motion for enlargement of time to file pre-filed responsive testimony.

By Order issued October 20, 2005, the Commission determined that the pre-filed direct testimony of the Cemetery Association was insufficient as it was not in question and answer format, but rather presented an outline of topics to be addressed. The Commission canceled the November 1, 2005, hearing; required the Cemetery Association to file proper pre-filed direct testimony on October 31, 2005; allowed all parties to file responsive pre-filed testimony on November 16, 2005; and rescheduled the hearing to take place on December 5, 2005.

On October 28, 2005, the Cemetery Association filed a Motion for Extension of Time to File Pre-filed Direct Testimony and Enter Into an Agreed Procedural Order.

By Order issued October 31, 2005, the Commission granted the Cemetery Association's request for additional time to prepare pre-filed direct testimony in question and answer format, suspended the procedural schedule, and required that on or before November 4, 2005, the parties file an agreed upon procedural schedule, to include a proposed hearing date.

On November 4, 2005, the Cemetery Association attorney, Troy Giatras, filed a letter asking that the Commission consider moving the hearing to January 2006 in view of Staff Attorney, Cassius Toon's unavailability.

By Order issued October 31, 2005, the Commission declined to consider a January 2006 hearing date and established the following procedural schedule:

- November 23, 2005 - Cemetery Association to file pre-filed direct testimony in question and answer format.
- December 7, 2005 - Parties to file responsive pre-filed testimony in question and answer format.
- December 21, 2005,
9:30 a.m. - Hearing, Howard M. Cunningham hearing room, 201 Brooks Street, Charleston, West Virginia.

On November 23, 2005, the Cemetery Association filed an Objection to Having to File Pre-Filed Direct Testimony in a Question and Answer Format.

On November 23, 2005, the Cemetery Association submitted pre-filed direct testimony of LaJeana W. Aldredge; James Aliff; Michael Ash; Kaye Ballard; Timothy F. Beavers; Chad D. Robinson; and Brent W. Sears, in question and answer format.

On December 7, 2005, the Division of Veterans Affairs filed an Objection to the Association's direct testimony.

On December 7, 2005, the Cemetery Association submitted pre-filed responsive pre-filed testimony of Chad D. Robinson, responding to both Senator Jon Blair Hunter and Larry Linch.

On December 8, 2005, the West Virginia Veterans Coalition filed a question and answer document signed by Jacob N. Stafford, Past Chairman. This document was not filed by an attorney. As the West Virginia Veterans Coalition is not a party to this proceeding, the filing was docketed in this case as a public comment.²

On December 15, 2005, the Association filed an Objection to the Pre-filed Direct Testimony of Jacob N. Stafford.

Also on December 15, 2005, the Association filed a Response to the December 7, 2005, Division of Veterans Affairs' Objection to pre-filed testimony.

On December 19, 2005, the Division of Veterans Affairs filed a Motion to Accept the pre-filed testimony of Jacob N. Stafford, who could be called as a witness for Division of Veterans Affairs.

The hearing convened as scheduled on December 21, 2005. Cassius Toon, Esquire, appeared on behalf of Commission Staff, Darlene Ratliff-Thomas, Esquire, appeared on behalf of the West Virginia Division of Veterans Affairs, Troy Giatras, Esquire, and Dennis Vaughan, Jr., Esquire, appeared on behalf of the West Virginia Cemetery and Funeral Association.

At the outset of the hearing, the Commission heard the parties' preliminary motions. In response to a Motion by the Association to strike certain portions of Senator Jon Blair Hunter's testimony, the Commission ruled from the bench that the Senator could be called as a witness, but would not be permitted to testify as to legislative intent. Tr. p. 14. In

²Additional public comment was received prior to the December 21, 2005, hearing, including: 1) the December 13, 2005, filing of a copy of an agreement between Lawson Monument Co. and a Mrs. James S. Williams, relating to installation of a veterans marker was filed in this case; and 2) the December 15, 2005, filing of a letter from Ira S. Latimer, Jr., President of the Air Force Association.

response to a motion by the Association to strike portions of the testimony of Mr. Lynch, the Commission denied that motion. Tr. p. 26. The Commission denied a motion filed by the Division of Veterans Affairs to call Mr. Stafford as a witness, and determined that he could offer comments during the public comment portion of the hearing. Tr. p. 34-35. The Commission clarified that a filing received at the Commission from Mr. Lattimer was docketed as public comment. Tr. p. 36.

Following the preliminary motion phase of the hearing, the Commission asked the parties to summarize their positions in the case. During this portion of the hearing, in response to a question from counsel to the Association regarding the goals of the hearing, the Chairman clarified that the purpose of the hearing was to satisfy the statutory requirements of Chapter 24F of the *West Virginia Code* and the West Virginia Supreme Court Remand Order. Tr. p. 38; 44. Counsel to the Association stated that it believed the purpose of the hearing was to analyze only whether the proposed rules filed by the Association and Staff on June 28, 2005, met the statutory requirements of the *West Virginia Code* and the Remand Order. Tr. p. 39-42.

Following a short recess of the hearing, the parties informed the Commission that a new joint agreement of the issues had been reached among the parties. Tr. p. 46-47.

Chad D. Robinson who represents the Cemetery and Funeral Association in its government relations, was called as a witness to testify in support of a written proposed joint stipulation. Tr. p. 47-48; Joint Exh. No. 1. He summarized some of the particular rule sections included in the joint stipulation. Included in his summary were the definitions of a veterans marker found at Rule 1.7.h.; the three types of installation for which maximum prices would be set and the respective maximum prices found in Rule 2.1.; the prohibition against discrimination found in Rule 3.1.; the opportunity for a service provider to file for relief from the Commission if it is unduly burdened by the Rules, as found in Rule 1.6.b. and 1.6.c.; the requirements for record-keeping by service providers found in Rule 4.1.b.; and billing requirements found in Rule 5.1. Tr. p. 49 - 53.

Mr. Robinson testified that it was his opinion that the proposed jointly stipulated rules satisfy the requirements of *West Virginia Code* Chapter 24F, and the requirements of the West Virginia Supreme Court Remand Order in this case. Tr. p. 53-54.

Staff stated that it supported the jointly stipulated rules as entered into the record as Joint Exh. No. 1. Tr. p. 54. Counsel to the Division of Veterans Affairs also stated her support of the jointly stipulated rules. Tr. p. 55.

Mr. Robinson clarified that Rule 2.1.d. should indicate that the stated maximum fees include the mounting of the veterans marker, installation, and repair of any damages to a marker in perpetuity. Tr. p. 55-57. The parties agreed that this rule section should be amended, as reflected in Attachment A to this Order. Tr. p. 57-58. The parties further agreed that the words "maximum fee" in Rule 2.1.d. and throughout the rules, need not be capitalized, and agreed to amend the rules as attached hereto. Tr. p. 58-59.

Following a short recess, the parties presented the Commission with a signed stipulation attaching stipulated rules, which was entered into the record in lieu of the prior draft, as Joint Exh. No. 1. Tr. p. 60-61.

Following the parties' presentation of the stipulated rules, Mr. Don Kinard, from Putnam County, made a public comment expressing satisfaction that an agreement had been reached, and stating that families and wives of future deceased veterans will benefit from the Rules. He expressed dismay that the Rules cannot assist the families that were overcharged in the past.

Following closing remarks from the Chairman, the hearing was adjourned.

DISCUSSION

Upon review of the stipulated rules entered into the record of this proceeding as Joint Exhibit No. 1, and attached hereto as Attachment A, the Commission determines that the rules should be adopted as final by this Commission. The Commission met the West Virginia Supreme Court's requirement to convene a hearing within 180 days, to consider the matters outlined in the Court's Remand Order. The hearings convened since the Remand Order offered the opportunity to the parties to present testimony under oath, and to cross-examine the other parties' witnesses. The parties have stipulated, and the Commission agrees that the attached rules satisfactorily address the location of any specific cemetery, price fluctuations in materials, and differences in labor costs between small and large cemeteries. *See*, Remand Order, p. 7-8. The parties have stipulated, and the Commission agrees that the fees established by the attached rules consider regional market forces and all relevant conditions. *Id.*, citing, *W. Va. Code* § 24F-1-2 (2003). Furthermore, all parties have stipulated, and the Commission agrees, that the attached rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, and the West Virginia Supreme Court's Remand Order in this case.

Accordingly, the rules attached as Attachment A shall be adopted as final rules, effective sixty days from the date of this Order. Attachment B to this Order shows the changes from the rules adopted December 16, 2003, in a blackline and underscored version.

FINDINGS OF FACT

1. On December 8, 2004, the Supreme Court of Appeals filed its decision affirming in part, reversing in part, and remanding the Commission's final order in this proceeding. The Court found *West Virginia Code* Chapter 24F to be constitutional, but agreed with the appellant that the Commission failed to follow procedure when creating its rules.

2. The Court ordered that the Commission hold a new hearing within 180 days, and at that hearing consider relevant market forces, and any other considerations required by statute. The Commission was required to take testimony under oath and provide the parties with the opportunity to cross-examine witnesses. The Commission was to consider at hearing location of any specific cemetery, price fluctuations in materials, or the differences in labor costs between small and large cemeteries. Order, p. 7-8. The Court required the Commission to establish fees that take into consideration regional market forces and noted that the Commission could consider classes of veterans' markers or any other relevant conditions. *Id*; *W. Va. Code* § 24F-1-2 (2003).

3. The Court ordered that the previously issued rules remain in effect while the Commission considers these issues on remand. *Id*.

4. By Order issued January 7, 2005, the Court issued its Remand Order to the Commission.

5. The Commission issued procedural orders on January 27, 2005, and February 7, 2005. Affidavits of publication evidencing statewide publication of a hearing to be held on May 10, 2005, were filed.

6. A Commission hearing convened as scheduled in this matter on May 10, 2005. The two party participants at the hearing were the Association and Commission Staff. During the evidentiary portion of the hearing, counsel for the Association requested a recess for the purpose of discussing a possible resolution of this matter with Commission Staff. Following a brief recess, the parties made a joint motion that the hearing again be recessed pending the filing by the parties of new proposed Rules. The Commission granted the motion, and it was agreed that the parties would file a draft of proposed rules.

7. The Commission issued a procedural order on May 17, 2005, setting a reconvened hearing date of June 30, 2005.

8. On June 10, 2005, the Association filed draft Rules. The draft Rules would have required customers to pay the cemeteries'/installers' various scheduled installation rates less a 15% discount. The June 10, 2005, filing did not indicate that Staff had agreed in advance with the proposed rules.

9. By Order issued June 24, 2005, the Commission required that any stipulation between the Association and Staff be filed by 4:00 p.m. on June 28, 2005, in advance of the June 30, 2005, hearing date. The Commission further advised the parties that at the June 30, 2005, hearing, the Commission expected the parties to show, by presentation of evidence, and/or argument of counsel, that the proposed rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, as well as the West Virginia Supreme Court's Remand Order in this case.

10. On June 28, 2005, Staff filed proposed, stipulated rules, agreed to between Staff and the Cemetery Association. These rules provided a 20% discount from market prices for marker installation.

11. On June 29, 2005, Senator Jon Blair Hunter, Chair, Senate Committee on the Military, filed a letter formally requesting a continuance of the hearing scheduled for the next day.

12. By Order issued June 29, 2005, the Commission continued the hearing generally until further Commission Order.

13. By Order issued July 15, 2005, the Commission scheduled the continued hearing on August 16, 2005. The Commission again reminded the parties of the Commission's requirement, stated in its June 24, 2005, Order, that at the hearing, proponents of the proposed rules filed with the Commission on June 28, 2005, were to show, by presentation of evidence, and/or argument of counsel, that the proposed rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, as well as the West Virginia Supreme Court's Remand Order in this case.

14. The Division of Veterans Affairs intervened and was made a party to this proceeding. *See*, August 1, 2005, petition to intervene; August 11, 2005, Commission Order.

15. By Order issued August 11, 2005, the Commission rescheduled the hearing on August 31, 2005, and ordered statewide publication of a notice regarding the new hearing date. Affidavits evidencing such publication were subsequently filed.

16. The hearing convened as scheduled on August 31, 2005. Present at the hearing were Commission Staff, Senator Jon Blair Hunter; the West Virginia Cemetery and Funeral Association, and the West Virginia Division of Veterans Affairs. One person made public comment at the hearing. Following argument of counsel as to the admissibility of planned testimony, the Commission concluded the hearing and indicated that it would issue a further procedural order. Tr. p. 19, 21.

17. By Order issued September 22, 2005, the Commission affirmed the identity of the parties to this case as Commission Staff, the Cemetery Association, and the Division of Veterans Affairs; determined that no additional parties would be permitted to intervene at that point in the case; scheduled a new hearing to occur on November 1, 2005; and required that pre-filed testimony be filed.

18. Following the parties' filing of pre-filed testimony, the Commission, by Order issued October 20, 2005, determined that the pre-filed direct testimony of the Cemetery Association was insufficient as it was not in question and answer format, but rather presented an outline of topics to be addressed. The Commission canceled the November 1, 2005, hearing; required the Cemetery Association to file proper pre-filed direct testimony on October 31, 2005; and set a revised procedural schedule.

19. By Order issued October 31, 2005, the Commission granted the Cemetery Association's request for additional time to prepare pre-filed direct testimony in question and answer format and suspended the procedural schedule.

20. By Order issued October 31, 2005, the Commission established a procedural schedule ending with a hearing to be held on December 21, 2005.

21. The hearing convened as scheduled on December 21, 2005.

22. Following a short recess of the hearing, the parties informed the Commission that a new joint agreement of the issues had been reached among the parties. Tr. p. 46-47.

23. Chad D. Robinson who represents the Cemetery and Funeral Association in its government relations, was called as a witness to testify in support of a written proposed joint stipulation. Tr. p. 47-48; Joint Exh. No. 1. Mr. Robinson testified that it was his opinion that the proposed jointly stipulated rules satisfy the requirements of *West Virginia Code* Chapter 24F, and the requirements of the West Virginia Supreme Court Remand Order in this case. Tr. p. 53-54.

24. Staff stated that it supported the jointly stipulated rules as entered into the record as Joint Exhibit No. 1. Tr. p. 54. Counsel to the Division of Veterans Affairs also stated her support of the jointly stipulated rules. Tr. p. 55.

25. The Joint Exhibit No. 1. attached to the hearing transcript reflects all amendments to the proposed rules, agreed to by the parties during the December 21, 2005, hearing. Tr. p. 55-57; Tr. p. 57-58; Tr. p. 58-59; Tr. p. 60-61.

CONCLUSIONS OF LAW

1. Upon review of the stipulated rules entered into the record of this proceeding as Joint Exhibit No. 1, and as reproduced as Attachment A hereto, the Commission determines that the rules should be adopted as final.

2. The Commission met the West Virginia Supreme Court's requirement to convene a hearing within 180 days, to consider the matters outlined in the Court's Remand Order.

3. The hearings convened since the Remand Order offered the opportunity to the parties to present testimony under oath, and to cross-examine the other parties' witnesses.

4. The parties have stipulated, and the Commission agrees, that the attached rules satisfactorily address considerations such as location of any specific cemetery, price fluctuations in materials, and differences in labor costs between small and large cemeteries. *See*, Remand Order, p. 7-8.

5. The parties have stipulated, and the Commission agrees that the fees established by the attached rules consider regional market forces and all other relevant conditions. *Id.*, citing, *W. Va. Code* § 24F-1-2 (2003).

6. The parties have stipulated, and the Commission agrees, that the attached rules satisfy the statutory requirements of Chapter 24F of the *West Virginia Code*, and the West Virginia Supreme Court's Remand Order in this case.

7. The rules attached hereto as Attachment A should be adopted as final rules, effective sixty days from the date of this Order.

ORDER

IT IS THEREFORE ORDERED that the attached Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, 150 C.S.R. 28, attached hereto as Attachment A, are hereby adopted as final rules.


IT IS FURTHER ORDERED that the new Rules for the Government of Fees for Installation of United States Department of Veterans Affairs Grave Markers, shall be effective sixty days from the date of this Order, or on March 24, 2006.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this Order and Attachment B to all parties of record, all parties previously served in this proceeding, by United States mail, and upon Commission Staff by hand delivery.

IT IS FURTHER ORDERED that the Executive Secretary shall file a copy of Attachment A and Attachment B, together with the requisite forms, with the Office of the Secretary of State.

IT IS FURTHER ORDERED that this case is hereby resolved and shall be removed from the Commission's docket of active cases.

A True Copy, Teste:


Sandra Squire
Executive Secretary

JML/ljm
go257cp.wpd