

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
**KEN HECHLER**  
**ADMINISTRATIVE LAW DIVISION**

Form #7

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FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE June 11, 1987  
ADMINISTRATIVE LAW DIVISION

**NOTICE OF AN EMERGENCY RULE**

AGENCY: Blennerhassett Historical Park Comm. TITLE NUMBER: 181

CITE AUTHORITY: WV Code 29-8

EMERGENCY 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 FILED AS AN EMERGENCY: Series 1

TITLE OF RULE BEING FILED AS AN EMERGENCY: Rules Related to

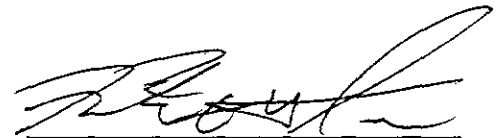
Blennerhassett Historical Park

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE UPON FILING.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

SEE ATTACHED

Use Additional Sheets If Necessary.



RICHARDSON & RICHARDSON  
LAWYERS

RICHARDSON BUILDING  
325 SEVENTH STREET  
P.O. Box 266

PARKERSBURG, W. VA. 26102

June 10, 1987

FILED

1987 JUN 11 PM 2:42

SECRETARY OF STATE

WILLIAM B. RICHARDSON  
WILLIAM B. RICHARDSON, JR.

TELEPHONE  
(304) 422-3574

The Honorable Ken Hechler,  
Secretary of State of W.Va.  
Capitol Building  
Charleston, WV 25305

RE: Emergency Rules - Blennerhassett  
Historical Park Commission

Dear Mr. Hechler:

Enclosed are Emergency Rules for the Blennerhassett Historical Park Commission. These rules are promulgated pursuant to W.Va. Code 29-8-3, 29-8-4 and 29A-3-15. These rules are necessary due to the following facts and circumstances.

A. Blennerhassett Historical Park Commission is charged by Chapter 29, Article 8 of the Code of West Virginia with responsibility and control in developing and maintaining educational, cultural, and recreational attractions at or near Blennerhassett Island, and is a public corporation with authority to own or operate by itself or in conjunction with any other public agency or private agency or any private person, firm or corporation, such facilities and equipment as it considers necessary or convenient for the implementation of its duties, in the proper and effective development of Blennerhassett Island and related locations in the County of Wood.

B. For the past seven (7) years the Blennerhassett Historical Park Commission has provided regularly scheduled excursions to Blennerhassett Island by license agreement with a private operator.

C. This year, another private carrier, not licensed and approved by the Blennerhassett Historical Park Commission has been attempting to provide regular service to Blennerhassett Historical Park.

D. The other carrier has not complied with reasonable requests to promote efficient use of limited landing space at Blennerhassett Island.

E. The other carrier has from time to time blocked landing by the licensed carrier, has broken down, and has delayed scheduled trips to and from Blennerhassett Historical Park by the regular licensed carrier.

F. It is necessary to provide for the safety, comfort, and convenience of passengers being attracted to Blennerhassett Island by the Blennerhassett Historical Park Commission by requiring that all commercial carriers be insured and duly certified by the U.S. Coast Guard.

G. To promote the development and use of all facilities and services of Blennerhassett Historical Park, it is necessary to establish reasonable rules and regulations for the use of docking or landing areas.

H. Within the past two (2) weeks, the licensed carrier struck another boat which was moored in the area reserved for the licensed carrier. To avoid congestion in this area and to provide for regular landings, these rules are necessary.

I. Over 100,000 visitors are expected to visit Blennerhassett Historical Park during the 1987 season. There are costly improvements and public property on the Island recently completed which need immediate rules to protect their value and thus enhance the public enjoyment and safety while on the Island.

J. Thus, in order to preserve the public health, safety, and welfare and to prevent substantial harm to the public interest in Blennerhassett Historical Park, the enclosed rules and regulations are filed as Emergency Rules

Very truly yours,



W.B. Richardson, Jr.  
Counsel for BHPC

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Dan Fowler, Executive Director for BHPC

P.S. These rules were adopted at the Commission's meeting held June 10, 1987.

RICHARDSON & RICHARDSON  
LAWYERS  
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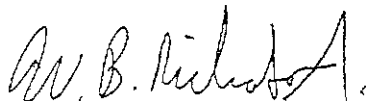
Ken Hechler  
Secretary of State  
Capitol Building  
Charleston, WV 25300

Re: Blennerhassett Historical  
Park Commission

Dear Mr. Hechler:

Enclosed for filing are written statement and Emergency Rules. For your information, I have also forwarded 15 copies of the same to the Legislative Rule Making Committee.

Yours very truly,



Richardson and Richardson

jeb

Enclosure

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RULES AND REGULATIONS RELATING TO BLENNERHASSETT  
HISTORICAL PARK

AUTHORITY: These rules are promulgated pursuant to W.Va. Code 29-8-3, 29-8-4 and 29A-3-15.

SECTION 1: General Regulations

1.01 - Use of Facilities - The Blennerhassett Historical Park Commission may reserve certain facilities or grounds at Blennerhassett Island, or certain days and times, for groups or individuals, and may collect fees for this purpose.

1.02 - Special Events or Celebrations - Special events, activities, or celebrations may be planned and performed on Blennerhassett Island with the approval of the Executive Director of the Blennerhassett Historical Park Commission.

1.03 - Docking or Landing of Watercraft - Various watercraft, boats, or vessels may dock or land on the shoreline of Blennerhassett Island in areas not marked as restricted. The Executive Director or his designated BHPC representative may require boats, vessels or vehicles to be moved or removed when docked or parked in restricted, unsafe, or otherwise undesirable locations.

1.04 - Responsibility - The Blennerhassett Historical Park Commission assumes no responsibility for lost, stolen or damaged goods, boats, or other property brought to Blennerhassett Island.

1.05 - Safety - Individuals and groups are required to confine their activities within normal and reasonable limits of safety.

1.06 - Evacuation - In certain emergency situations, the Blennerhassett Historical Park Commission with its employees or equipment may move or evacuate individuals from Blennerhassett Island, but assumes no risk in providing this service.

SECTION 2: General Prohibitions

2.01 - General Prohibitions - The following are prohibited activities at Blennerhassett Island:

- a. Digging or other subsurface disturbances or excavations;
- b. Collecting rocks, minerals, antiquities, artifacts, fossils, or other geological or cultural objects;
- c. Collecting or removing plant or animal specimens;
- d. Cutting or defacing trees, flowers, or other plant specimens;
- e. Defacing buildings, signs, or other objects;

- f. Removal or unauthorized use of BHPC property or equipment;
- g. Depositing litter, trash, food waste, or other refuse in other than provided containers;
- h. Affixing docks or other permanent or semi-permanent facilities to the Island without written authority;
- i. Trespassing in areas duly posted as restricted or entering grounds or facilities that are locked, closed, or designated as limiting access by days or times;
- j. Carrying or discharging of firearms, weapons, fireworks or explosives, or other dangerous substances;
- k. Hunting, trapping or other animal capture;
- l. Blocking designated public landing or docking areas;
- m. Interfering with tours, lectures, or other park activities;
- n. Selling of foods or commodities without specific written authority of the director of the BHPC;
- o. Hawking, peddling, soliciting, begging, advertising, or carrying on of any business or commercial enterprise without written permission of the director of the Blennerhassett Historical Park Commission;
- p. Fighting, drunken, or disorderly behavior;
- q. Creating loud or excessive noises, demonstrations, or disturbances;
- r. Operating motor-driven vehicles (trail bikes, motor bikes, snowmobiles, etc.).

### SECTION 3 - SPECIAL REGULATIONS

3.01 - Fires - Fires may be lighted only in fireplaces or grates as provided or in areas designated by the director or his designated representative. Fires must be completely extinguished before leaving park grounds.

3.02 - Pets - Dogs and other domestic pets may be brought to Blennerhassett Island: Provided, that they shall be kept on a leash not to exceed ten feet in length; and provided further that pets are prohibited inside park buildings.

3.03 - Abandoned Property - the Blennerhassett Historical Park Commission assumes no responsibility for watercraft or other personal property and if such property is abandoned or left unattended for a period in excess of forty-eight (48) hours, the BHPC may remove such property from the area and dispose of it according to law.

3.04 - Camping - Tent camping may be permitted in designated areas only and only by written permission.

3.05 - Swimming and skiing - Swimming or water skiing at or from Blennerhassett Island is permitted only in designated areas, but the BHPC assumes no responsibility or risk to individuals engaging in such activities.

3.06 - Closing or Evacuation - If, in the judgment of the director, a condition exists which requires that Blennerhassett Island be closed or that all persons should be evacuated from the Island, all personnel and persons will cooperate and abide by the director's order.

#### SECTION 4 - Transportation

4.01 - Only Commercial passenger boats operating under a written agreement with the Blennerhassett Historical Park Commission will be permitted to make regular scheduled excursion trips to Blennerhassett Island.

4.02 - Commercial carriers involved in the carriage of persons to Blennerhassett Island must have all boats (barge, tow boat, etc.) certified and inspected by the U.S. Coast Guard.

4.03 - The Blennerhassett Historical Park Commission may limit the number of carriers conducting regularly scheduled trips to the Blennerhassett Island.

4.04 - Any carriers desiring to bring a chartered party to Blennerhassett Historical Park (Blennerhassett Island) shall give not less than twenty-four (24) hours advance notice to the Executive Director or his designated representative

4.05 - Unless otherwise permitted by the Executive Director, or his designee, any charter conducted during the time regular scheduled service by the Blennerhassett Historical Park Commission is operating shall not land on the north side of Blennerhassett Island in the restricted area reserved for the regular service.

4.06 - The Executive Director or his designee shall have authority and power to assign a reasonable landing area for all commercial carriers operating charter service to Blennerhassett Island.

4.07 - Any commercial boat intending to land at Blennerhassett Island and discharge passengers shall furnish upon request proof of liability insurance in the minimum amount of one million dollars (\$1,000,000.00).

4.08 - The Executive director may, at his discretion, revoke the privilege of any commercial passenger carrier to land at Blennerhassett Island if there exists a safety hazard or potential for public harm, harm to Blennerhassett Historical Park, or other conditions that adversely affect public use, development or maintenance or operation of Blennerhassett Historical Park on Blennerhassett Island.

4.09 - The Executive Director shall have power to cause all boats of every description to move to or lay in such manner and position at any of the public landings of Blennerhassett Island, as in his discretion he believes best calculated for the convenience of all boats laying at or near such landing. He may, at his discretion, order off and cause, rafts and other watercraft, to make room for the convenient landing of any boat, barge, or other watercraft.

SECTION 5:

5.01 - Breach of Rules and Regulations - Any person may be evicted from Blennerhassett Island for any breach of the rules and regulations herein set forth or for the breach of any other rule or regulation which may be in effect. All rentals, fees or charges paid shall be forfeited in the event of eviction.

5.02 - Responsibility - It is the responsibility and duty of Blennerhassett Historical Park Commission employees and caretakers to enforce these rules and regulations and to advise the director of the BHPC of any violations and actions taken.

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 17th day of July, 1987.

CASE NO. 86-300-F-CN

RIVER CITY TOURS, INC.,  
a corporation,  
Parkersburg, Wood County.

Application for a certificate  
of convenience and necessity to  
operate a charter ferry or boat  
service on the Ohio River and its  
tributaries, Wood County.

CASE NO. 86-301-F-CN

R. C. "HECK" HECKERT AUTO, INC.,  
a corporation,  
Parkersburg, Wood County.

Application for a certificate  
of convenience and necessity to  
operate a charter or ferry boat  
service on the Ohio River and its  
tributaries, Wood County.

CASE NO. 86-385-F-CN

THE BLENNERHASSETT HISTORICAL PARK COMMISSION;  
and RUBLE'S STERNWHEELERS, INC., a corporation,  
Parkersburg, Wood County.

Application for a certificate  
of convenience and necessity to  
operate a charter or ferry boat  
at Parkersburg, Wood County.

CASE NO. 86-391-F-C

R. C. "HECK" HECKERT AUTO, INC.,  
a corporation,  
Parkersburg, Wood County,

Complainant,

v.

RUBLE'S STERNWHEELERS, INC.,  
a corporation,

Defendant.

COMMISSION ORDER

On June 2, 1986, River City Tours, Inc. (River City), and R. C. "Heck" Heckert Auto, Inc. (Heckert), filed applications for certificates of convenience and necessity to operate charter or ferry boat services on the Ohio River and its tributaries, Wood County. These applications were designated respectively as Case Nos. 86-300-F-CN and 86-301-F-CN.

On July 3, 1986, the Blennerhassett Historical Park Commission (BHPC), a governmental agency of the State of West Virginia, and Ruble's Sternwheelers, Inc. (Ruble's), filed petitions to intervene in protest of Heckert and River City's applications. Ruble's and BHPC also filed a motion to dismiss the certificate applications in Case Nos. 86-300-F-CN and 86-301-F-CN on the basis that the Commission should not regulate this type of charter and ferry boat service.

Pursuant to §29-8-1 of the West Virginia Code, the Blennerhassett Historical Park Commission is responsible for the development of educational, cultural and recreational attractions associated with historical events which occurred on or near Blennerhassett Island. After receiving information from certain members of the Commission Staff that the Commission's jurisdiction would not extend to the proposed ferry boat operations between the mainland and Blennerhassett Island, the BHPC and Ruble's entered into a contract dated April 1, 1986, pursuant to BHPC's authority under §29-8-3 of the Code, to allow Ruble's to be the exclusive entity to provide charter or ferry boat service to Blennerhassett Island.

On July 8, 1986, the applicants filed a motion to deny intervenor status to BHPC and Ruble's in the certificate cases.

On July 9, 1986, Blennerhassett Historical Park Commission and Ruble's Sternwheelers, Inc., filed a joint application for a certificate of convenience and necessity to operate a charter or ferry boat service

from points and places in Parkersburg, Wood County, to points and places at Blennerhassett Island. This case was designated as Case No. 86-385-F-CN.

Heckert filed a formal complaint on July 10, 1986, against Ruble's which alleged that Ruble's had violated the laws of the State of West Virginia by engaging in the transportation of passengers in ferry boat service between Parkersburg, West Virginia, and Blennerhassett Island without a certificate of convenience and necessity from the Public Service Commission. On July 18, 1986, River City and Heckert filed a motion which requested that the applicants be granted temporary authority to provide ferry boat service from Parkersburg to Blennerhassett Island.

On July 16, 1986, the Commission's Hearing Examiner entered an order, in Case Nos. 86-300-F-CN and 86-301-F-CN, in which it was determined that the Commission had jurisdiction over the proposed ferry boat and charter operations. The Hearing Examiner granted BHPC's intervention since it has a legitimate interest in any proceeding involving an applicant who proposes to provide ferry boat service to Blennerhassett Island. However, since Ruble's had not obtained a certificate of public convenience and necessity to provide ferry boat service to Blennerhassett Island, the Hearing Examiner determined it would be unfair to grant Ruble's intervenor status. Since the requested authority to provide ferry service to Blennerhassett Island was protested, the Hearing Examiner granted the requested certificates to River City and Heckert to provide charter boat service from Parkersburg, West Virginia and to provide ferry boat service to points and places in West Virginia, other than Blennerhassett Island, from Parkersburg, West Virginia. The Hearing Examiner found that this matter should proceed on the limited issue concerning whether the

applicant should be granted authority to provide ferry boat service to Blennerhassett Island.

By order entered on July 21, 1986, the Hearing Examiner consolidated the three certificate cases and the complaint case for hearing since all cases involved the same issue. All applicants were granted temporary authority to provide service to Blennerhassett Island, pending a final decision in the consolidated cases.

On July 25, 1986, the Hearing Examiner entered a further order which noted that since River City and Heckert had already been granted permanent authority to provide charter service to points and places other than Blennerhassett Island, Ruble's would be granted similar temporary authority. The order also allowed the parties to file petitions for reconsideration of the July 16, July 21, and July 25, 1986, orders by August 8, 1986. By order entered on August 7, 1986, the Hearing Examiner extended the time for filing petitions for reconsideration to the above-mentioned orders until August 25, 1986.

On August 25, 1986, BHPC and Ruble's filed a petition for reopening and rehearing of the July 16, 1986 decision.

The Commission entered an order on October 14, 1986, in which it was determined: (1) that the Hearing Examiner's July 16, 1986 denial of intervenor status to Ruble's should be reversed; and (2) that further hearings in the consolidated cases should be conducted on Thursday, November 13, 1986, in Parkersburg, and at those hearings, all parties of record should be allowed an opportunity to present oral argument on the Commission's jurisdiction over the various proposed operations.

By order entered on November 10, 1986, the hearings scheduled on Thursday, November 13, 1986, for these consolidated cases were cancelled, to be rescheduled at a later date by further order. By order entered on

December 12, 1986, the hearings in the consolidated cases were rescheduled to commence on Friday, January 23, 1987. As a result of hazardous weather conditions, the hearing was cancelled and the Commission entered an order on February 3, 1987, rescheduling the hearing to commence on Thursday, April 2, 1987.

The hearing was held as scheduled on April 2, 1987 in the Municipal Building, Parkersburg, West Virginia. Thomas N. Hanna appeared on behalf of River City and Heckert. The BHPC was represented by William B. Richardson and George Zivkovich appeared on behalf of Ruble's. The Commission Staff was represented by Franklin Crabtree, Director of the Transportation Division. The Commission heard testimony from public witnesses during the hearing and also received oral arguments from the parties with respect to the jurisdictional issue. At the conclusion of the hearing, the Commission established a procedural schedule in which simultaneous initial briefs were to be submitted to the Commission by the close of business on April 24, 1987, and simultaneous reply briefs were to be received by the close of business on May 8, 1987.

On April 30, 1987, River City filed a complaint against BHPC and Ruble's, designated Case No. 87-243-F-C, alleging that the defendants intend to prevent regularly scheduled ferry boat service to the island.

By letter filed May 8, 1987, River City withdrew its complaint. The Commission entered an order on May 15, 1987, dismissing complaint Case No. 87-243-F-C without prejudice and removed it from the Commission's open docket.

On May 11, 1987, the Commission received a letter from Ruble's requesting that its tariff be amended by adding a provision allowing charter service rates to be negotiated pursuant to its temporary

authority. River City and Heckert have similar provisions for charter service pursuant to their temporary authority.

On June 1, 1987, River City filed a formal complaint against BHPC and Ruble's, designated as Case No. 87-338-F-C, alleging that the defendant has been operating its ferry boats between Parkersburg and Blennerhassett Island every half hour, contrary to its advertised schedule of providing service every hour. As a result of the alleged schedule change, the complainant asserts that the defendant has interfered with its service and has denied docking facilities. The complainant also requested that the Commission grant it interim relief and issue an order requiring the defendant to immediately cease and desist from providing ferry boat service to Blennerhassett Island on the half hour and to conform to its advertised schedule.

By order entered on June 10, 1987, the Commission approved Ruble's request to amend its charter provision, consistent with the negotiated charter provisions approved for the other two ferry services pursuant to their temporary authority.

On June 11, 1987, BHPC and Ruble's filed an answer to the June 1, 1987 complaint, Case No. 87-338-F-C. The defendants assert that as a result of the complainant's mechanical failures of its boats and the complainant's inability to comply with its schedule, that the defendants have suffered irreparable economic harm through loss of revenue and the public interest has suffered as well. The defendants request that the Commission dismiss the complaint and that the complainant's motion for interim relief be denied.

River City filed a formal complaint against BHPC on June 23, 1987, designated Case No. 87-385-F-C. River City alleges that BHPC filed, on or about June 4, 1987, Emergency Rules and Regulations Relating to

Blennerhassett Historical Park and that these rules usurp the exclusive power of the Public Service Commission to regulate public utilities within its jurisdiction.

On July 3, 1987, BHPC answered River City's June 23, 1987 complaint. BHPC maintains that pursuant to §§29-8-3(13), 29-8-3(17) and 29-8-5, it is authorized to promulgate rules and regulations for the proper development of Blennerhassett Island. Therefore, BHPC requests that the Commission dismiss the complaint.

On July 3, 1987, BHPC and Ruble's filed a formal complaint against River City and Heckert, designated Case No. 87-413-F-C, alleging that the defendants are not operating pursuant to their advertised schedules and as a result, their late departures and arrivals are causing delays to Ruble's. Furthermore, the complainants allege that River City's unreliable service and mechanical difficulties have required Ruble's services to either tow River City's sternwheeler or transport River City's passengers. The complainants request that the Commission terminate the temporary authority of River City and Heckert to transport hourly passengers to Blennerhassett Island.

River City and Heckert filed a motion for an extension of time in which to file an answer in Case No. 87-413-F-C. On July 9, 1987, the Commission granted the petitioners an extension of time in which to file an answer until July 13, 1987.

On July 13, 1987, River City and Heckert filed an answer to the complaint in Case In. 87-413-F-C.

#### DISCUSSION

After careful consideration of the record in this case, the oral

arguments set forth at the April 2, 1987 hearing, the numerous complaints and answers filed, and the briefs submitted by the parties, the Commission has determined that the ferry boat services proposed by River City, Heckert and Ruble's are subject to the jurisdiction of the Public Service Commission.

Pursuant to §24-2-1 of the West Virginia Code, the jurisdiction of the Public Service Commission extends to the common carriage of passengers or goods by ferry. The statute, however, does not provide a definition for the word "ferry" and each party to this proceeding cite various definitions for the term "ferry" in their respective briefs.

River City and Heckert cite a definition of "ferry" as set forth in a Virginia case, Chesapeake Ferry Company v. Hampton Road Transportation Company, 133 S.E. 561, 145 Va. 28, wherein the Court held that "a ferry, both in common and legal parlance, is but the continuance of highway from one side of the water over which it passes to the other side, or but the substitute for the ordinary bridge, and is for the accommodation of the public generally". River City and Heckert argue that the proposed ferry service is merely a substitute for a bridge. Furthermore, the applicants argue that the proposed service is clearly distinguishable from the service provided by other sternwheelers in West Virginia, such as the P. A. Denny, Camden Queen and Valley Voyager, in that these boats are not substitutes for bridges and do not transport passengers or property from one side of the water to the other. River City and Heckert emphasize that the proposed service has all the characteristics of a ferry such as the type of boat used, the regular schedule, the charging of a fare or toll, the use of public facilities at both ends of the trip, the distance traveled, the availability of the service to the general public and the fact that the public has no other means of access to the land. River City

and Heckert urge the Commission to enter an order finding that the proposed transportation of passengers by sternwheel boat between Parkersburg and Blennerhassett Island is subject to the Commission's jurisdiction.

BHPC and Ruble's contend that the boats leave from Point Park to go to Blennerhassett Island solely for amusement or recreational purposes (Tr. pp. 41, 54). BHPC and Ruble's emphasize that the proposed transportation is not essential to the welfare of the public and since there is no public interest, there can be no regulation.

The Commission Staff argues that the services proposed by the applicants in this proceeding appear to consist of excursions or pleasure boat rides, rather than the common carriage of passengers or goods for the purpose of transportation. Staff maintains that the passengers on these vessels are traveling for the purpose of recreation or entertainment and are not using these services because they are the only means of continuing a trip between two points. However, Staff submits that if the Commission asserts jurisdiction over these services, it should confine its act of supervision in this area to safety and financial responsibility.

The Commission finds that the ferry boat services provided by the applicants pursuant to their temporary authority are within the Commission's regulatory jurisdiction. In determining whether these services represent ferry services, the Commission considered the following factors: (1) the character of the service rendered; (2) the length of the trip; (3) the places or localities served; (4) the extent to which service to passengers is emphasized; (5) the extent to which its use is necessitated by lack of land transportation; and (6) the manner in which the trips of the vessels are made. Canadian Pacific Ry. v. United States, 73 F.2d, 831 (1934); Puget Sound Navigation Company v. United States, 107

F.2d, 73 (1939); Alaska Steamship Company v. Federal Maritime Commission, 399 F.2d, 623, 627 (1968). The Commission recognizes that a ferry, in its ordinary sense, has been defined as a continuation of a highway from one side of the water over which it passes to the other side, or a substitute for a bridge, and is for the accommodation of the public generally. Savage Trucking Line v. Commonwealth, 65 S.E.2d 510, 513, 193 Va. 237 (1952).

The passengers are using the applicants' ferry service because it is the only means of reaching Blennerhassett Island. The use of a ferry boat is necessitated by the lack of land transportation between the mainland and Blennerhassett Island. The ferry service is operated pursuant to an advertised schedule of departures and arrivals, for the sole purpose of transporting passengers for a short distance to and from Blennerhassett Island. The applicants' proposed ferry service has all of the established characteristics of a ferry. The legislature, by including ferries in §24-2-1 of the Code, intended that ferries should be operated as a public utility, subject to control as to the reasonableness of rates and the adequacy of service in the same manner as other common carriers of passengers. Since the proposed boat service does constitute a ferry, pursuant to the provisions of §24-2-1 of the West Virginia Code, it will be subject to the provisions of Commission regulation as to safety, service and rates.

With respect to the charter boat service, the Commission finds that this service is also subject to regulation. The charter boat service is an extension of the applicants' ferry utility and it is necessary for the Commission to regulate this service consistent with the public interest. Pursuant to §24A-5-4, when a motor carrier proposes to lease, it must apply to the Commission for such authority. Since the ferry utilities are

actually leasing their vessels temporarily as a charter service, it logically follows that this service will also require certificated authority from the Commission. Therefore, the charter services will be subject to Commission regulation as to safety, service and rates.

Vessels in West Virginia such as the P. A. Denny, Camden Queen and Valley Voyager are not subject to regulation by the Commission. A sternwheeler, such as the P. A. Denny, is not a necessary public service nor does it affect the public interest. The use of the P. A. Denny is not necessitated by the lack of land transportation nor does it operate as a substitute for a bridge for the purpose of transporting passengers from one side of a body of water to the other. The P. A. Denny is a commercial pleasure boat which operates solely for the purpose of amusement or entertainment. Since the operation of such a vessel is not essential to the public interest, the Commission does not assert jurisdiction over such operations.

Ruble's, River City and Heckert will be required to obtain certificates of convenience and necessity to operate ferry and charter boat services from Parkersburg, West Virginia to Blennerhassett Island. The applicants will be required to demonstrate need and fitness for regular ferry service and charter service. Since the applications of Ruble's, River City and Heckert are pending before the Commission at this time, the Commission has determined that the certificate applications should be remanded to the Hearing Examiner's Division, for hearing and further disposition. Moreover, the complaint cases, Case Nos. 87-338-F-C, 87-385-F-C and 87-413-F-C, which stem from this proceeding shall be consolidated with the certificate cases since the matters raised in the complaints are interrelated with the issues of the certificate

cases. The Commission finds that administrative efficiency will be served by adjudicating these matters jointly.

The applicants are on notice that the temporary authority pursuant to which each carrier is operating may be revoked by the Administrative Law Judge upon proper findings and conclusions.

#### FINDINGS OF FACT

1. A ferry, in its ordinary sense, has been defined as a continuation of a highway from one side of the water over which it passes to the other side, or a substitute for a bridge, and is for the accommodation of the public generally. Savage Trucking Line v. Commonwealth, 65 S.E.2d 510, 513, 193 Va. 237 (1952).

2. Passengers use the applicants' ferry service because it is the only means of reaching Blennerhassett Island.

3. The use of a ferry boat is necessitated by the lack of land transportation between Parkersburg and Blennerhassett Island.

4. The ferry service is operated pursuant to an advertised schedule of departures and arrivals, for the sole purpose of transporting passengers for a short distance to and from Blennerhassett Island.

5. The charter boat service is an extension of the applicants' ferry utility.

#### CONCLUSIONS OF LAW

1. The legislature, by including ferries in 24-2-1 of the Code, intended that ferries should be operated as a public utility, subject to control as to the reasonableness of rates and adequacy of service in the same manner as other common carriers of passengers.

2. Since the proposed boat service has all of the established characteristics of a ferry pursuant to the provisions of §24-2-1 of the

Code, it will be subject to the provisions of Commission regulation as to safety, service and rates.

3. Since the charter boat service is an extension of the applicants' ferry utility, it is necessary for the Commission to regulate this service consistent with the public interest as to safety, service and rates.

4. Ruble's, River City and Heckert will be required to obtain certificates of convenience and necessity to operate charter and ferry boat services from Parkersburg, West Virginia to Blennerhassett Island.

5. Since the applications of Ruble's, River City and Heckert are pending before the Commission at this time, the Commission has determined that the certificate applications should be scheduled for hearing and further disposition.

6. The applicants will be required to demonstrate need and fitness for regular ferry service and charter service.

7. Complaint cases which stem from this proceeding shall be consolidated with the certificate cases, since the matters raised in the complaints are interrelated with the issues of the certificate cases.

8. The applicants are on notice that the temporary authority pursuant to which each carrier is operating may be revoked by the Administrative Law Judge upon proper findings and conclusions.

9. The Commission finds that administrative efficiency will be served by adjudicating the certificate applications and the complaint cases jointly.

ORDER

IT, THEREFORE, ORDERED that pursuant to §24-2-1 of the West Virginia Code, the Public Service Commission shall regulate ferry boat operations

between the mainland and Blennerhassett Island on the Ohio River and its tributaries, Wood County.

IT IS FURTHER ORDERED that Ruble's Sternwheelers, Inc., River City Tours, Inc., and R. C. "Heck" Heckert Auto, Inc., obtain certificates of convenience and necessity to operate charter and ferry boat services from Parkersburg, West Virginia to Blennerhassett Island.

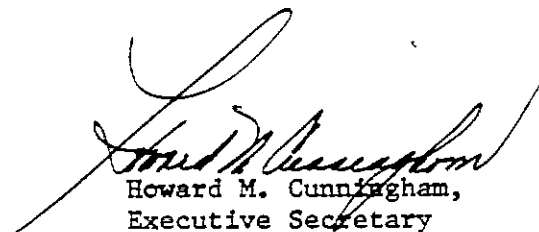
IT IS FURTHER ORDERED that the certificate applications of Ruble's, River City and Heckert be consolidated with complaint Case Nos. 87-338-F-CN, 87-385-F-C and 87-413-F-C, and remanded to the Hearing Examiner's Division for hearing and disposition by further order.

IT IS FURTHER ORDERED that the applicants be on notice that the temporary authority pursuant to which each carrier is operating may be revoked by the Administrative Law Judge upon proper findings and conclusions.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties in this matter by United States First Class Mail.

A TRUE COPY

TESTE:

  
Howard M. Cunningham,  
Executive Secretary

Commissioner Casto dissents and has filed a dissenting opinion.

SMW/is

DISSENTING OPINION BY COMMISSIONER CASTO

July 17, 1987

I respectfully dissent from the majority's determination that the Commission has jurisdiction over the regulation of the boat services between the City of Parkersburg and Blennerhassett Island. The boat services proposed by the applicants are scenic excursion trips to Blennerhassett Island. Scenic excursion trips or "sight-seeing tours" are not necessary to the public interest, are not subject to the provisions of §24-2-1 of the West Virginia Code, and therefore, should not be regulated by the Public Service Commission.

The scenic excursion boats, operating in conjunction with Blennerhassett Island, cannot be included in any of the definitions of a "ferry" provided by the parties. It is improper to characterize the applicants' proposed service as a ferry since the passengers are on a tour of Blennerhassett Island and the boats used are part of the tour which attracts the sightseers. The boat service to Blennerhassett Island is a scenic excursion for amusement and is not essential to the public welfare.

Although the majority ruled that the evidence showed the Commission has jurisdiction over the ferry boat services pursuant to §24-2-1 of the Code, there was no evidence which indicated that charter boat service should also be included within the scope of its authority. The charter boat services are clearly separate and distinct from the ferry boat services. The public leases the charter boats for private temporary use, rather than for transportation only to Blennerhassett Island. The charter boats do not operate on a fixed advertised schedule and the rates are negotiable. The charter boat service operates in the same manner as boats

such as the P. A. Denny and should not be subject to the Commission's jurisdiction.

Pursuant to §29-8-1 of the West Virginia Code, the Legislature created the Blennerhassett Historical Park Commission to establish and implement a program for the development of educational, cultural, and recreational activities related to historical events which occurred on Blennerhassett Island. Moreover, §29-8-3(13) of the Code authorizes the Blennerhassett Historical Park Commission to own or operate, by itself or in conjunction with any other public agency or any private entity, such facilities and equipment as it considers necessary for the implementation of its duties. The equipment and facilities to be used by the Blennerhassett Historical Park Commission may include boats and docks. If the majority had determined that the Commission did not have jurisdiction over the ferry services provided to Blennerhassett Island, the language of §§29-8-1 and 29-8-3 of the Code indicate that a public agency exists which can regulate or supervise, in the public interest, the ferry boat service to Blennerhassett Island.

Therefore, I respectfully dissent from the majority's finding that the proposed boat service is a ferry service as contemplated by the legislature when it enacted §24-2-1 of the Code.



\_\_\_\_\_  
Otis D. Casto, Commissioner

PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON

Entered: July 21, 1986

CASE NO. 86-300-F-CN

RIVER CITY TOURS, INC.,  
a corporation, Parkersburg,  
Wood County.

Application for a certificate  
of convenience and necessity to  
operate a charter or ferry boat  
service on the Ohio River and its  
tributaries, Wood County.

CASE NO. 86-301-F-CN

R. C. "HECK" HECKERT AUTO, INC.,  
a corporation, Parkersburg,  
Wood County.

Application for a certificate  
of convenience and necessity to  
operate a charter or ferry boat  
service on the Ohio River and its  
tributaries, Parkersburg, Wood  
County.

CASE NO. 86-385-F-CN

THE BLENNERHASSETT HISTORICAL PARK COMMISSION;  
and RUBLE'S STERNWHEELERS, INC., a corporation,  
Parkersburg, Wood County.

Application for a certificate of convenience  
and necessity to operate a charter or ferry  
boat at Parkersburg, Wood County.

CASE NO. 86-391-F-C

R. C. "HECK" HECKERT AUTO, INC.,  
a corporation, Parkersburg, Wood  
County,

Complainant,

v.

RUBLE'S STERNWHEELERS, INC.,  
a corporation,

Defendant.

SECOND ORDER ON MOTIONS

On June 2, 1986, River City Tours, Inc. (River City), a corporation, and R. C. "Heck" Heckert Auto, Inc. (Heckert), a corporation, (jointly Applicants), filed applications, duly verified, for certificates of convenience and necessity to operate charter or ferry boat services on the Ohio River and its tributaries, Wood County, designated respectively as Case Nos. 86-300-F-CN and 86-301-F-CN. Both applications proposed specific rates to be charged for trips from Parkersburg to Blennerhassett Island, with charter rates and rates to other points and places to be negotiated. According to the applications, Coast Guard-approved ferry boats will be used in the operations of the two Applicants. Both applications asserted that there is currently no certificated carrier providing the proposed service.

On July 3, 1986, a Motion to Dismiss; Intervene; Protest was filed in these proceedings by the Blennerhassett Historical Park Commission (BHPC), a governmental agency of the State of West Virginia and Ruble's Sternwheelers, Inc. (Ruble's), an Ohio corporation authorized to do business in the State of West Virginia. The motion itself was captioned only for Case No. 86-301-F-CN; however, attached to and included in the motion was a further statement of protest on behalf of the BHPC, which contained both case numbers. On July 9, 1986, the BHPC and Ruble's filed a letter indicating that the caption for Case No. 86-300-F-CN was erroneously omitted from the original motion. Since the attachment to the original motion contained both case captions, the Hearing Examiner considers the motion to have been filed in both cases.

As a result of the aforesaid protests filed in these proceedings, on July 7, 1986, a Notice of Hearing was issued, setting both cases for

hearing to be held in Parkersburg, West Virginia, on July 24, 1986, at 10:30 a.m., at which time and place the Applicants were ordered to appear and prosecute their applications. Leave was granted to anyone interested to file objection to the applications at any time on or before said date or at said hearing.

On July 9, 1986, The Blennerhassett Historical Park Commission, Parkersburg, Wood County, and Ruble's Sternwheelers, Inc., filed a joint application, duly verified, for a certificate of convenience and necessity to operate a charter or ferry boat service from points and places in Parkersburg, Wood County, to points and places to Blennerhassett Island, Wood County, designated as Case No. 86-385-F-CN. Additionally, Ruble's Sternwheelers, Inc., proposed to operate a charter service from points and places in the City of Parkersburg to points and places on the Ohio River and its tributaries and to other points and places in West Virginia along the Ohio River.

On July 10, 1986, R. C. "Heck" Heckert Auto, Inc., a corporation, filed a formal complaint, duly verified, against Ruble's Sternwheelers, Inc., designated as Case No. 86-391-F-C, alleging that Ruble's Sternwheelers, Inc., had violated the laws of the State of West Virginia by engaging in and continuing to engage in the transportation of passengers in ferry boat service between Parkersburg, West Virginia and Blennerhassett Island without a certificate of convenience and necessity from the Public Service Commission, as required by West Virginia Code §24-2-1 and §24-2-11.

By order issued on July 16, 1986, in Case Nos. 86-300-F-CN and 86-301-F-CN, the Hearing Examiner granted certificates of convenience and necessity to provide charter boat service from Parkersburg, West Virginia,

and to provide ferry boat service to points and places in West Virginia, other than Blennerhassett Island, from Parkersburg, West Virginia, to River City Tours, Inc., and R. C. "Heck" Heckert Auto, Inc. The Hearing Examiner further ordered that a motion to dismiss these proceedings filed on July 3, 1986, by the Blennerhassett Historical Park Commission and Ruble's Sternwheelers, Inc., be denied. The order further granted the intervention and protest filed by the Blennerhassett Historical Park Commission for the limited purpose of protesting and intervening in the portion of the applications dealing with service to Blennerhassett Island, while the motion to intervene or protest filed on July 3, 1986, by Ruble's Sternwheelers, Inc., was denied. The hearing currently set for July 24, 1986, was ordered to be held as scheduled, for the limited purpose of hearing testimony on the applications for certificates of convenience and necessity to provide ferry boat service to Blennerhassett Island.

On July 18, 1986, River City Tours, Inc., and R. C. "Heck" Heckert Auto, Inc., filed a motion with the Commission requesting that the hearing set for July 24, 1986, in Case Nos. 86-300-F-CN and 86-301-F-CN be continued to a later date to be agreed upon by the parties; that the proceedings in Case No. 86-300-F-CN, 86-301-F-CN, 86-385-F-CN and 86-391-F-C be consolidated for hearing, since all cases involve the same issue, namely, ferry service to and from Blennerhassett Island; and that the Commission grant temporary authority to the Applicants to provide ferry boat service to Blennerhassett Island, pending a final decision in the aforesaid cases. The Applicants asserted that, if such temporary authority was granted, they would agree to cooperate with the BHPC in arranging a schedule of landings and departures from Blennerhassett Island that would be fair for all and would not inconvenience the public, and that such a grant would

not result in a presumption in favor of the granting of permanent authority. The Applicants further requested that the Commission immediately order Ruble's Sternwheelers, Inc., to cease and desist from providing ferry boat service to and from Blennerhassett Island until such time as it obtained temporary or permanent authority from the Commission to provide such service.

On July 21, 1986, counsel for the Blennerhassett Historical Park Commission also filed a motion to continue the hearing set for July 24, 1986, due to the fact that both the Chairman and Executive Director of the Blennerhassett Historical Park Commission would be out of town on that date and requesting that the hearing be set after August 23, 1986.

#### DISCUSSION

The Hearing Examiner has given serious consideration to the motion filed on July 18, 1986, by River City and Heckert. In the Hearing Examiner's opinion, there is substantial merit in the request for temporary authority filed by those two Applicants. At the present time, the Applicants in Case Nos. 86-300-F-CN and 86-301-F-CN, who have duly filed applications for certificates of convenience and necessity with the Public Service Commission prior to beginning operations as ferry boat services, are not operating such services, consistent with the requirements of Chapter 24 of the West Virginia Code. In the meantime, a competing applicant, Ruble's Sternwheelers, Inc., apparently is continuing to operate the ferry boat service which it has been operating between Parkersburg and Blennerhassett Island, without a certificate of convenience and necessity from the Public Service Commission. In the Hearing Examiner's opinion, it would be grossly inequitable and discriminatory to

deny operating authority to River City and Heckert, while Ruble's continues to operate pending hearing in these various proceedings. Indeed, considering the request of the BHPC and Ruble's, that the hearing be reset for sometime after August 23, 1986, temporary authority is required for the Applicants in Case Nos. 86-300-F-CN and 86-301-F-CN, since it would be unreasonable to require them to not operate for a period of over a month pending hearing on their duly filed applications, at the request of the competing ferry boat service, which is still operating without a certificate of convenience and necessity.

Further, the Hearing Examiner believes that it would be unreasonable at this time to cease all ferry boat services to Blennerhassett Island by denying the request for temporary authority filed by River City and Heckert and issuing an order requiring Ruble's to cease and desist from its operations pending hearing on its application for a certificate of convenience and necessity, since the State of West Virginia has a clear interest in promoting Blennerhassett Island as a tourist attraction and in seeing that people have access to Blennerhassett Island. By cutting off all access to Blennerhassett Island, the Public Service Commission would not be serving the public and would, indeed, be violating its obligation to balance the general interests of the State's economy and the interest of the utilities subject to its jurisdiction, pursuant to the requirements of West Virginia Code §24-1-1(b).

Thus, the Hearing Examiner is left with the proposition that it would be inequitable to not allow River City and Heckert to operate pending hearing, considering that Ruble's is continuing to operate without a certificate of convenience and necessity, and that it would be equally unreasonable to deny temporary authority to River City and Heckert and at

the same time order Ruble's to cease operating, thereby cutting off access to Blennerhassett Island to the public of the State of West Virginia. The only reasonable course of action in this proceeding is to grant temporary authority to all three applicants in Case Nos. 86-300-F-CN, 86-301-F-CN, and 86-385-F-CN, even though Ruble's and the BHPC have not, at this time, filed an application for temporary authority. This like treatment of competing applications is consistent with the Commission's recent decision in M.C. Case No. 22642-C, Jessie D. Covey, doing business as Glen Morgan Cab Company and M.C. Case No. 18922-AC, Leeber Transportation, Inc., doing business as Beckley Limousine Service. In a Commission Order Reversing and Remanding Hearing Examiner's Decision, entered on April 28, 1986, the Commission stated that, "[W]e deem it appropriate to consolidate for hearing the certificate applications of competing interests when both seek to provide a service to an area that has heretofore been without legal limousine service." Further in that decision, at Finding of Fact No. 5, the Commission stated that, "When two competing interests seek to provide service to an unserved area, it is appropriate to consolidate both applications for hearing." Since there is no certificated ferry boat service at this time between Parkersburg, West Virginia and Blennerhassett Island, it is appropriate to consolidate, and treat similarly, the competing applications to provide service to that area.

Therefore, the Hearing Examiner deems it necessary to grant temporary authority to operate as ferry boat services, between Parkersburg and Blennerhassett Island, to River City Tours, Inc., R. C. "Heck" Heckert Auto, Inc., and, jointly, The Blennerhassett Historical Park Commission and Ruble's Sternwheelers, Inc. None of the grants of temporary authority shall create a presumption that any of the Applicants are entitled to a

grant of permanent authority following hearing in these proceedings. As a condition of operating under these grants of temporary authority, all three Applicants shall file proof of insurance on the equipment, boats and facilities used in their operations, with said proof of insurance to be filed within fifteen (15) days from the date of this decision. This decision granting temporary authority is strictly limited to the facts of this proceeding, wherein an uncertificated operator has been and is continuing to operate pending hearing on various applications to provide legitimate certificated service to the same area, while two applicants to provide service to the area have duly filed legitimate applications with the Commission and are not operating in violation of Chapter 24 of the West Virginia Code. Additionally, such competing temporary authority is granted considering the peculiar nature of ferry boat service, and its striking similarity to service provided by motor carriers subject to the Commission's jurisdiction, contrary to the type of utility service generally provided pursuant to Chapter 24 of the West Virginia Code, when competing or temporary authority would not generally be considered appropriate.

As a result of the grants of temporary authority set forth previously in this decision, the Hearing Examiner is of the opinion that it is reasonable to grant the various motions for a continuance of the hearing date until a date to be established later by the Hearing Examiner following consultation with the parties to this proceeding. Further, the Hearing Examiner is of the opinion that, in light of the decision rendered above, it is reasonable to consolidate for hearing Case Nos. 86-300-F-CN, 86-301-F-CN, 86-385-F-CN and 86-391-F-C, since, as pointed out by the Applicants, the four cases all deal with primarily the same issue and

involve the same parties and the same area of operation. Such a decision to consolidate would also be consistent with the Commission's decision in the Covey and Leeber cases cited above.

Finally, the Hearing Examiner deems it inappropriate to rule on the motion requiring Ruble's to cease and desist at this time, since, as part of the relief requested in Case No. 86-391-F-C, the Complainants requested an order requiring Ruble's Sternwheelers, Inc., to cease and desist from operations, and that proceeding has not yet been heard. Further, the grant of temporary authority eliminates the uncertificated aspect of Ruble's operations to Blennerhassett Island, at least for the present.

#### FINDINGS OF FACT

1. All of the parties to these proceedings have requested a continuance of the hearing currently scheduled for July 24, 1986. (See, motions filed July 18 and July 21, 1986).

2. To deny the request for temporary authority filed by River City and Heckert in Case Nos. 86-300-F-CN and 86-301-F-CN would deny the ability to operate to two applicants who have legitimately filed applications for certificates of convenience and necessity to operate ferry boat service pursuant to Chapter 24, while an uncertificated operator would be continuing to provide ferry boat service pending the hearings in these matters, while at the same time, issuing an order to Ruble's to cease and desist from providing ferry boat service, and denying temporary authority to the other Applicants, would leave Blennerhassett Island completely unserved by ferry boat service and would render it inaccessible to members of the public.

3. The Commission has recently held that, when competing interests file applications to provide service to an area unserved by a certificated carrier, it is reasonable to consolidate the applications for hearing and decision. (See, M.C. Case No. 22642-C, Jessie D. Covey, doing business as Glen Morgan Cab Company, and M.C. Case No. 18922-AC, Leeber Transportation, Inc., doing business as Beckley Limousine Service, Commission Order Reversing and Remanding Hearing Examiner's Decision, April 28, 1986).

#### CONCLUSIONS OF LAW

1. It is reasonable to grant temporary operating authority to River City Tours, Inc., R. C. "Heck" Heckert Auto, Inc., and, jointly, The Blennerhassett Historical Park Commission and Ruble's Sternwheelers, Inc., since to allow any one of the Applicants to operate or continue to operate while denying the ability to operate to any of the other applicants would treat two competing interests seeking to serve the same area in a different and inequitable manner, while to deny operating ability to all of the Applicants would leave Blennerhassett Island unserved by any ferry boat service and would render it inaccessible to the public in the State of West Virginia, both of which alternatives are unreasonable and do not serve the public interest.

2. The grants of temporary authority provided in this decision shall not create a presumption that any of the Applicants are entitled to permanent operating authority when hearing is held in these proceedings and the grants of temporary authority are limited strictly to the narrow facts of these proceedings and do not create a presumption in other types

of proceedings that temporary operating authority is appropriate or legitimate.

3. It is reasonable to grant the various motions for a continuance of the hearing scheduled for July 24, 1986, and to continue the hearing currently scheduled until a date to be set later by the Hearing Examiner, following consultation with the various parties to this proceeding.

4. It is reasonable to deny the motion to order Ruble's Sternwheelers, Inc., to cease and desist operations, filed by River City and Heckert, since the issue of whether or not Ruble's should be required to cease and desist from further operations is an issue in the formal complaint filed by Heckert in Case No. 86-391-F-C against Ruble's and, therefore, it would be premature to rule upon that motion at this time, without holding hearing in the formal complaint proceeding.

#### ORDER

IT IS, THEREFORE, ORDERED that River City Tours, Inc., R. C. "Heck" Heckert Auto, Inc., and, jointly, The Blennerhassett Historical Park Commission and Ruble's Sternwheelers, Inc., be, and they hereby are, all granted temporary authority to provide ferry boat service from Parkersburg, West Virginia, to Blennerhassett Island, under the rates set forth in the various applications. River City Tours, Inc., R. C. "Heck" Heckert Auto, Inc., and Ruble's Sternwheelers, Inc., shall all file proof of insurance on the various facilities and boats used in their operations, as well as tariffs setting forth their respective rates and charges, with the Public Service Commission within fifteen (15) days from the date of this decision.

IT IS FURTHER ORDERED that Case Nos. 86-300-F-CN, 86-301-F-CN, 86-385-F-CN and 86-391-F-C, be, and they hereby are, consolidated for hearing and decision thereon. The Executive Secretary shall henceforth file copies of orders issued, in all of the above-styled and numbered proceedings, in each of the respective case files.

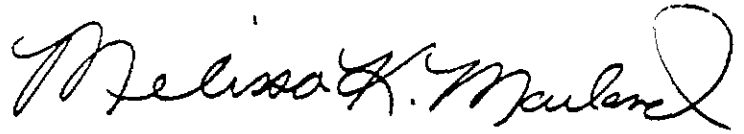
IT IS FURTHER ORDERED that the hearing currently scheduled in this proceeding for July 24, 1986, be, and it hereby is, cancelled and the matters involved in these proceedings be, and they hereby are, continued, until a date to be set later by the Hearing Examiner, following consultation with the parties to these proceedings.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this order upon all parties to this proceeding by United States Certified Mail, return receipt requested, and upon Commission Staff by hand delivery.

This order is issued pursuant to General Order No. 212, dated December 16, 1982, which order designates the Division of Hearing Examiners as the initial decision making body in the Public Service Commission and authorizes the Public Service Commission Hearing Examiners to issue orders on behalf of the Commission in all proceedings filed pursuant to Chapter 24 of the West Virginia Code, which proceedings are not set for hearing and which orders shall have the full force and effect of Commission orders, without the provision for the filing of exceptions thereto.

Leave is hereby granted to the parties to file a petition for further hearing, reopening, or rehearing pursuant to Rule 19 of the Commission's

Rules of Practice and Procedure with the Executive Secretary of the Commission within ten (10) days after the date this order is mailed.



Melissa K. Marland  
Hearing Examiner

MKM:mal

P. S. C. W. Va. No. 1

Cancels P. S. C. W. Va. No.

PUBLIC SERVICE COMMISSION  
OF W.VA. TARIFF OFFICE

APR 13 1987

RIVER CITY TOURS, INC., dba RIVER CITY TOURS AND STEAMBOAT CO.

SPECIAL STUDIES SECTION  
RECEIVED

OF

Parkersburg, West Virginia

### Rates, Rules and Regulations for Furnishing

Ferry boat service and charter boat service

AT

From Parkersburg, West Virginia, to Blennerhassett

Island and Return, and service to and from points

on the Ohio River and its tributaries.

Filed with THE PUBLIC SERVICE COMMISSION  
OF  
WEST VIRGINIA

Issued April 13, 1987

Effective May 3, 1987

Issued by authority of an order  
of the P.S.C. in Case No.  
86-300-F-CN on July 21, 1986.

RIVER CITY TOURS, INC., dba  
RIVER CITY TOURS AND STEAMBOAT  
CO.

Issued by \_\_\_\_\_  
(Name of Utility)

By Thomas N. Hanna

Its Attorney

## RULES AND REGULATIONS

1. Regularly scheduled ferry service will depart from Parkersburg's Point Park and from Blennerhassett Island's ferry boat landing on the Ohio side.
2. Tickets for regularly scheduled ferry boat service will be sold to the general public at Point Park and other outlets prior to boarding.
3. Operator reserves the right to adopt, post for public inspection and enforce such rules and regulations as may be necessary for convenience and safety of the passengers.

RATES

Regularly scheduled ferry boat service from Parkersburg to Blennerhassett Island and return.

Adults	-	\$2.50 per person, round trip
Children, 7 years and older	-	\$1.00 per person, round trip
Children 6 years and younger	-	No charge
Charter Service	-	To be negotiated

OPERATING SCHEDULE FOR 1987**FERRY SERVICE:**

From May 3 to May 25 (Memorial Day)

Departures from Point Park every Saturday, Sunday and Memorial Day:  
11:30 a.m., 12:30 a.m., 1:30 p.m., 2:30 p.m., 3:30 p.m., and 4:30 p.m.

Departures from Blennerhassett Island every Saturday, Sunday and Memorial Day: 12:00 Noon, 1:00 p.m., 2:00 p.m., 3:00 p.m., 4:00 p.m., and 5:00 p.m.

From May 25 (Memorial Day) to September 7 (Labor Day)

Same departure schedule as above stated except service will operate every Friday, Saturday, Sunday and all Holidays.

**CHARTER SERVICE:**

To operate on an "as needed" basis.

PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA  
CHARLESTON

Entered: January 22, 1987

M.C. CASE NO. 22881-FC

LAMBERTS WRECKER & AUTO SERVICE, INC.,  
a corporation, Bluefield, Mercer  
County,

Complainant,

v.

WEST VIRGINIA TURNPIKE COMMISSION; and  
JOSEPH HOSLER, doing business as BECKLEY  
TRUCK AND WRECKER SERVICE,

Defendants.

M.C. CASE NO. 22898-FC

RONNIE FRENCH FERRELL, Rt. 5, Box 212,  
Bluefield, Mercer County,

Complainant,

v.

WEST VIRGINIA TURNPIKE COMMISSION; and  
JACK C. HUTCHINSON, doing business as  
HUTCH'S BODY SHOP, Handley, Kanawha  
County,

Defendants.

HEARING EXAMINER'S DECISION

PROCEDURE

On December 18, 1985, Lamberts Wrecker & Auto Service, Inc., a corporation, Bluefield, Mercer County, filed a formal complaint, duly verified, against the West Virginia Turnpike Commission and Joseph Hosler, doing business as Beckley Truck and Wrecker Service, Raleigh County, alleging, inter alia, that the Complainant cannot provide wrecker service for its customers on the West Virginia Turnpike without permission of the West Virginia Turnpike Commission. The complaint was designated by the Commission as M.C. Case No. 22881-FC.

By order entered by the Commission on December 18, 1985, the Defendants, West Virginia Turnpike Commission and Joseph Hosler, doing business as Beckley Truck and Wrecker Service, were required to satisfy said complaint or make answer thereto, in writing, within ten (10) days of the service upon them by certified mail of a copy of said complaint and a copy of said order in accordance with the provisions of Rule 7 of the Commission's Rules of Practice and Procedure. The order required the Commission Executive Secretary to serve a copy of said complaint and said order upon the Defendants by United States Certified Mail, return receipt requested.

On December 23, 1985, A. David Abrams, Jr., Esq., filed an answer on behalf of the West Virginia Turnpike Commission. Joseph H. Hosler, doing business as Beckley Truck and Wrecker Service, filed his answer on December 31, 1985.

On January 15, 1986, Ronnie French Ferrell, Route 5, Box 212, Bluefield, Mercer County, filed a formal complaint, duly verified, against the West Virginia Turnpike Commission and Jack C. Hutchinson, doing business as Hutch's Body Shop, Handley, Kanawha County, alleging, inter alia, that on December 27, 1985, the West Virginia Turnpike Commission refused to permit Lamberts Wrecker & Auto Service to tow the Complainant's disabled motor vehicle from a point located on the West Virginia Turnpike and that the Complainant's vehicle was towed to the nearest exit by Jack C. Hutchinson's wrecker service. This formal complaint was designated by the Commission as M.C. Case No. 22898-FC.

By order entered by the Commission on January 15, 1986, the Defendants, West Virginia Turnpike Commission and Jack C. Hutchinson, doing business as Hutch's Body Shop, were required to satisfy said complaint or

make answer thereto, in writing, within ten (10) days of serve upon them by certified mail of a copy of said complaint and a copy of said order in accordance with the provisions of Rule 7 of the Commission's Rules of Practice and Procedure. The order required the Commission's Executive Secretary to serve a copy of said complaint and order upon the Defendants by United States Certified mail, return receipt requested. The Postal Return Receipts contained in the Commission's case file indicate that proper notice was given.

On January 24, 1986, A. David Abrams, Jr., Esq., filed an answer on behalf of the West Virginia Turnpike Commission. Jack C. Hutchinson filed his answer on January 22, 1986.

By order entered on February 12, 1986, the above-styled formal complaints were consolidated and set for hearing to be held in the Commission's Hearing Room, 201 Brooks Street, Charleston, West Virginia, on April 14, 1986, at 10:00 a.m., EST. The order required the Commission's Executive Secretary of give notice of said hearing by mailing a copy of the order to the Complainants and to the Defendants at least fifteen (15) days prior to April 7, 1986, by United States Certified Mail, return receipt requested. Proper notice was given.

The hearing was held as scheduled on April 14, 1986, at 10:00 a.m. The Complainant, Lamberts Wrecker & Auto Service, Inc., appeared by its proper officers and by Thomas N. Hanna, Esq., Counsel. The Complainant, Ronnie French Ferrell, appeared without legal counsel. A. David Abrams, Jr., Esq., appeared on behalf of the Defendant, the West Virginia Turnpike Commission. J. Stephen Max, Esq., appeared on behalf of the Defendants, Jack C. Hutchinson and Joseph Hosler. Franklin G. Crabtree, Esq., appeared on behalf of the Commission's Staff. Thomas H. Vanderford, Esq.,

appeared on behalf of World Wide Equipment, Inc., Intervenor. At the conclusion of the hearing the matters involved in the complaints were submitted for decision, subject to the filing of briefs.

On May 29, 1986, Franklin G. Crabtree, Esq., filed a brief on behalf of the Commission's Staff. On June 30, 1986, A. David Abrams, Jr., Esq., filed a brief on behalf of the West Virginia Turnpike Commission. The Complainants did not file briefs.

DISCUSSION OF THE EVIDENCE  
INCLUDING FINDINGS OF FACT

The Complainant, Lamberts Wrecker & Auto Service, Inc., a corporation, is the holder of P.S.C. M.C. Certificate Nos. F-3212 and F-4063, acquired by transfer order entered on November 7, 1979, in M.C. Case Nos. 8110 and 13344. Certificate No. F-3212, issued in M.C. Case No. 8110, authorizes the holder thereof to operate as a common carrier by motor vehicle (wrecker truck) in the transportation of wrecked and disabled motor vehicles in the City of Bluefield, Mercer County, with trips between said City and other points in Mercer County. Certificate No. F-4063, issued in M.C. Case No. 13344, authorizes the holder thereof to operate two motor vehicles (wrecker trucks) in the transportation of wrecked and disabled motor vehicles within a radius of twenty miles of the City of Bluefield, with occasional trips to or from more distant points, from a base of operation located within the City of Bluefield, Mercer County. (P.S.C. Motor Carrier Records).

Henry R. Lambert, Jr., President of Lamberts Wrecker & Auto Service, Inc., testified that the Complainant has statewide operating authority and is operating eight vehicles to provide twenty-four hour wrecker service

from a place of business located in the City of Bluefield. (Tr., pp. 26, 27).

The Complainant, Ronnie French Ferrell, is a Police Officer for the City of Bluefield. (Tr., p. 9).

The Defendant, West Virginia Turnpike Commission, is a public corporation created by the Legislature to construct, maintain, repair and operate a toll road, commonly known as the West Virginia Turnpike. (West Virginia Code §17-16A-1, et seq.). In addition to its powers and duties relative thereto, the Turnpike Commission has the rights, privileges and powers in regard to turnpike projects under its jurisdiction, which are granted or otherwise accorded to the State Road Commission (Commissioner of Highways) and the authority to adopt rules and regulations for the movement of traffic upon any turnpike project under its jurisdiction. (West Virginia Code §17C-20-1). In furtherance of its powers to regulate the movement of traffic on the Turnpike, the West Virginia Turnpike Commission has undertaken to regulate wrecker service on the Turnpike by contracting such service to certain wrecker operators and thereby excluding and/or prohibiting the service of other wrecker operators certificated by this Commission on the turnpike.

The Defendant, Joseph Hosler, doing business as Beckley Truck and Wrecker Service, is the holder of P.S.C. M.C. Certificate No. F-6148, as amended, which authorizes operation as a common carrier by motor vehicle in the transportation of wrecked and/or disabled motor vehicles in Raleigh County and points and places on the West Virginia Turnpike. Mr. Hosler has a contract with the West Virginia Turnpike Commission to provide wrecker service on a designated portion of the Turnpike. (WVTC Exh. No. 3; P.S.C. Motor Carrier Records).

The Defendant, Jack C. Hutchinson, doing business as Hutch's Body Shop, in addition to other operating authority, has authority under P.S.C. M.C. Certificate No. F-1435 to operate on the West Virginia Turnpike from Standard Interchange to the Packs Interchange. Mr. Hutchinson also has a contract with the West Virginia Turnpike Commission to provide wrecker service on a designated portion of the West Virginia Turnpike. (P.S.C. Motor Carrier Records; WVTC Exh. No. 2).

Intervenor, World Wide Equipment, Inc., a Kentucky corporation with offices located in Princeton, Mercer County, appearing in support of the complaint filed by Lamberts Wrecker & Auto Service, Inc., is a distributor of Mack Trucks and has employed Lamberts Wrecker to service vehicles on the Turnpike. (Tr., pp. 5-7).

Ronnie F. Ferrell and Henry R. Lambert, Jr., testified on behalf of the Complainants in this proceeding.

The Complainant, Ronnie F. Ferrell, a Police Officer for the City of Bluefield, testified that on December 27, 1985, he and his family were traveling south bound on the West Virginia Turnpike, south of the Memorial Tunnel, when his pickup truck became disabled. He parked the truck on the shoulder clear of the traffic lane, left a note on the vehicle indicating where he would be and proceeded to the nearby Howard Johnson Restaurant where he telephone Lamberts Wrecker & Auto Service, Inc., in Bluefield for towing service. At the Restaurant he received a call from one of the Communication Dispatchers for the West Virginia Turnpike Commission advising him that Lamberts was not authorized to pick up his vehicle on the Turnpike, that the Turnpike's designated wrecker would tow his vehicle to the nearest exit, approximately one-half mile from the scene of the breakdown, and would unhook from the vehicle for further towing service by

Lamberts to Bluefield. Accordingly, the designated wrecker service, Hutch's, contacted Ferrell and arranged a tow from the Turnpike to the nearest exit. Within fifteen (15) minutes after unhooking from the Ferrell vehicle, Lamberts arrived, hooked up to Ferrell's vehicle and towed the same across the length of the Turnpike to Bluefield. (Tr., pp. 9-11).

Ferrell received two bills for service rendered, one for \$31.50 From Hutch's, and another for \$84.00 from Lamberts. Ferrell believes he was inconvenienced by the Turnpike Commission's designated wrecker policy, that his freedom of choice of wrecker service was taken away, and that the policy resulted in increased charges. Ferrell does not question the service or the charge of either wrecker company, but maintains that the Turnpike Commission's policy unduly inconvenienced him and restricted his freedom of choice. (Tr., pp. 11-14, 17, 21-22).

The Complainant, Lamberts Wrecker & Auto Service, Inc., presently provides 24-hour wrecker service from a place of business located in Bluefield, Mercer County. It has eleven full-time employees and is operating eight wrecker trucks which are capable of towing all sizes of vehicles. Lamberts tows vehicles for members of the public, commercial establishments and at the request of the State, county and city law enforcement officers. It occasionally receives calls for service on the Turnpike. (Tr., pp. 26-30).

Henry R. Lambert, Jr., President of Lamberts Wrecker & Auto Service, Inc., testified that on or about November 27, 1985, Lamberts was called by a commercial customer to provide towing service for a disabled gravel truck on the Turnpike. Upon arrival at the scene, Lamberts' driver was advised by a State Trooper that he would have to obtain permission of the

Defendant, Hosler, Turnpike Commission approved carrier in that area, to tow the truck from the Turnpike. The driver proceed to the next exit and called Hosler, who gave his permission to move the truck. Mr. Lambert testified that the extra time occasioned by the requirement of obtaining Hosler's permission was thirty to forty-five minutes. Mr. Lambert complains of the Turnpike Commission's policy of allowing only a designated wrecker company to tow from the Turnpike. (Tr., pp. 30-32).

It also appears from Mr. Lambert's testimony that in 1982 the company was contacted by the Turnpike Commission to see if it was interested in becoming a designated wrecker service on the Turnpike. Mr. Lambert testified that the company expressed no interest at that time because of the terms of the proposed contract, which, inter alia, required the wrecker service to pay 4% of its gross Turnpike business to the Turnpike Commission. (Tr., pp. 31-33, 47).

Mr. Lambert further indicated that three large repair shops are located in the Bluefield area, within Lamberts' authorized area of operation. Lamberts is often called on to provide service to these business, a large portion of those trucks use the Turnpike, including the Intervenor, World Wide Equipment. Mr. Lambert is of the opinion that he should be able to provide service on the Turnpike whenever requested. (Tr., p. 24).

The Turnpike Commission presented the testimony of its General Manager, George A. McIntire, who testified as to the history and rationale for the Turnpike Commission's policy concerning wrecker services. (Tr., pp. 68-89). The basic testimony of Mr. McIntire was that the Turnpike Commission, in accordance with its rules and regulations and statutory authority, undertook to regulate traffic and authority over vehicles traversing the Turnpike, including those stopping, standing or parked

along the Turnpike, and that the Turnpike Commission, in accordance with its statutory authority, rules and regulations, continued to do that. (Tr., pp. 77-79). It was further the testimony of Mr. McIntire that it was not and is not the intent of the Turnpike Commission to interfere in any way with the regulation by the Public Service Commission of wrecker services. (Tr., p. 79).

Mr. McIntire further testified that it had been the policy of the West Virginia Turnpike Commission since October, 1984, to enter into wrecker services agreements for wrecker service on the Turnpike. (Tr., p. 81). Mr. McIntire sponsored WVTC Exhibit Nos. 1 through 4 which are copies of agreements executed with each of the four wrecker companies which authorize such companies to provide wrecker service upon designated portions of the Turnpike. (Tr., pp. 69-72). Relevant parts of the agreements provide: (A) exclusive rights to four designated territories, except in cases of emergency; (B) a fee to be paid to the WVTC equaling four percent of each tow bill, including charge for storage up to thirty (30) days; (C) equipment requirements and specifications for wreckers used on the Turnpike; (D) a twenty-four service requirement and a maximum response time of forty-five minutes; (E) a schedule of rates which shall not be greater than P.S.C. approved rates for wrecker service, without WVTC approval; (F) a rate for the provision of service calls not requiring towing services, one-half to be paid by the patrons and one-half to be paid by WVTC; (G) traffic control restrictions; and (H) insurance requirements. Each agreement also includes a map depicting the four sections of the Turnpike for which exclusive authority is granted. (WVTC Exh. Nos. 1-4). Mr. McIntire testified that the purpose of the wrecker service agreements was to assure the traveling public that wrecker service would

always be available, 24-hours a day, that roadside repairs could be made in an economical fashion, that the wrecker services provided would be properly equipped, insured and would perform in a proper manner. Mr. McIntire elaborated that the 4% fee charge to authorize wreckers was in lieu of tolls which would otherwise be incurred by the operator. (Tr., pp. 82-85).

Mr. McIntire also sponsored WVTC Exhibit Nos. 5, 6 and 7. Exhibit No. 5 is a copy of the minutes of the Commission meeting on July 21, 1955, wherein traffic control rules and regulations were "adopted". These rules and regulations provide for the removal of disabled motor vehicles by an "authorized wrecker". (Tr., pp. 73-74). The evidence does not indicate whether the rules and regulations have been promulgated pursuant to the requirements of the Administrative Procedures Act.

Turnpike Exhibit Nos. 6 and 7, excerpts from the minutes of Turnpike meetings held on August 26, 1954 and October 18, 1954, indicate that the rates for the Turnpike service would not exceed P.S.C. authorized rates. (WVTC Exh. Nos. 6 and 7).

Mr. McIntire further testified that in accordance with West Virginia Code Chapter 17, Article 16A, Section Nos. 1-20, that the West Virginia Turnpike Commission has authority to designate locations and limit control of access, ingress and egress to the Turnpike. (Tr., p. 86). It was his position that the West Virginia Turnpike Commission, alone, had the authority to determine and regulate vehicles that use the Turnpike and the manner in which it was used, including the stopping, standing and parking of vehicles on it. (Tr., pp. 86-87).

On cross-examination, Mr. McIntire revealed that the Turnpike has been upgraded substantially since its original operation in 1954; that the

Turnpike now consists of all four-lane divided highway with the exception of eleven miles, and that eleven new exits have been constructed, with the maximum distance between them being approximately ten miles. Mr. McIntire was not aware of any substantial difference between safety and traffic rules promulgated for the Turnpike and other interstate highways in West Virginia. Nor could he state any difference in physical characteristics between the Turnpike and other interstate highways, except for the eleven miles under construction. (Tr., pp. 92-94, 97-98, 104-105, 118-119, 122-124).

According to Mr. McIntire, if any wrecker company holding proper P.S.C. authority were allowed to service the Turnpike confusion could result. He envisioned more than one wrecker arriving at the scene of a disabled vehicle. He stated that the Turnpike Commission may not know whether a wrecker has been called for a stranded vehicle. He predicted that the lack of regulation might cause vehicles to set along the road for extended periods of time, creating a safety hazard. (Tr., pp. 98-99). On further cross-examination, Mr. McIntire also testified that other emergency vehicles, such as fire department vehicles and ambulances, are not regulated by the Turnpike Commission nor are they required to pay toll if answering an emergency call. (Tr., pp. 126-127).

Mr. McIntire described the procedure used by the Turnpike Commission when investigating a complaint against an authorized wrecker. It appears that the Turnpike's Director of Administrative Services negotiates with the parties concerning complaints for service or overcharging. It further appears that only on some complaints do both the Public Service Commission and the Turnpike Commission investigate. In other words, some complaints

are made and investigated without P.S.C. input or knowledge. (Tr., pp. 101-103, 115-117).

The Defendant, Joseph H. Hosler, doing business as Beckley Truck and Wrecker Service, has a contract with the West Virginia Turnpike Commission to provide wrecker service on a designated portion of the West Virginia Turnpike. (Tr., p. 134; WVTC Exh. No. 3). Mr. Hosler testified that approximately 50% of his overall business is derived from the contract with the West Virginia Turnpike Commission and that 60% to 70% of the Turnpike business is towing, the remainder being road service. (Tr., p. 142). Mr. Hosler maintains that it is the exclusive nature of his contract which allows him to operate efficiently. However, except for the Turnpike, Mr. Hosler has substantial competition in his service area, including approximately twelve wrecker companies in Raleigh County. (Tr., pp. 158-161).

It also appears from cross-examination that Mr. Hosler does not always abide by the Turnpike Commission's rules and regulations concerning U-turns and flares, depending upon the situation. He maintains the same equipment on his wreckers for both on and off the Turnpike. Mr. Hosler carries some spare parts on his wrecker in order to make emergency repairs to disabled vehicles on the Turnpike. Mr. Hosler also testified that he has declined to provide service at a customer's request, although the trip would be within his P.S.C. authorized area, where the trip would not have been within his area as authorized by the Turnpike Commission. (Tr., pp. 145-153).

No direct evidence or testimony was placed in the record on behalf of the Defendant, Jack C. Hutchinson, doing business as Hutch's Body Shop; on behalf of the Intervenor, World Wide Equipment, Inc., or Staff.

## COMMENTS

The primary issue in this proceeding is whether or not the West Virginia Turnpike Commission has jurisdiction to regulate and/or determine what common carriers by motor vehicle can tow wrecked and/or disabled motor vehicles from points and places on the West Virginia Turnpike, to the exclusion of other common carriers certificated by this Commission.

The Legislature has vested the Public Service Commission of West Virginia with the power and duty to regulate all public utilities in this State . . . including common carriers of passengers and property by motor vehicle. (West Virginia Code §24-2-1). Specifically, the Legislature has conferred upon the Commission the power, authority, and duty to supervise and regulate the transportation of persons and property for hire by motor vehicle upon or over the public highways of this State so as to: (a) Protect the safety and welfare of the traveling and shipping public in their use of the transportation agencies by motor vehicle; (b) preserve, foster and regulate transportation and permit the coordination of transportation facilities; (c) provide the traveling and shipping public transportation agencies rendering stabilized service at just and reasonable rates. (West Virginia Code §24A-1-1).

The term "public highways" has been defined by the Legislature as "any public street, alley, road, or highway, or thoroughfare of any kind in this state used by the public". (West Virginia Code §24A-1-2(b)). The Legislature has also specifically declared that the West Virginia Turnpike shall also be a part of the state road system. (West Virginia Code §17-16a-17a).

To carry out the legislative mandate the Commission is specifically empowered to issue certificates of convenience and necessity to evidence

lawful operations by common carriers, attaching to such authority specific operating conditions and areas (§24A-2-5(a)); to establish rates and to regulate facilities, accounts, service and safety of operations of such carriers (§24A-2-3); to regulate operating and time schedules so as to meet community needs (§24A-2-3); to prevent unnecessary duplication of service by common carriers (§24A-2-3); to suspend, revoke or amend authority granted unto a carrier, for good cause and after notice and opportunity to be heard (§24A-2-5(d)); to authorize transfers, consolidations, mergers, purchases or leases of motor carriers or their property (§24A-5-4); to establish safety rules and regulations applicable to motor vehicles and drivers' hours of service (§24A-5-5(j)); to collect annual assessments from motor carriers (§24A-6-5); and to investigate complaints against motor carriers (§24A-7-1).

In addition to the regulations promulgated by the Commission applicable to all motor carriers, including wrecker operators, the Commission has established certain rules exclusively applicable to wrecker operators relating to billing statements, wrecker charges, storage charges, equipment marking, emergency vehicle permits and equipment, highway cleanup equipment, safety equipment, twenty-four hour service, wrecker equipment specifications, and storage facilities for towed vehicles. Rules 6.01-6.10, Rules and Regulations for the Government of Motor carriers of Passengers and Property, Public Service Commission of West Virginia (1984).

Moreover, it is beyond argument that the Legislature intended that the Commission pervasively regulate wrecker operations in the state for the benefit of both industry and public.

On the other hand, the West Virginia Turnpike Commission was created and empowered by the Legislature to construct, maintain, repair and operate the turnpike projects and to issue revenue bonds to pay the cost of such projects. (West Virginia Code §17-16a-1, et seq.). The Legislature has also declared that, "The turnpike commission shall have all rights, privileges and powers in regard to turnpike projects under its jurisdiction, which are by this chapter granted, reserved or otherwise accorded to the state road commission [commissioner of highways] or commissioner or to any local or public authority or body in regard to other public highways. In addition, the turnpike commission shall have full authority to adopt rules and regulations for the movement of traffic upon any turnpike project under its jurisdiction. . ." (West Virginia Code §17C-20-1).

The Turnpike Commission has adopted rules and regulations pertaining to afixing of maximum speed limits, restrictions upon stopping, standing or parking vehicles along the Turnpike and in the matter of removal from the Turnpike of vehicles in need of repair or otherwise incapable of sustaining proper speeds. On July 21, 1955, the Turnpike Commission adopted rules and regulations which, it argues, governs wrecker operations on the Turnpike. (WVTC Exh. No. 5). Specifically, Rule VI provides:

Vehicles in need of repair or otherwise incapable of sustaining speeds great enough to insure that they are not serious impediments to the flow of traffic or hazards to other travelers, their own occupants or to other property, shall be removed from the Turnpike by an authorized wrecker unless the occupant, or the mechanic in charge of the wrecker, can repair the vehicle on the Turnpike within a period of twenty (20) minutes or unless more expeditious means of safety eliminating the impediment or hazard is available.

The Public Service Commission has exclusive jurisdiction to regulate the provision of wrecker service over the highways of this State including

the West Virginia Turnpike. There are no provisions, either expressed or implied, in Article 16A of Chapter 17 or Article 20 of Chapter 17C empowering the West Virginia Turnpike Commission to regulate the provision of wrecker service on the turnpike to the extent it may exclude all wrecker services certificated by this Commission, other than those with whom it may have specific contracts for the provision of such wrecker services. The West Virginia Turnpike Commission does not have jurisdiction to dictate what wrecker services the public may use on the West Virginia Turnpike. This practice clearly usurps the Commission's jurisdiction to supervise and regulate the transportation of wrecked and/or disabled motor vehicles upon or over the public highways of this State.

The Examiner does not, however, contend that the West Virginia Turnpike Commission is without power to adopt rules and regulations to control the flow of traffic on the turnpike, including stopping, standing and parking of vehicles and to otherwise eliminate safety hazards imposed by disabled vehicles. Nor is the Examiner saying that the West Virginia Turnpike Commission is without statutory authority to contract with certificated wrecker operators for the provision of emergency road services and towing on the West Virginia Turnpike. The Examiner is of the opinion, however, that the West Virginia Turnpike Commission may not exclude wrecker operators certificated by this Commission from providing wrecker service on the West Virginia Turnpike upon request of the public by granting exclusive contracts with selected wrecker operators. Any member of the public needing wrecker service on the turnpike should be permitted to use the certificated wrecker operator of his choice in the same fashion as if the need had occurred on any other public highway of this State. Likewise, any wrecker operator certificated by this

Commission should be permitted to provide service on the turnpike so long as the turnpike is within its certificated area of authority, without interference from the West Virginia Turnpike Commission. This is not to say that the West Virginia Turnpike Commission is without authority to adopt uniform traffic regulations relating to wrecker operators alike. At the present time, the West Virginia Turnpike Commission fails to regulate privately owned wreckers servicing a commercial fleet, as well as other emergency vehicles (fire trucks and ambulances) operating on the turnpike.

The West Virginia Turnpike Commission argues in its brief that the Commission does not have jurisdiction over the primary issues involved in this case and specifically in cases of "conflict of laws". As it can be seen from the provisions of West Virginia Code Chapters 24 and 24A, the Public Service Commission has sole jurisdiction to regulate wrecker service in this State, the subject matter of these cases. The Examiner is unable to detect any "conflict of laws" between the pertinent provisions of West Virginia Code Chapters 24 and 24A which empower the Public Service Commission to regulate common carriers by motor vehicle for the transportation of wrecked and/or disabled motor vehicles over the public highways of this State and the pertinent provisions of Code Chapters 17 and 17C, which empower the West Virginia Turnpike Commission to construct, operate and finance the West Virginia Turnpike and to control traffic flow thereon.

The West Virginia Public Service Commission has jurisdiction to decide the issues involved in this case, since it has sole authority to issue certificates of convenience and necessity to common carriers by motor vehicle for the transportation of wrecked and/or disabled motor vehicles over the public highway system of this State, of which the West

Virginia Turnpike has been declared by the Legislature to be a part thereof. Under its scheme of regulation only the Public Service Commission has jurisdiction to define the area in which a common carrier of wrecked and/or disabled motor vehicles is required to operate by virtue of the provisions of West Virginia Code §24A-2-5. The West Virginia Turnpike Commission, on the other hand, has usurped the Commission's jurisdiction by undertaking to determine what wrecker operator may serve upon a designated portion of the West Virginia Turnpike. Only the Public Service Commission may define the service area in which common carriers are authorized to operate.

The Public Service Commission has, in past decisions, ordered municipalities to cease and desist from interfering with certificated common carriers operating within municipal boundaries. (See, Order entered March 15, 1967, in M.C. Case No. 17728, Ashby Allen v. Town of Pineville; Order entered February 11, 1980, in M.C. Case No. 20373, Elk Valley Sanitation, Inc., v. Town of Sutton, as examples).

The practice of the West Virginia Turnpike Commission in excluding all certificated wrecker operators from providing service on the West Virginia Turnpike, other than those with whom it has specific contracts, is tantamount to the ordinances and acts of municipalities which undertake to exclude certificated common carriers from providing service within municipal boundaries. In the case of State of West Virginia ex rel. Ashby Allen v. Paul Goude, Sheriff of Wyoming County, a habeas corpus proceeding, order dated February 14, 1967, Docket No. 12628, the West Virginia Supreme Court of Appeals stated ". . . the arrest and conviction of the petitioner were in violation of his rights under the certificate of convenience and necessity; that the ordinance of the Town of Pineville

cannot be enforced in such a manner as to defeat the purpose and effect of the certificate of convenience and necessity and to deny to the petitioner rights thereby granted to him . . .". The West Virginia Turnpike Commission's practice of regulating wrecker service on the turnpike not only defeats the purposes and effects of the certificates of convenience and necessity issued by this Commission, but also deprives and inconveniences the public of its choice and use of the certificated wrecker services available for service on the turnpike.

There was no evidence introduced in this proceeding indicating that the individual common carrier Defendants, Joseph Hosler and Jack C. Hutchinson, have operated contrary to the rules and regulations of this Commission or the laws of this State, and the Complainants are not requesting any sanctions or disciplinary actions to be taken in respect to such carriers. (Tr., pp. 174-175).

#### FINDINGS OF FACT

The Hearing Examiner is of the opinion and finds that:

1. The Complainant, Lamberts Wrecker & Auto Service, Inc., is the holder of two certificates issued by this Commission which authorizes it to operate a wrecker service within a twenty-mile radius of the City of Bluefield, Mercer County, with occasional trips to more distant points within the State of West Virginia. (P.S.C. M.C. Certificate Nos. F-3212, F-4063; Tr., pp. 26-28).

2. As a common carrier for the transportation of wrecked and/or disabled motor vehicles, Lamberts Wrecker & Auto Service, Inc., receives requests for towing service on the West Virginia Turnpike. (Tr., p. 30).

3. Common carriers certificated by this Commission for the transportation of wrecked and/or disabled motor vehicles may not provide service on the West Virginia Turnpike, unless authorized by the West Virginia Turnpike Commission to do so by special contract. (Tr., pp. 69-80).

4. The West Virginia Turnpike Commission has granted exclusive authority by contract to four (4) wrecker companies for wrecker service upon designated portions of the turnpike. (Tr., pp. 69-72; WVTC Exh. Nos. 1-4).

5. On December 27, 1985, the West Virginia Turnpike Commission refused Ronnie F. Ferrell, a Police Officer for the City of Bluefield, to use a wrecker service of his choice for the purpose of towing a disabled motor vehicle from a point on the West Virginia Turnpike south of the Memorial Tunnel. (Tr., pp. 9-11).

6. Mr. Ferrell's vehicle was towed from the West Virginia Turnpike to the nearest exit by the turnpike's designated wrecker, Jack C. Hutchinson, doing business as Hutch's Body Shop. Mr. Ferrell's vehicle was then towed to Bluefield by Lamberts Wrecker & Auto Service, Inc. (Tr., pp. 9-11).

7. The West Virginia Turnpike system has been substantially upgraded to interstate highway standards, with the exception of 11 miles, and there are no substantial differences between safety and traffic rules promulgated for the turnpike and other interstate highways in this State. (Tr., pp. 92-94, 97-98, 104-105, 118-119, 122-124).

## CONCLUSIONS OF LAW

1. The Public Service Commission has sole jurisdiction by virtue of the provisions of West Virginia Code Chapters 24 and 24A, to issue certificates of convenience and necessity and designate areas of operation for common carriers by motor vehicle for the transportation of wrecked and/or disabled motor vehicles for hire upon or over the public highways of this State.

2. The public highway system of this State includes the West Virginia Turnpike by virtue of the provisions of West Virginia Code §17-16a-17a.

3. The West Virginia Turnpike is a part of the public highway system of this State within the meaning of the provisions of West Virginia Code Chapter 24A, for purpose of regulation of common carriers of wrecked and/or disabled motor vehicles by the Public Service Commission.

4. The West Virginia Turnpike Commission does not have statutory authority to regulate the transportation of wrecked and/or disabled motor vehicles for hire upon or over the public highways of this State.

5. The West Virginia Turnpike Commission has usurped the powers of the Public Service Commission by granting exclusive rights by contract to designated wrecker companies to provide wrecker service on designated sections of the West Virginia Turnpike, and by prohibiting all other wrecker companies certificated by this Commission from providing wrecker service on the West Virginia Turnpike.

ORDER


IT IS, THEREFORE, ORDERED that the West Virginia Turnpike Commission cease and desist in the enforcement of any policy and/or practice that prohibits common carriers certificated by this Commission from providing wrecker service on the West Virginia Turnpike.

The Executive Secretary is hereby ordered to serve a copy of this order upon the Commission by hand delivery, and upon all parties of record by United States Certified Mail, return receipt requested.

Leave is hereby granted to the parties to file written exceptions supported by a brief with the Executive Secretary of the Commission within fifteen (15) days of the date this order is mailed. If exceptions are filed, the parties filing exceptions shall certify to the Executive Secretary that all parties of record have been served said exceptions.

If no exceptions are so filed this order shall become the order of the Commission, without further action or order, five (5) days following the expiration of the aforesaid fifteen (15) day time period, unless it is ordered stayed or postponed by the Commission.

Any party may request waiver of the right to file exceptions to a Hearing Examiner's Order by filing an appropriate petition in writing with the Secretary. No such waiver will be effective until approved by order of the Commission, nor shall any such waiver operate to make any Hearing Examiner's Order or Decision the order of the Commission sooner than five (5) days after approval of such waiver by the Commission.

  
Maynard D. McDonnell  
Hearing Examiner

McD:dfs

THOMAS N. HANNA  
Attorney at Law

602 TENNESSEE AVENUE, CHARLESTON, W. VA. 25302  
TELEPHONE (304) 342-1687

June 29, 1987

Mr. Rich Hartman  
Secretary of State  
State Capitol  
Charleston, WV 25305

Re: Emergency Rules and Regulations -  
Blennerhassett Historical Park Commission

Dear Mr. Hartman:

As attorney for River City Tours, Inc., the operator of a ferry service between Parkersburg and Blennerhassett Island, I would like to object to the Emergency Rules and Regulations for Blennerhassett Historical Park (BHP) filed with your office by letter dated June 4, 1987, and would respectfully request that your office disapprove said rules, pursuant to West Virginia Code §29A-3-15a, for the following reasons:

- (1) That the agency (BHP) exceeded the scope of its authority.
  - (a) Section 4 of the aforesaid rules applies to commercial carriers. By West Virginia law and caselaw, the Public Service Commission has exclusive jurisdiction to regulate public utilities, which includes common carriers by water and ferries, and the aforesaid rules clearly would usurp the power of the P.S.C. in this area. For your review, I have attached a copy of an order entered by the P.S.C. in a case involving this issue, wherein the West Virginia Turnpike Commission, a state agency, was ordered to cease and desist from interfering with common carriers by wrecker truck. Also, I am attaching a copy of the P.S.C. order granting my client temporary authority to provide ferry service to Blennerhassett Island and a copy of my client's tariff filed with the P.S.C. containing its rates and operating schedule.
  - (b) Under the provisions of West Virginia Code §29-8-3, the Blennerhassett Historical Park Commission is given various powers, none of which pertain to the regulation of commercial carriers by water. Although the BHP does have the power, under West Virginia Code §29-8-3(13), to own or operate, by itself, or in conjunction with others, various facilities and equipment, including boats and docks, this provision cannot be construed to empower the BHP to regulate commercial carriers operated by others.

Mr. Rich Hartman  
June 29, 1987  
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- (2) That an emergency does not exist justifying the promulgation of these rules.

Although my client has no particular objection to Sections 1, 2, 3 and 5 of said rules, it should be noted that there are no facts stated by BHP which would constitute an emergency and provide justification for these rules since the Park has been open for visitors for seven years and has had sufficient time to promulgate general rules for visitors. Regarding Section 4, I would point out that my client provided excursion service to the Island during 1986 and regular service commencing in May, 1987, and that the only problems in said service, of which my client is aware, are those caused by the other stern-wheeler operator, Ruble's, which are the subject of a formal complaint filed by my client with the P.S.C. against Ruble's. (See Case No. 87-338-F-C, River City Tours, Inc. v. Blennerhassett Historical Park Commission, pending before P.S.C.).

Finally, I would point out to you that BHP is a state park, open to the public, and my client has expended considerable time and money in promoting the park and attempting to provide public transportation to the Park, on a regular basis, from a public dock, the Point of Parkersburg, over a public waterway, the Ohio River. Attached is a full-color brochure distributed by my client.

In return for these efforts, my client has met resistance at every step of the way by BHP. These rules, which were drafted to exclude or hinder my client in serving the Island, are just the latest effort in this program. The particular parts of these rules that would harm my client are the provision that would require my client to land elsewhere on the Island from the regular carrier and the requirement of Coast Guard certification for all boats, barges and tow boats. My client's barge is Coast Guard inspected for the carrying of passengers, but the tow boat is not, since passengers are only carried on the barge. In order to obtain this certification, which my client believes is unnecessary, there would have to be various improvements made in the tow boat, which would be very costly. Ruble's Sternwheelers, on the other hand, carries passengers on its tow boat and therefore has Coast Guard certification.

In conclusion, for the reasons stated herein, I would request that your office disapprove the emergency rules filed by Blennerhassett Historical Park Commission.

Sincerely,

*Thomas N. Hanna/ms*

Thomas N. Hanna

TNH/ns  
Attachments  
cc: R. Cline  
S. Hunter

RICHARDSON & RICHARDSON

LAWYERS

RICHARDSON BUILDING

325 SEVENTH STREET

P O Box 266

PARKERSBURG, W. VA. 26102

WILLIAM B RICHARDSON  
WILLIAM B RICHARDSON, JR

TELEPHONE  
(304) 422-2874

June 15, 1987

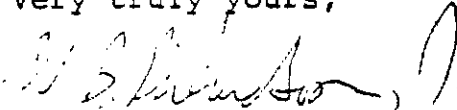
Robert Cline  
River City Tours  
100 Broadway Avenue  
Parkersburg, WV 26101

RE: Blennerhassett Emergency Rules & Regulations

Dear Mr. Cline:

Enclosed, for your information, is Emergency Rules and Regulations for Blennerhassett Historical Park which have been filed in the Secretary of State's Office. Pursuant to these rules, please furnish the Blennerhassett Historical Park Commission proof of insurance and Coast Guard Certification for the Sheila D and City of Parkersburg. Please furnish these documents or copies of the same to Dan Fowler by the end of this week.

Very truly yours,



Richardson and Richardson

vaj  
Enclosure

RICHARDSON & RICHARDSON

LAWYERS

RICHARDSON BUILDING

325 SEVENTH STREET

P. O. Box 266

PARKERSBURG, W. VA. 26102

WILLIAM S. RICHARDSON  
WILLIAM S. RICHARDSON, JR.

TELEPHONE  
(304) 488-3674

June 4, 1987

The Honorable Ken Hechler,  
Secretary of State of W.Va.  
Capitol Building  
Charleston, WV 25305

RE: Emergency Rules - Blennerhassett  
Historical Park Commission.

Dear Mr. Hechler:

Enclosed are Emergency Rules for the Blennerhassett Historical Park Commission. These rules are promulgated pursuant to W.Va. Code 29-8-3, 29-8-4 and 29A-3-15. These rules are necessary due to the following facts and circumstances.

A. Blennerhassett Historical Park Commission is charged by Chapter 29, Article 8 of the Code of West Virginia with responsibility and control in developing and maintaining educational, cultural, and recreational attractions at or near Blennerhassett Island, and is a public corporation with authority to own or operate by itself or in conjunction with any other public agency or private agency or any private person, firm or corporation, such facilities and equipment as it considers necessary or convenient for the implementation of its duties, in the proper and effective development of Blennerhassett Island and related locations in the County of Wood.

B. For the past seven (7) years the Blennerhassett Historical Park Commission has provided regularly scheduled excursions to Blennerhassett Island by license agreement with a private operator.

C. This year, another private carrier, not licensed and approved by the Blennerhassett Historical Park Commission has been attempting to provide regular service to Blennerhassett Historical Park.

D. The other carrier has not complied with reasonable requests to promote efficient use of limited landing space at Blennerhassett Island.

E. The other carrier has from time to time blocked landing by the licensed carrier, has broken down, and has delayed scheduled trips to and from Blennerhassett Historical Park by the regular licensed carrier.

F. It is necessary to provide for the safety, comfort, and convenience of passengers being attracted to Blennerhassett Island by the Blennerhassett Historical Park Commission by requiring that all commercial carriers be insured and duly certified by the U.S. Coast Guard.

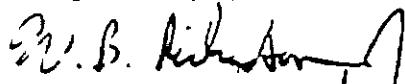
G. To promote the development and use of all facilities and services of Blennerhassett Historical Park, it is necessary to establish reasonable rules and regulations for the use of docking or landing areas.

H. Within the past two (2) weeks, the licensed carrier struck another boat which was moored in the area reserved for the licensed carrier. To avoid congestion in this area and to provide for regular landings, these rules are necessary.

I. Over 100,000 visitors are expected to visit Blennerhassett Historical Park during the 1987 season. There are costly improvements and public property on the Island recently completed which need immediate rules to protect their value and thus enhance the public enjoyment and safety while on the Island.

J. Thus, in order to preserve the public health, safety, and welfare and to prevent substantial harm to the public interest in Blennerhassett Historical Park, the enclosed rules and regulations are filed as Emergency Rules

Very truly yours,



W.B. Richardson, Jr.  
Counsel for BHPC

---

Dan Fowler, Executive Director for BHPC

**RULES AND REGULATIONS RELATING TO BLENNERHASSETT  
HISTORICAL PARK**

**AUTHORITY:** These rules are promulgated pursuant to W.Va. Code 29-8-3, 29-8-4 and 29A-3-15.

**SECTION 1: General Regulations**

1.01 - Use of Facilities - The Blennerhassett Historical Park Commission may reserve certain facilities or grounds at Blennerhassett Island, or certain days and times, for groups or individuals, and may collect fees for this purpose.

1.02 - Special Events or Celebrations - Special events, activities, or celebrations may be planned and performed on Blennerhassett Island with the approval of the Executive Director of the Blennerhassett Historical Park Commission.

1.03 - Docking or Landing of Watercraft - Various watercraft, boats, or vessels may dock or land on the shoreline of Blennerhassett Island in areas not marked as restricted. The Executive Director or his designated BHPC representative may require boats, vessels or vehicles to be moved or removed when docked or parked in restricted, unsafe, or otherwise undesirable locations.

1.04 - Responsibility - The Blennerhassett Historical Park Commission assumes no responsibility for lost, stolen or damaged goods, boats, or other property brought to Blennerhassett Island.

1.05 - Safety - Individuals and groups are required to confine their activities within normal and reasonable limits of safety.

1.06 - Evacuation - In certain emergency situations, the Blennerhassett Historical Park Commission with its employees or equipment may move or evacuate individuals from Blennerhassett Island, but assumes no risk in providing this service.

**SECTION 2: General Prohibitions**

2.01 - General Prohibitions - The following are prohibited activities at Blennerhassett Island:

- a. Digging or other subsurface disturbances or excavations;
- b. Collecting rocks, minerals, antiquities, artifacts, fossils, or other geological or cultural objects;
- c. Collecting or removing plant or animal specimens;
- d. Cutting or defacing trees, flowers, or other plant specimens;
- e. Defacing buildings, signs, or other objects;

- f. Removal or unauthorized use of BHPC property or equipment;
- g. Depositing litter, trash, food waste, or other refuse in other than provided containers;
- h. Affixing docks or other permanent or semi-permanent facilities to the Island without written authority;
- i. Trespassing in areas duly posted as restricted or entering grounds or facilities that are locked, closed, or designated as limiting access by days or times;
- j. Carrying or discharging of firearms, weapons, fireworks or explosives, or other dangerous substances;
- k. Hunting, trapping or other animal capture;
- l. Blocking designated public landing or docking areas;
- m. Interfering with tours, lectures, or other park activities;
- n. Selling of foods or commodities without specific written authority of the director of the BHPC;
- o. Hawking, peddling, soliciting, begging, advertising, or carrying on of any business or commercial enterprise without written permission of the director of the Blennerhassett Historical Park Commission;
- p. Fighting, drunken, or disorderly behavior;
- q. Creating loud or excessive noises, demonstrations, or disturbances;
- r. Operating motor-driven vehicles (trail bikes, motor bikes, snowmobiles, etc.).

### SECTION 3 - SPECIAL REGULATIONS

3.01 - Fires - Fires may be lighted only in fireplaces or grates as provided or in areas designated by the director or his designated representative. Fires must be completely extinguished before leaving park grounds.

3.02 - Pets - Dogs and other domestic pets may be brought to Blennerhassett Island: Provided, that they shall be kept on a leash not to exceed ten feet in length; and provided further that pets are prohibited inside park buildings.

3.03 - Abandoned Property - the Blennerhassett Historical Park Commission assumes no responsibility for watercraft or other personal property and if such property is abandoned or left unattended for a period in excess of forty-eight (48) hours, the BHPC may remove such property from the area and dispose of it according to law.

3.04 - Camping - Tent camping may be permitted in designated areas only and only by written permission.

3.05 - Swimming and skiing - Swimming or water skiing at or from Blennerhassett Island is permitted only in designated areas, but the BHPC assumes no responsibility or risk to individuals engaging in such activities.

3.06 - Closing or Evacuation - If, in the judgment of the director, a condition exists which requires that Blennerhassett Island be closed or that all persons should be evacuated from the Island, all personnel and persons will cooperate and abide by the director's order.

#### SECTION 4 - Transportation

4.01 - Only Commercial passenger boats operating under a written agreement with the Blennerhassett Historical Park Commission will be permitted to make regular scheduled excursion trips to Blennerhassett Island.

4.02 - Commercial carriers involved in the carriage of persons to Blennerhassett Island must have all boats (barge, tow boat, etc.) certified and inspected by the U.S. Coast Guard.

4.03 - The Blennerhassett Historical Park Commission may limit the number of carriers conducting regularly scheduled trips to the Blennerhassett Island.

4.04 - Any carriers desiring to bring a chartered party to Blennerhassett Historical Park (Blennerhassett Island) shall give not less than twenty-four (24) hours advance notice to the Executive Director or his designated representative

4.05 - Unless otherwise permitted by the Executive Director, or his designee, any charter conducted during the time regular scheduled service by the Blennerhassett Historical Park Commission is operating shall not land on the north side of Blennerhassett Island in the restricted area reserved for the regular service.

4.06 - The Executive Director or his designee shall have authority and power to assign a reasonable landing area for all commercial carriers operating charter service to Blennerhassett Island.

4.07 - Any commercial boat intending to land at Blennerhassett Island and discharge passengers shall furnish upon request proof of liability insurance in the minimum amount of one million dollars (\$1,000,000.00).

4.08 - The Executive director may, at his discretion, revoke the privilege of any commercial passenger carrier to land at Blennerhassett Island if there exists a safety hazard or potential for public harm, harm to Blennerhassett Historical Park, or other conditions that adversely affect public use, development or maintenance or operation of Blennerhassett Historical Park on Blennerhassett Island.

4.09 - The Executive Director shall have power to cause all boats of every description to move to or lay in such manner and position at any of the public landings of Blennerhassett Island, as in his discretion he believes best calculated for the convenience of all boats laying at or near such landing. He may, at his discretion, order off and cause, rafts and other watercraft, to make room for the convenient landing of any boat, barge, or other watercraft.

**SECTION 5:**

5.01 - Breach of Rules and Regulations - Any person may be evicted from Blennerhassett Island for any breach of the rules and regulations herein set forth or for the breach of any other rule or regulation which may be in effect. All rentals, fees or charges paid shall be forfeited in the event of eviction.

5.02 - Responsibility - It is the responsibility and duty of Blennerhassett Historical Park Commission employees and caretakers to enforce these rules and regulations and to advise the director of the BHPC of any violations and actions taken.



P.O. Box 361  
Parkersburg, WV 26102

(304) 428-8687  
(304) 428-TOUR

June 16, 1987

Members of the Blennerhassett Historical Park Commission

Ladies and Gentlemen:

This morning I received and read a copy of the "Emergency Rules - Blennerhassett Historical Park Commission". I am very upset with what I've just read. These rules, I believe, have been filed vindictively by Mr. Fowler and Mr. Richardson. They are also filed improperly.

The accompanying cover letter to the Secretary of State is dated June 4, 1987. I understand that you, the Commission, approved these rules on June 10th. Did Mr. Fowler have authority to file this document prior to your approval? Does a State of Emergency exist?

For nine months now I have been spending considerable money. I have spent much money promoting Blennerhassett Island and I have spent just as much protecting myself from Blennerhassett Island.

Please put a stop to the vindictiveness pointed at me. I am a small business. I have only one boat and I am trying honestly and professionally to promote my business and your park. Please make an effort to stop the assault on my company. Give my company a chance to develop and be of benefit to you.

What has River City Tours done to the Island Project? Have we harmed it? Look at this spring; look at the changes that have come from a competitive ferryboat market. Because of us consumers have greatly expanded service available. Point Park has two attractive ticket booths. Customers now receive a bonafide ticket. The number of school children must have been higher this year than ever before.

Certainly the Island has Operational Problems because of increased visitors and demand for service. But, those are being solved for you; and perhaps because of us. You

***ROLLIN' ON THE RIVER!***

received free brochures this year. The Convention Bureau is providing free marketing to help you. Several companies have offered you free guides; including us. You have a management planning committee of local leaders helping you, free of charge. Plus, our advertising and marketing alone has given you much free exposure.

If left alone the two Sternwheel Companies will find their own competitive market segments. The other company is quite capable of competing and has proved it. They have adapted well to every innovative marketing technique we instigated, and have placed many into their own program. They will survive and offer new and improved service. We have not hurt them. How have we hurt you?

There is no doubt in my mind that these "Emergency Rules" are another attack against my business levied by a couple of individuals harboring animosity. Look very closely at those "Rules", they do not appear to be legal or enforceable. If they are not discarded they may prove to be very embarrassing to the Island Commission.

Be advised that there is considerable caselaw in West Virginia that no other state agency, municipality, or political subdivision may interfere with the regulation of Public Utilities by the P.S.C. These "Emergency Rules" most definitely interfere. The BHPC does not have authority to regulate ferryboats. Ferryboats are Public Utilities. The BHPC is exceeding its power. Moreover, since the BHPC shares a P.S.C. Authority with Rubles Sternwheelers this action is contrary. You applied and received a regulated authority from the P.S.C. With one hand you accepted their regulations and with the other hand write your own regulations. This appears to be a conflict of interest and may damage your position.

Please, read again the enclosed cover letter to Mr. Heckler. Emergency Rules? Be realistic the emergency is a thinly veiled attempt, by a few individuals, to prohibit my serving your needs. The letter sites the following emergencies:

- C. An unlicensed, unapproved carrier providing regular service.
- D. My failure to comply with reasonable requests.
- E. My blocking of landing space, etc.
- H. The implication that we had something to do with an accident.

To address each in order:

- C. I am charged with the obligation to provide service and authorized to do so by the W.Va. Public Service Commission, and I'm approved by the United States Coast Guard. The only license

- I lack is the one you've refused to give me.
- D. I have never received a request to limit use of landing space. I have not been asked verbally or in writing.
- E. Your "Licensed Carrier" had never heretofore operated the schedule I do. They have never filed or advertised the schedule I operate. My schedule was developed opposite of theirs so this problem would not exist. If they were not operating my schedule also, the problem would not exist. Coincidentally, the "Licensed Carrier", more often than not, is blocking or delaying my operation and has many times done so blatantly.
- H. The evening of the accident my boat was moored in its berth 4½ miles away; and I seriously resent this implication.

As to the rules themselves, many appear to coincidentally fit the description of the "Licensed Carrier", but 4.01 and 4.02 are the only ones I will argue. The others I can adapt too, if required.

Item 4.01 - "Only Commercial passenger boats operating under a written agreement with the Blennerhassett Historical Park Commission will be permitted to make regular scheduled excursion trips to Blennerhassett Island."

I applied for your license on Feb. 17, 1987. At the April 3, Quarterly BHPC Meeting I was told only that the application had been referred to your attorney. Have you decided to accept or reject it? Would you direct your attorney to disclose its status. Also, please answer the questions in the applications cover letter, specifically, what substantiating documents do you require?

This is the second application River City Tours has made for a license. The first one from June of 1986 also has neither been accepted or rejected. How can I get a License, so as to qualify to Rule 4.01, if you throw away the application?

Item 4.02 - "Commercial carriers involved in the carriage of persons to Blennerhassett Island must have all boats (barge, towboat, etc.) certified and inspected by the U.S. Coast Guard.

The intent of this rule is to penalize or eliminate River City Tours as we differ from the "Licensed Carrier". Be advised that my vessels meet all requirements and certification of the United States Coast Guard. The difference

is that the "Sheila D" Sternwheeler is not a passenger carrying vessel therefore not certifiable under Coast Guard Rules and Regulations. The "Sheila D" is a push boat, crew quarters and storeroom. There are over 100 examples nationwide of this type of non-certifiable vessel pushing a Certified Vessel. Those examples include the Gateway Clipper Fleet in Pittsburgh and B & B Riverboats in Cincinnati. Thus, Rule #4.02 is contrary to existing State and Federal Requirements, and requires an unusual type of operation.

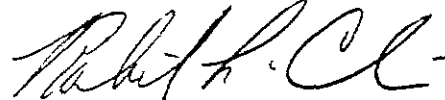
The "EMERGENCY RULES" are an attempt to circumvent the State Administrative Procedures Act and place immediate restriction on River City Tours, which would require River City to close a portion of its operation without affecting the other company. I have already defended myself against this type of vindictive, partial and unfair regulation (promulgated by Dan Fowler) with the U.S. Coast Guard, W.Va. Public Service Commission and the City of Parkersburg. Each time Mr. Fowler and Attorney pushed for this type of regulation the question of Supporting a Monopoly and Restraint of Trade was raised. Can you afford to provide more evidence of malfeasance to us? Stop those people assaulting me. I am trying to promote your Park and this region. We need no negative press and no further litigation.

You will, I hope, understand when I state that I cannot abide by the "EMERGENCY RULES". I cannot afford to in many ways, and I am awaiting rulings by the PSC, Attorney General, Secretary of State, etc. as to the legality of these "RULES".

Look at the progress of this Spring, read again the letters I've mailed you this winter. You'll see that River City Tours has not harmed you and that we have offered to help you.

Please discard the "RULES", don't make me fight you again. Let us concentrate on business.

Sincerely,  
River City Tours



Robert L. Cline  
President/General Manager

cc: Governor Arch A. Moore  
Sen. Robert Byrd  
Sen. Jay Rockefeller  
Rep. Alan B. Mollohan

cc: continued

cc: Sec. of State Ken Heckler  
Treasurer A. James Manchin  
Attorney General Charlie Brown  
Michael Herron  
Carolyn Ketchum  
Mayor William P.A. Nicely  
James Todd  
Members Parkersburg City Council  
George Kellenberger  
Steve Nicely  
Pat Pappas  
Don Feeney  
Harry Begg  
Art Mayer  
Charlene Crooks  
Robert Goldman  
Rob Hankins  
Fran Hollandonner



P.O. Box 361  
Parkersburg, WV 26102

(304) 428-8687  
(304) 428-TOUR

June 16, 1987

The Honorable Ken Hechler,  
Secretary of State of W. Va.  
Capitol Building  
Charleston, WV 25305

RE: Emergency Rules - Blennerhassett  
Historical Park Commission

Dear Mr. Hechler:

I am writing with regard to the above, asking that such "Emergency Rules" submitted to you on June 4, 1987, be rejected by your office and be returned to W.B. Richardson, Jr., Counsel for Blennerhassett historical Park Commission.

I make such request for three valid, and I believe legally compelling reasons:

1) No "Emergency" exists. The concept of Emergency Rules can and should be invoked only in the case of an actual emergency, i.e. flood, fire, tornado. If an organization such as BHPC wishes to have Emergency Rules on their books they should have a preamble or the Rules should be prefaced in such a way to incorporate a "trigger mechanism" such as "in the event of a flood, fire or other disaster the following Emergency rules shall be put into effect."

2) BHPC appears to have exceeded and abused their authority by enacting "Emergency Rules" for the purposes of avoiding or eliminating valid due process, circumventing the State Administrative Procedures Act and aiming these alleged rules directly at a business competitor in the Ferry Service. I personally believe it is a further abuse of authority for the BHPC to form a joint venture with a private company then pass so called "Emergency Rules" to insure that the joint venture will meet certain regulations thus preventing valid competition.

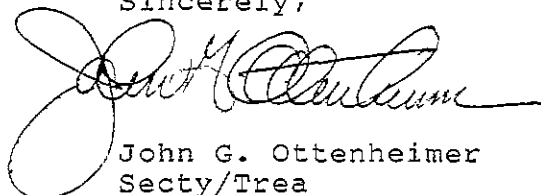
***ROLLIN' ON THE RIVER!***

3) It appears that the Counsel for BHPC and the BHPC Executive Director have exceeded their authority by submitting to you on June 4, 1987 certain "Emergency Rules". It is my understanding that the Rules in question were not approved by the commission - the actual governing body - until their regularly scheduled meeting on June 10, 1987. Therefore, the submission of these Rules to your office on June 4, 1987 is invalid because the rules were not approved until June 10, 1987. This again appears to be a situation where due process was either avoided or ignored.

Again, I request that you reject and return the "Emergency Rules" submitted to you on June 4, 1987 by BHPC. The Rules do not state the nature of the "Emergency"; they claim "Emergency" for the sole purpose of avoiding "due process" provided under the State Administrative Prodeedures Act; and they were submitted to your office without proper authority or authorization to do so.

Thank you for your consideration.

Sincerely,



John G. Ottenheimer  
Secty/Trea

cc: Arch Moore  
Dr. Faye Greene  
Mr. Daniel Fowler  
Mr. Michael D. Herron  
Carolyn Ketchem

RECORD TYPE: C

CORP NAME: RIVER CITY TOURS, INC.

DBA NAME: RIVER CITY TOURS; RIVER CITY TOURS & STEAMBOAT CO.(SEE COMM)  
INCORPORATION DATE: 05 / 08 / 1986 TYPE: D CLASS: P CHARTERED STATE: WV

PRINCIPLE OFFICE STREET	CITY	ST ZIP
PO BOX 361	PARKERSBURG	WV 26102 -
LOCAL OFFICE STREET	CITY	ST ZIP
		-

NOTICE OF PROCESS NAME AND ADDRESS: RANSFORD C. HECKERT		
P.O. BOX 361	PARKERSBURG	WV 26102 -

AUTH CAP STOCK:	25,000 .00	PAR VALUE:	10 . 00	EXCESS ACRES:	000000
TAX ID:	BUS PUR:	INACTIVE DATE:	/ /	REASON:	

REFER TO:

COMM: AND RIVER CITY STEAMBOAT CO. (ALL EFFECTIVE AS OF 3-20-1987)

"PF18" = GO TO UPDATE OFFICERS  
"PF15" = RETURN TO MENU NO UPDATE  
"PF23" = UPDATE & GO TO UPDATE AMENDS

"PF16" = GO TO BROWSE  
"PF22" = ADD A CORPORATION  
"ENTER" = UPDATE & RETURN TO MENU

## CORPORATION ADDRESS UPDATE SCREEN

SS01CC2

CORPORATION NAME: RIVER CITY TOURS, INC.

INCORPORATOR 1 NAME AND ADDRESS: KRISTIN P. SINCLAIR  
5702 HAMPTON DR. VIENNA WV 26105 -

INCORPORATOR 2 :

PRESIDENT NAME AND ADDRESS: -

VICE-PRESIDENT : -

SECRETARY : -

TREASURER : -

DIRECTOR 1 NAME AND ADDRESS: -

DIRECTOR 2 : -

"PF18 " = RETURN TO PREVIOUS SCREEN  
"ENTER" = UPDATE & RETURN TO MENU"PF15" = RETURN TO MENU NO UPDATE  
"PF23" = UPDATE & GO TO UPDATE AMENDS

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

BARBARA STARCHER  
Deputy Secretary of State

RICHARD S. STEPHENSON  
Deputy Secretary of State

Telephone: (304) 345-4000  
Corporations: 342-8000



STATE OF WEST VIRGINIA  
SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
Chief of Staff

RICH O. HARTMAN  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

VIRGINIA SKEEN  
Special Assistant

(Plus all the volunteer  
help we can get)

NOTICE OF THE EXPIRATION OF AN EMERGENCY RULE

AGENCY: BLENNERHASSETT HISTORICAL PARK COMMISSION  
RULE: RULES RELATED TO BLENNERHASSETT HISTORICAL PARK  
DATE FILED AS AN EMERGENCY RULE: June 11, 1987

THE ABOVE EMERGENCY RULE EXPIED ON AUGUST 11, 1987 DUE TO THE FAILURE OF THE BLENNERHASSETT HISTORICAL PARK COMMISSION TO FILE A NOTICE OF A PUBLIC HEARING ON THE ABOVE PROPOSAL WITHIN THE SIXTY DAYS AS REQUIRED BY WV CODE 29A-3-15. THIS EMERGENCY RULE WAS EFFECTIVE FROM JUNE 11, 1987 TO AUGUST 10, 1987.

A handwritten signature in cursive script, appearing to read "Rich O. Hartman".

Rich O. Hartman, Director  
Administrative Law Division

FILED IN THE OFFICE OF  
THE SECRETARY OF STATE  
THIS DATE Aug 11, 1987  
ADMINISTRATIVE LAW DIVISION

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

BARBARA STARCHER  
Deputy Secretary of State

RICHARD S. STEPHENSON  
Deputy Secretary of State

Telephone: (304) 345-4000  
Corporations: 342-8000



STATE OF WEST VIRGINIA  
SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
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RICH O. HARTMAN  
Director, Administrative Law

DONALD R. WILKES  
Director, Corporations

VIRGINIA SKEEN  
Special Assistant

(Plus all the volunteer  
help we can get)

July 23, 1987

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

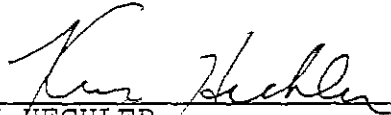
AGENCY: Blennerhassett Historical Park Commission (Title 181)

RULE: Rules Related to Blennerhassett Historical Park, new  
Rule, Series 1

DATE FILED AS AN EMERGENCY RULE: June 11, 1987

DECISION NO. 10-87

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be approved, except for Section 4 which is disapproved. A copy of the complete decision with required findings is available from this office.

  
KEN HECHLER  
Secretary of State

FILED  
1987 JUL 23 PM 4:21  
SECRETARY OF STATE

KEN HECHLER  
Secretary of State

MARY P. RATLIFF  
Deputy Secretary of State

BARBARA STARCHER  
Deputy Secretary of State

RICHARD S. STEPHENSON  
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STATE OF WEST VIRGINIA  
SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON  
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(Plus all the volunteer  
help we can get)

DECISION

Emergency Rule Decision  
(ERD 10-87)

AGENCY: Blennerhassett Historical Park Commission (Title 181)  
RULE: Rules Related to Blennerhassett Historical Park, New  
Rule, Series 1  
DATE FILED AS AN EMERGENCY RULE: June 11, 1987

- par. 1 The Blennerhassett Historical Park Commission (BHPC) has filed amendments to the above series 2 as an emergency rule amendment.
- par. 2 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [29A-3-15a(a)].
- par. 4 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The BHPC has filed this emergency rule with supporting documents with the Secretary of State on June 11, 1987, and with the LRMRC on June 11, 1987

par. 7 It is the determination of the Secretary of State that the Blennerhassett Historical Park Commission has complied with the procedural requirements of WV Code §29A-3-15.

par. 8 (B) Statutory Authority -- WV Code §29-8-3 reads in part:

*§29-8-3. General powers of commission as public corporation.*

*(17) Promulgate rules and regulations, in accordance with the provisions of chapter twenty-nine-a (§29A-1-1 et seq.) of this code, to implement and make effective the powers and duties vested in it by the provisions of this article and take such other steps as may, in its discretion, be necessary or expedient for proper and effective development of Blennerhassett island and related locations in the county of Wood into a major educational, cultural and recreational attraction.*

par. 9 Section 4 of the BHPC emergency rule seeks to regulate the operations of ferry service to and from the island. By an order dated July 17, 1987 of the West Virginia Public Service Commission involving ferry service to Blennerhassett Island, the PSC stated that it is the PSC - not the BHPC - which has statutory authority to regulate ferry service in West Virginia. In agreement with this order, Section 4 of these emergency rules is disapproved for exceeding statutory authority.

par. 10 (C) Emergency: WV Code 29A-3-15(g) defines "emergency" as follows:

*(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.*

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 18 The facts and circumstances as presented by the Blennerhassett Historical Park Commission are as follows:

A. Blennerhassett Historical Park Commission is charged by Chapter 29, Article 8 of the Code of West Virginia with responsibility and control in developing and maintaining educational, cultural and recreational attractions at or near Blennerhassett Island, and is a public corporation with authority to own or operate by itself or in conjunction with any other public agency or private agency or any private person, firm or corporation, such facilities and equipment as it considers necessary or convenient for the implementation of its duties, in the proper and effective development of Blennerhassett Island and related locations in the County of Wood.

B. For the past seven (7) years the Blennerhassett Historical Park Commission has provided regularly scheduled excursions to Blennerhassett Island by license agreement with a private operator.

C. This year, another private carrier, not licensed and approved by the Blennerhassett Historical Park Commission has been attempting to provide regular service to Blennerhassett Historical Park.

D. The other carrier has not complied with reasonable requests to promote efficient use of limited landing space at Blennerhassett Island.

E. The other carrier has from time to time blocked landing by the licensed carrier, has broken down, and has delayed scheduled trips to and from Blennerhassett Historical Park by the regular licensed carrier.

F. It is necessary to provide for the safety, comfort and convenience of passengers being attracted to Blennerhassett Island by the Blennerhassett Historical Park Commission by requiring that all commercial carriers be insured and duly certified by the U. S. Coast Guard.

G. To promote the development and use of all facilities and services of Blennerhassett Historical Park, it is necessary to establish reasonable rules and regulations for the use of docking or landing areas.

H. Within the past two (2) weeks, the licensed carrier struck another boat which was moored in the area reserved for the licensed carrier. To avoid congestion in this area and to provide for regular landings, these rules are necessary.

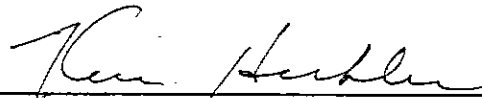
I. Over 100,000 visitors are expected to visit Blennerhassett Historical Park during the 1987 season. There are costly improvements and public property on the Island recently completed which need immediate rules to protect their value and thus enhance the public enjoyment and safety while on the Island.

J. Thus, in order to preserve the public health, safety and welfare and to prevent substantial harm to the public interest in Blennerhassett Historical Park, the enclosed rules and regulations are filed as Emergency Rules.

par. 13 Of the above facts and circumstances, the one statement designated as "I" would qualify as a reason for an emergency. Loosely hung on this one fact, it is the decision of the Secretary of State that this rule qualifies as an emergency.

par. 14 It is the decision of the Secretary of State that this proposal by the BHPC is in procedural compliance with WV Code 29A-3-15; does not exceed the statutory authority of the BHPC except for Section 4 which do exceed statutory authority; and that the facts and circumstances presented constitute an emergency. Therefore, the Secretary of State decides that this emergency rule should be approved, except Section 4 which are not approved as an emergency amendment.

par. 15 This decision shall be cited as Emergency Rule Decision 10-87 or ERD 10-87 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Blennerhassett Historical Park Commission, the Attorney General and the Legislative Rule Making Review Committee.



KEN HECHLER  
SECRETARY OF STATE

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