

jurisdiction. Further, experienced practitioners before the Commission have provided in-depth input concerning the preservation of the rights and interests of all parties appearing before the Commission and their respective clients.

While significant progress has been made in addressing issues and concerns raised by numerous parties, Sprint remains concerned that the Third Proposed Rules have not resolved numerous procedural inconsistencies which will materially impact all parties seeking to initiate proceedings before the Commission.

COMMENTS

1. PROPOSED RULES CONCERNING PARTICIPATION IN COMMISSION PROCEEDINGS

Sprint has previously expressed its concerns about the incorporation of provisions from the APA related to the filing of Protests and Formal Interventions in Commission proceedings. Because the APA's formal intervention and protest provisions deal only with proceedings that are already deemed to be "contested cases", it is essential to provide a separate process for recognizing and adjudicating proceedings that are not "contested" and a procedural process for converting an uncontested proceeding into a "contested case". While Sprint agrees with the Commission's decision to assign a separate section of the Proposed Rules to contested cases, the Third Proposed Rules retain the very troubling provisions permitting interested persons to file a Formal Intervention in a proceeding that has already been deemed to be a contested case, which raises serious due process issues. Sprint agrees with the Commission Staff's recently articulated position that the specific statutory authority of the Commission to develop its own rules of procedure effectively trumps the APA's provisions which establish this debilitating procedure. However, it has been suggested by the Commission that corrective legislation may be needed to satisfy concerns about this legal matter. Sprint urges the Commission to carefully explore this

option pending the finalization of the Proposed Rules in order to preserve the integrity of the Commission's historic procedural process which effectively addresses both contested and uncontested cases without such troubling procedural due process issues.

2. **CERTAIN DEFINITIONS CONTAINED IN THE PROPOSED RULES SHOULD BE ADDED AND/OR CLARIFIED.**

Sprint has previously suggested the addition of and/or modification of certain definitions to provide clarity and uniformity to the construction of the Proposed Rules and to facilitate Sprint's suggestions to distinguish between "contested cases" and "uncontested cases". In particular, the following defined terms would be of particular value, but have not been included in the Third Proposed Rules. Sprint would encourage the Commission to further consider adopting these defined terms.

- a. **"Proceeding"**. The term "proceeding" has been used historically throughout the rules, but it is not defined. While a "proceeding" is the fundamental administrative vehicle through which the Commission conducts its official business, the Rules often refer to initiating an "action" (002.07), or a "case" (002.09), or intervening in a "matter" (002.12B), none of which are defined. Further, several existing definitions incorporate the term "proceeding", but do not define what it is. For example, the definition of "pleading" (001.25) (identifying the types of documents that are used in any "proceeding") and the definition of "Petition" (001.23) provides that it is an "initial document" that "initiates a proceeding". In addition, there are two categories of "proceedings" which the Commission adjudicates--"contested" and "uncontested". Given that the statutory definition of "contested case" in the APA and in our existing regulations provides that it is a distinct type of "proceeding" (001.06), and that the APA establishes a host of separate procedural rules for any "proceeding" that constitutes a "contested case", it seems very important that the Rules have a uniform definition of "proceeding". By establishing a specific and uniform definition, the usage of the term throughout the Rules provides important internal legal consistency and clarity. I have submitted a proposed definition that I hope would serve this important purpose.
- b. **"Initial Pleading"**. The term "initial pleading" is also used with some frequency in the Rules but is not defined. For example, the definition of "Application" is ". . . an **initial pleading** seeking Commission action"(001.02). Likewise, "petition" is defined and an "initial document"

[this should say initial “pleading” because that would be consistent--the term “document” is not defined either] that “initiates a proceeding”. This designation is important for two reasons. First, it identifies just those “pleadings” that actually initiate a proceeding. Second, an “initial pleading” establishes the existence of a “proceeding” that is not a “contested case”, unless it is a Complaint (Formal or Departmental), which by its nature is contested.

- c. “**Initial Proceeding**”. The filing of an” initial pleading” establishes a “proceeding” before the Commission which, except in limited situations, is **not** contested. New Section 003 specifically provides under what circumstances a “matter” (i.e., an “initial proceeding”) becomes or is deemed to be a “contested case”, which triggers an entire procedural process that does not apply to uncontested proceedings. Since most proceedings processed by the Commission are **not** contested, it is important to preserve the simplified manner of processing initial uncontested proceedings under the Rules. Clearly, the thrust of both of our efforts in reordering and revising the Rules is to delineate and preserve these separate regulatory structures and processes. Defining such proceedings as “initial proceedings” memorializes them as proceedings that are **not contested** until deemed to be so under a separate section of the Rules (i.e., Section 003 in your draft).

3. **SPRINT SUBMITS PRIOR COMMENTS FOR THE RECORD.**

Sprint hereby submits as **Exhibits 1 and 2** and reiterates its Comments provided to Staff Counsel on June 9, 2015 and July 13, 2015, for further consideration in the development of the Proposed Rules.

CONCLUSION

Sprint is grateful for the efforts of the Commission to advance the difficult and tedious task of updating and reorganizing the Commission’s Rules of Procedure. Sprint urges the Commission to continue its efforts to finalize this process and to recognize that the Nebraska Supreme Court has repeatedly stated that the Commission’s underlying authority to promulgate rules and regulations is derived from Neb. Rev. Stat. § 75-110, rather than the APA. Sprint hopes that the Commission will continue to refine the Proposed Rules in a fashion that best

meets its unique needs and that provides procedural and due process protection to all interested parties.

Respectfully submitted this 28th day of August, 2015.

SPRINT

By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of August, 2015, one original, one copy and an electronic copy of the Comments of Sprint in Docket No. Rule and Regulation No. 192 were delivered to:

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A handwritten signature in black ink, appearing to read "Loel P. Brooks", written over a horizontal line.

Loel P. Brooks

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The undersigned hereby certifies that on this 28th day of August, 2015, an electronic copy of the Comments of Sprint in Docket No. Rule and Regulation No. 192 were delivered to:

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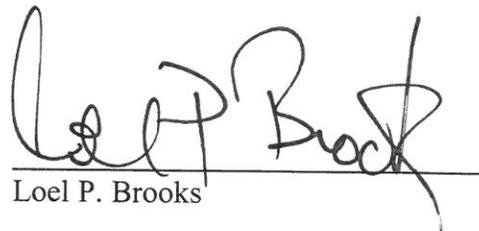
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EXHIBIT 1

Comments Provided to Commission Staff Counsel on June 9, 2015

Sonya Brakeman

From: Loel P. Brooks
Sent: Tuesday, June 09, 2015 12:54 PM
To: Melton, Angela
Cc: Browning, Diane C [GA]; Sonya Brakeman
Subject: RE: Rule and Reg. 192
Attachments: Rule and Regulation #192 - Draft Proposed Rules - LPB Revisions 6-8-15.docx
Importance: High

Angela, attached is my updated version of Rule and Reg. 192 for your review. I have redacted the body of the Rules rather than providing another memo or additional comments, so that we have something concrete to deal with. I have built off of your significant work to establish a procedural framework that derives context and terminology from the APA but does not abandon the procedural foundations of the Commission set forth in specific statutory provisions of Nebraska Law, in particular Chapters 75 and 86.

Working from your April 28, 2015 version of the Rules, and from the direction of the Commission during the Workshop to “reorder” certain procedural sections in order to restore the unique and important features of the Commission’s historic statutory procedural foundations, I have created three separate sections for your consideration, as follows;

Section 4A - Rules of Practice and Procedure in Initial (Non-contested) Proceedings
Section 4B – Formal Interventions and Protests in Non-Contested Proceedings
Section 4C – Rules of Practice and Procedure in Contested Cases

Using these section designations eliminates the need to renumber all the other Sections, but renumbering is certainly an option if necessary.

Section 4A captures the procedures and mechanics of initiating and processing Initial Proceedings (newly defined here but often used in the current Regs without definition) that have not yet been deemed a Contested Case. All actions filed at the Commission begin as an Initial Proceeding, and probably most remain as Initial Proceedings that are not, and do not become. Contested Cases. This section also captures sections that apply to all proceedings before the Commission, such as the form of Pleadings, Motions for Reconsideration, and the effective date of a Commission Order. I have also included ex parte communications in this section in deference to the Commission’s current practice of prohibiting ex parte communications at the time an Initial Pleading is filed. Of course, this interpretation is subject to further Commission review and determination, as we discussed at the Workshop.

Section 4B covers Formal Interventions and Protests in Initial Proceedings, and restores the mechanism of establishing a contested case by virtue of the filing of one of these pleadings. Informal Intervention only applies in the event of a contested case.

Section 4C captures all of the remaining procedural matters relating to Contested Cases, with the exception of formal interventions and protests in proceedings that are already deemed to be contested, which I omitted entirely.

The submission of this revised version of Rule and Reg. 192 to the Attorney General would necessarily require the simultaneous filing by the Commission of an “explanatory statement” pursuant to Neb. Rev. Stat. Sections 84-907.04 and 84-909.01 to state the reasons why relevant portions of the model rules were impartible under the circumstances, which can be persuasively done given the statutory underpinnings of the Commission’s Rule of Procedure.

Of course, I am open to further iterations of the version as they may appear to advance the underlying objectives of this approach.

Thanks very much for all your efforts on this massive and complex project and for your patience. I look forward to your comments and suggestions.

Best regards,

Loel

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APPENDIX

001 DEFINITIONS: The following definitions shall apply:

001.01 Applicant shall mean a party or parties who have filed an application with the Commission.

001.02 Application shall mean an initial pleading seeking Commission action.

001.03 Argument shall mean the oral statement of the petitioner or any other party which explains his or her view of the facts and issue to be decided, the law applicable to the question presented, and the reasoning that connects the facts and law.

001.04 Commission shall mean the Nebraska Public Service Commission.

001.05 Common Carrier shall mean a person transporting passengers or goods or providing telecommunications services for hire to the general public at large in Nebraska intrastate commerce.

001.06 Contested Case shall mean a proceeding before the Commission in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the Commission.

001.07 Contract Carrier shall mean a person transporting passengers or goods or providing telecommunications services for hire, other than as a common carrier, in Nebraska intrastate commerce.

001.08 Declaratory Order Proceeding shall mean a proceeding initiated by a petitioner pursuant to seeking issuance of a binding order by the Commission as to the applicability of specified circumstances to a statute, rule, regulation, or order within the primary jurisdiction of the Commission.

001.09 Departmental Complaint shall mean a complaint filed by a director of a department alleging a violation of a statute, rule or Commission order and seeking relief.

001.10 Executive Director shall mean the designated person in charge of the day-to-day operations of the Commission.

001.11 Ex parte Communication shall mean an oral or written communication which is not on the record in a contested case [proceeding] with respect to which reasonable notice to all parties was not given. Ex parte communication shall not include:

001.11A Communications which do not pertain to the merits of a contested case [proceeding];

001.11B Communications required for the disposition of ex parte matters as authorized by law;

001.11C Communications in a ratemaking or rulemaking proceeding except with respect to any proceedings in which the public advocate is a party as set forth in 004.01B; and

001.11D Communications to which all parties have given consent.

001.12 Formal Complaint shall mean a written complaint filed with the Commission alleging a violation of a statute, rule or Commission order and seeking relief.

001.13 Formal Intervenor(s) shall mean an intervenor who files a Petition for Formal Intervention seeking to become a party to a Commission proceeding.

001.14 Hearing Officer shall mean the Commissioner or Commissioners conducting a proceeding pursuant to the Administrative Procedure Act, whether designated as the presiding officer, administrative law judge, or some other title.

~~001.15 Intervenor(s) shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the Commission's issuance of a binding order.~~

~~001.16-15 Informal Intervenor(s) shall mean an intervenor who does not satisfy the requirements of formal intervention or files a satisfactory petition requesting informal intervention status. Informal intervenors are not made parties to the proceeding and their participation is limited.~~

001.16 Initial Pleading shall mean a pleading filed with the Commission to commence an initial proceeding before the Commission.

001.17 Initial Proceeding shall mean a proceeding commenced before the Commission by the filing of an Initial Pleading that is not deemed to be a contested case.

~~001.158 Intervenor(s) shall mean persons, political subdivisions, corporations, organizations, or other entities who have or claim to have any interest, legal right, duty, privilege, or immunity, which would be directly affected by the Commission's issuance of a binding order.~~

~~001.17-19 Jurisdictional Utility shall mean a natural gas public utility subject to the jurisdiction of the Commission under the State Natural Gas Regulation Act as defined in section 66-1802(10).~~

~~001.18-20 Motion shall mean an oral or written request addressed to a Hearing Officer or the Commission by any party to a proceeding.~~

~~001.19-21 Necessary Party for Purposes of Petitions for Declaratory Rulings shall mean a person who or an entity which has a specific interest in the applicability of the statute, rule, regulation, or order, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or~~

would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

~~001.20-22~~ Order to Show Cause shall mean an order issued by the Commission directing a person subject to its jurisdiction to appear before the Commission and present evidence as to why the Commission should not take a particular action.

~~001.21-23~~ Parties shall mean persons, political subdivisions, corporations, organizations, or other entities subject to the jurisdiction of the Commission who are involved in a proceeding before the Commission according to the procedures set forth in this chapter. In a contested case, party means the person by or against whom a contested case is brought or a person allowed to formally intervene in a contested case.

~~001.22-24~~ Person shall mean an individual, firm, organization, corporation, company, association, partnership, joint stock association, body politic, common carrier, society, legal representative, trustee, receiver, assignee, guardian, executor or administrator.

~~001.23-25~~ Petition means an initial ~~document-pleading~~ filed by or with the Commission that sets forth a claim and request for Commission action or initiates a proceeding.

~~001.24-26~~ Petitioner(s) shall mean a party or parties who have filed a petition with the Commission seeking issuance of a Commission order.

~~001.25-27~~ Pleading shall mean any written application, petition, formal complaint, answer, intervention, protest, or motion used in any proceeding before the Commission as set forth in this chapter.

~~001.28~~ Proceeding shall mean the form and manner of conducting official business before the Commission.

~~001.26-29~~ Protest shall mean any pleading filed in opposition to an application.

~~001.27-30~~ Protestant shall mean a person filing a protest to the granting of an application.

~~001.28-31~~ Public Advocate shall mean the person appointed by the Executive Director to represent the interests of Nebraska citizens and all classes of jurisdictional utility ratepayers, other than high-volume ratepayers, in matters involving jurisdictional utilities and as trial staff before the Commission.

013 GENERAL:

013.01 Office Hours: Commission office hours are 8:00 a.m. to 5:00 p.m., Monday through Friday, except for holidays as defined by state statute.

013.02 Computation of Time: In computing time prescribed or allowed by these rules and regulations or by any applicable statute in which the

~~method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day. In computing any period of time prescribed or allowed by the rules, the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.~~ When the period of time prescribed or allowed is less than five (5) days, intermediate Saturdays, Sundays and holidays will be excluded in the computation.

013.03 Copies: Unless otherwise specified, persons filing a pleading, comments or other filings, shall furnish to the Commission an original, a paper copy and an electronic copy either via e-mail or other electronic media.

008 APPEARANCES:

008.01 Individual: An individual may appear on his or her own behalf before the Commission.

008.02 On Behalf of Another: An individual may appear on behalf of another person and elicit testimony from witnesses if such individual is admitted to practice law before the Nebraska Supreme Court or is admitted to practice law before the Supreme Court of any other state and has been admitted to practice before the Commission in a proceeding upon a motion by a person admitted to practice before the Nebraska Supreme Court.

008.03 On Behalf of Another by Limited Appearance: An individual who is neither admitted to practice law before the Nebraska Supreme Court nor the Supreme Court of any other state may appear for a governmental subdivision, corporation, association or partnership for the sole purpose of making a statement on behalf of such person, but shall not elicit testimony from any other person.

~~008.04 Special Appearance: Objections to the jurisdiction of the Commission will be made by filing a special appearance. A party appearing specially for such purpose shall designate the specific defects upon which he or she relies. If no objection to the jurisdiction of the Commission is made prior to the hearing or at the time appearances are made, jurisdictional defects, except subject matter, are waived. If a special appearance is overruled, the objection to the jurisdiction of the Commission will be preserved in a further pleading if any is required.~~

Comment [SB1]: Loel Brooks-why remove?

010 SERVICE AND NOTICE:

010.01 Service and Notice: For the purpose of service, each person subject to the Commission's jurisdiction shall at all times keep on file with the Executive Director his, her or its business address or, in lieu thereof, notify the Executive Director of an agent (name and address)

designated to receive documents and notices. Until the Executive Director is notified to the contrary, the address on file with the Commission's various departments will be deemed to be the address to which documents and notices will be mailed or personally delivered. Proof of service that any person subject to Commission jurisdiction was served, or was attempted to be served, at the address on file with the Commission shall be adequate to satisfy any notice requirement imposed by these rules. Any person who does not hold a certificate, permit, or license from the Commission, and yet may be subject to the Commission's jurisdiction, may be served wherever such person is found within the state.

010.02 Manner of Service: Service of any pleading or subpoena may be accomplished through any means permitted by law related to civil cases.

010.03 Date of Service if by First Class Mail: If a document is served via first class mail, the date of service of a document is the date of the mailing plus three (3) days.

010.04 Notice of Application: Notice of the filing of all applications will be given to all interested persons by publishing a summary of the authority or relief sought.

010.05 Notice of Hearing: Notice of a hearing shall be mailed to all parties via first class mail, except that notice of a hearing on a complaint shall be mailed to the respondent via certified mail or made by personal service.

010.06 Official Publication: The legal newspaper is known as The Daily Record and is the official newspaper in which notices will be published by the Commission.

009 SUBPOENAS:

009.01 Witnesses and Documents: The Commission may compel the attendance of witnesses or production of documents through the issuance of a subpoena upon written request of any party, or on order of the Commission or Hearing Officer.

009.01A Requests for subpoenas must be filed with the Commission at least ten (10) days prior to the date the witness is expected to attend or the date the production of documents is expected to occur.

009.01B Witness fees shall be paid as provided by law in attendance at any district court in this state. The sheriff or constable executing any process of the Commission shall receive such compensation as is provided by law for performing similar services. Any such fee shall be paid by the party requesting the subpoena.

009.01C Any Motion to Quash a subpoena shall be filed in writing with the Commission and served on all parties to a proceeding by the movant in compliance with Rule 004.06C. The

hearing officer may grant or deny the motion in whole or in part or may schedule oral argument on the motion.

009.02 Failure to Comply with Subpoena:

009.02A Any witness failing or refusing to obey any subpoena issued by the Commission, or to produce before the Commission such books, papers, documents or records as shall have been enumerated and required in any subpoena, or failing or refusing, when before the Commission, to give testimony lawfully required by it, or failing or refusing to answer such questions as may be propounded by it which such witness would be required to answer if in court, the witness shall be guilty of a misdemeanor, and upon conviction thereof, for each offense, shall be fined in any sum not exceeding five thousand dollars (\$5,000.00).

009.02B The claim that any such testimony may tend to incriminate the witness shall not excuse the witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

004A RULES OF PRACTICE AND PROCEDURE IN INITIAL (NON-CONTESTED) PROCEEDINGS:

004A.01 Commencement of an Initial Proceeding.

004A.01A A person may commence a proceeding before the Commission by filing a petition, application or formal complaint with the Commission setting forth a claim and request for Commission action.

004A.01B The Commission may commence a proceeding before the Commission by filing a departmental complaint, petition for investigation or an order to show cause.

004A.02 Commencement of a Contested Case An initial proceeding shall be deemed to be a contested case pursuant to the provisions of Section 004C.

004A.03 Pleadings

004A.03A The pleadings in a proceeding may include a petition, application, formal complaint, intervention, protest, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Commission. Pleadings used in any proceeding before the Commission shall meet the following requirements:

004A.03A1 The pleading shall contain a caption specifying the title or nature of the pleading, shall state material factual allegations and state concisely the action the Commission is being requested to take, shall contain the name and address of the petitioner, applicant, or

complainant, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

004A.03A1a Attorneys shall also include their address, telephone number and bar number.

004A.03A1b The initial petition or formal complaint shall also contain the name and address of the respondent.

004A.03A2 All pleadings shall be made on white, letter-sized (8½ x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

004A.03A3 All pleadings shall be filed with the Commission at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Commission.

004A.03A4 The Commission shall serve a copy of any petition, application, formal complaint or other formal document on each respondent listed in the petition, application, formal complaint or other formal document personally or by first class or certified mail. Written proof of such service shall be filed with the Commission. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of Commission mailing of the petition, application, formal complaint or other formal document.

004A.03A5 All pleadings subsequent to the initial petition, application, or formal complaint shall be served by the party filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first class or certified mail. Written proof of such service shall be filed with the Commission.

004A.03A6 Pleadings filed with the Commission will not be withdrawn without approval of the Commission.

004A.03A7 Any petitioner, applicant, or complainant failing to prosecute his or her petition, application, or formal complaint within ninety (90) days may be subject to an order to show cause as to why the petition, application, or formal complaint should not be dismissed.

004A.03A8 Any application, petition, or other initial pleading which is not opposed through a protest or formal intervention within thirty (30) days of the date notice is published may be processed by use of affidavits and may be processed administratively without a hearing.

004A.04 Every order of the Commission shall become effective ten (10) days after the date of the mailing of a copy of the order to the parties of record except:

004A.04A When the Commission prescribes an alternate effective date;

004A.04B As otherwise provided with respect to emergency rate orders entered pursuant to section 75-121 and rate orders entered pursuant to section 75-139;

004A.04C For cease and desist orders issued pursuant to section 75-133 which shall become effective on the date of entry; or

004A.04D For orders granting temporary approval of a lease of a regulated motor carrier property and certificates or permits sought to be acquired entered pursuant to section 75-319 which shall become effective on the date of entry.

004A.04E When any application has been denied, in whole or in part, a subsequent application covering substantially the same subject matter will not be considered by the Commission within ninety (90) days from the date of the final denial, in whole or in part, of the previous application, except for good cause shown.

004A.05 Motions for Reconsideration and Appeals:

004A.05A Except with respect to rate orders under the State Natural Gas Regulation Act, any party may file a motion for reconsideration with the Commission within ten (10) days after the effective date of the order.

004A.05A1 The filing of a motion for reconsideration shall suspend the time for filing a notice of intention to appeal pending resolution of the motion.

004A.05A2 If the Commission does not dispose of a motion for reconsideration within sixty (60) days after the filing of the motion, the motion shall be deemed denied.

004A.05B Any party to a general rate proceeding under the State Natural Gas Regulation Act may file a motion for reconsideration within thirty (30) days after the day an order setting natural gas rates is entered by the Commission.

004A.05B1 The filing of a motion for reconsideration shall stay the order until the earlier of the date the Commission enters an order resolving the motion or one hundred twenty (120) days from the date of the order setting rates.

004A.05B2 Either party shall have thirty (30) days after the date the Commission enters an order resolving the

motion or the expiration of the one hundred twenty (120) day period for considering the motion, whichever is earlier, in which to file an appeal.

004A.05C Appeal of a Commission order shall be taken in the same manner and time as appeals from the district court, except that the appellate court shall conduct a review of the matter de novo on the record. Appeal of a Commission order shall be perfected by filing a notice of intention to appeal with the Executive Director of the Commission within thirty (30) days after the effective date of the order.

004A.05 Disposition Without Hearing.

004A.05A An initial proceeding which is not deemed to be a contested case pursuant to Section 004.02 may proceed administratively without a hearing.

004A.07 Prohibitions Against Ex Parte Communications:

004A.07A The prohibitions found in this section shall apply beginning at the time an initial pleading is filed.

004A.07B With respect to any matter of fact or law at issue in a [contested case] [proceeding] and notwithstanding any other provision of law, a member, staff, or agent of the Commission shall not during the pendency of any [contested case] [proceeding] proceeding heard before the Commission have any ex parte communication with any party having an interest in the outcome of the [contested case] [proceeding]. In any proceeding before the Commission in which the public advocate is a party or is appearing for a party, the public advocate shall be considered a party for purposes of the restrictions on ex parte communications.

004A.04C Any Commissioner, member of commission staff, or agent of the Commission who is or may reasonably be expected to be involved in the decision-making process of the [contested case] [proceeding] who receives or who makes or knowingly causes to be made an ex parte communication shall file in the record of the [contested case] [proceeding] all such written communications, memoranda stating the substance of all such oral communications, and all written responses and memoranda stating the substance of all oral responses to all the ex parte communications. The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.

004B FORMAL INTERVENTIONS AND PROTESTS IN NON-CONTESTED PROCEEDINGS:

004B.01 The following applies to formal interventions in a Commission proceeding:

004B.01A Formal Intervention; Status: Any person who has an interest in any initial proceeding pending before the Commission, but who does not desire to file a formal protest, may file a Petition for Formal Intervention. Such person shall be designated as a "formal intervenor", and shall become a party to the proceeding.

004B.01A1 Content: A Petition for Formal Intervention shall set forth the name and address of the intervenor, a statement of the interest of the intervenor in the proceeding, the grounds upon which the intervention is made and shall specify the facts and circumstances relied upon for such intervention.

004B.01A1a When Filed; Service: A Petition for Formal Intervention shall be filed with the Commission within the time specified in 014.02 for the filing of a formal protest. A copy of the Petition for Formal Intervention shall be served upon all parties of record to the proceedings or upon their attorneys of record.

004B.01A1b Participation in Proceedings: A formal intervenor shall be entitled to participate in the proceeding to the extent of his/her express interest in the matter. Such participation shall include, without limitation, presentation of evidence or argument, cross-examination of witnesses and participation in oral argument submission of briefs. An informal intervenor shall not be permitted to engage in discovery nor to cross-examine or otherwise interrogate the witnesses in the proceeding called by any party.

004B.02 The following applies to Protests in a Commission Proceeding:

004B.02A A protest shall set forth the name and address of the protestant, a statement concerning the interest of the protestant in the petition, application, and a request for the relief sought by the protestant. Additionally, the protest shall set forth specifically the grounds upon which it is made and the facts and circumstances relied upon.

004B.02B Except and unless otherwise provided in statute, a protest against the granting of any application or petition shall be filed with the Commission within thirty (30) days from the date of publication of notice of the application or petition. A copy of the protest must be served upon all parties.

004B.02C Except as otherwise provided in the statutes, a protest against the granting of an application or petition for a certificate authorizing inter-LATA interexchange telecommunications service shall be filed with the Commission within ten (10) days from the date of publication of said notice.

A copy of the protest should be served upon all adverse parties, or upon their attorneys of record.

004B.02D A protest to the granting of an application or petition for temporary motor carrier authority, which the Commission is empowered to grant after not less than five (5) days-notice and without hearing, shall be filed with the Commission within five (5) days after the date such notice is published.

004B.02E In certain emergency situations, the Commission has the statutory authority to temporarily alter, amend, or suspend any existing rates in force, or to fix any such rates where none exist by issuing an order which prescribes an emergency rate. A protest to the granting of such emergency rate must be filed within fifteen (15) days after notice of the emergency rate.

004C RULES OF PRACTICE AND PROCEDURE IN CONTESTED CASES:

004C.01 An initial proceeding shall be deemed a contested case upon the occurrence of the following events:

004C.01A A person files an initial pleading and a request for a hearing;

004C.01B A person files a formal intervention or protest to a petition, application, or formal complaint within thirty (30) days of the date notice is published;

004C.01C Upon the filing of a departmental complaint; or

004C.01D A matter is declared to be a contested case upon the Commission's own motion.

004C.02 The parties to a contested case shall be the petitioner, applicant, complainant, or other person by whom a contested case is brought and the respondent or person against whom a contested case is brought and includes an formal intervenors.

004C.03 A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

004C.04 Pleadings in a contested case shall comply with the requirements of Section 004A.04 in addition to the terms of this Section.

004C.05 In a contested case, a hearing date shall be set by the Commission in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the Hearing Officer, if known, shall be served by the Commission upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the Commission.

004C.06 Hearing Officer; Criteria:

004C.06A The Commission may delegate to a Hearing Officer the functions of conducting a prehearing conference, planning conference, and/or hearing and addressing discovery and evidentiary matters and other non-dispositive matters.

004C.06B A Commissioner who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as Hearing Officer or assist or advise a Hearing Officer in the same proceeding without the consent of all parties.

004C.06C A Commissioner who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as Hearing Officer or assist or advise a Hearing Officer in the same proceeding.

004C.06C1 A Commissioner may serve as Hearing Officer at successive stages of the same contested case.

004C.06D Prehearing Procedures:

004C.06D1 A Hearing Officer designated to conduct a hearing may determine, subject to the Commission's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not held, a Hearing Officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.

004C.06D1a If a prehearing conference is conducted:

004C.06D1ai The Hearing Officer shall promptly notify the Commission of the determination that a prehearing conference will be conducted. The Commission may assign another Hearing Officer for the prehearing conference; and

004C.06D1aii The Hearing Officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The Commission shall give notice to other persons entitled to notice.

004C.06D1aiii The notice referred to in subsection 004.05A1b shall include the following:

004C.06D1aiiii(a) The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;

004C.06D1aiii(b) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Commission;

004C.06D1aiii(c) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;

004C.06D1aiii(d) A statement of the time, place, and nature of the prehearing conference;

004C.06D1aiii(e) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;

004C.06D1aiii(f) The name, official title, mailing address, and telephone number of the Hearing Officer for the prehearing conference;

004C.06D1aiii(g) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act; and

004C.06D1aiii(h) Any other matters that the Hearing Officer considers desirable to expedite the proceedings.

004C.06D2 The Hearing Officer may conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The Hearing Officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.

004C.06D3 The Hearing Officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.

004C.06D4 The Hearing Officer or staff designated by the Hearing Officer may conduct informal planning conferences during the pendency of an action to discuss scheduling, discovery, and other procedural issues.

004C.06E Discovery in Contested Cases:

004C.06E1 The use of depositions and discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court unless otherwise ordered by the Hearing Officer.

004.06E2 The Hearing Officer or a designee, at the request of any party or upon the Hearing Officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

004C.06E3 Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery-related motion shall:

004C.06E3a Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;

004C.06E3b State the reasons supporting the motion;

004C.06E3c Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and

004C.06E3d Be filed with the Commission. The moving party must serve copies of all such motions to all parties to the contested case.

004C.06E3e Other than as provided in subsection 004.06C4 above, discovery materials need not be filed with the Commission.

004C.06F Continuances: The Hearing Officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the Hearing Officer's own motion or at the timely request of any party for good cause shown. A party must file a written motion for continuance which states in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.

004C.06F1 Good cause for an extension of time or continuance may include, but is not limited to, the following:

004C.06F1a Illness of the party, legal counsel or witness;

004C.06F1b A change in legal representation;
or

004C.06F1c Settlement negotiations are underway.

004C.06G Amendments:

004C.06G1 A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.

004C.06G2 A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A Hearing Officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.

004C.06H Disposition Without Hearing:

004C.06H1 Unless otherwise precluded by law, disposition of any contested case may be made by stipulation, agreed settlement, consent order, or default and thereafter be processed administratively without a hearing.

004C.06I Conducting a Contested Case Hearing:

004C.06I1 At the discretion of the Hearing Officer, the hearing may be conducted in the following order:

004C.06I1a The hearing is called to order by the Hearing Officer. Any preliminary motions, stipulations or agreed orders are entertained.

004C.06I1b Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.

004C.06J Evidence will be received in the following order. Presentation of evidence by Commission staff may be offered during the hearing at the discretion of the Hearing Officer:

004C.06J1 Evidence is presented by the applicant, petitioner, or complainant;

004C.06J2 Evidence is presented by the intervenor, protestant, or respondent;

004C.06J2a Rebuttal evidence is presented by the applicant, petitioner, or complainant; and

004C.06J2b Surrebuttal evidence is presented by the intervenor, protestant, or respondent, if permitted by the Hearing Officer.

004C.06J3 With regard to each witness who testifies, the following examination may be conducted:

004C.06J3a Direct examination conducted by the party who calls the witness;

004C.06J3b Cross examination by the opposing party;

004C.06J3c Redirect examination by the party who called the witness; and

004C.06J3d Recross examination by the opposing party, if permitted by the Hearing Officer.

004C.06J4 After the evidence is presented, each party may request the opportunity to make a closing argument. Closing arguments shall be made in the same order as the presentation of evidence. The Hearing Officer may limit the time allowed for each party's closing argument, however, each party will be allowed equal time. The Hearing Officer may request that the parties file briefs.

004C.07 Evidence:

004C.07A In contested cases the Commission or Hearing Officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.

004C.07B Any party to a formal hearing before the Commission, from which a decision may be appealed to the courts of this state, may request that the Commission be

bound by the rules of evidence applicable in district court by delivering to the Commission, at least three (3) days prior to the holding of the hearing, a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.

004C.07C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.

004C.07D All evidence including records and documents in the possession of the Commission of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.

004C.07E A Hearing Officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.

004C.07F The Commission shall give effect to the rules of privilege recognized by law.

004C.07G The Commission may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the Commission.

004C.07G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.

004C.07G2 Parties shall be afforded an opportunity to contest facts so noticed.

004C.07G3 The record shall contain a written record of everything officially noticed.

004C.07H The Commission may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.

004C.07I The Hearing Officer may conduct all or part of the hearing by television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, if technically feasible, to see the entire proceeding while it is taking place, and oaths can be properly administered to witnesses.

004C.07J Testimony of a witness may be adduced by use of a prepared statement, if the witness is present for cross examination.

004C.07K The Hearing Officer may authorize any party to furnish and serve designated late filed exhibits within a specified time after the close of the hearing.

004C.08 Official Record:

004C.08A The Commission shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the Commission upon request and tender of the cost of preparation.

004C.08B The Commission shall maintain an official record of each contested case under the Administrative Procedure Act for at least four (4) years following the date of the final order.

004C.08C The Commission record shall consist only of the following:

004C.08C1 Notices of all proceedings;

004C.08C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Commission pertaining to the contested case;

004C.08C3 The record of the hearing before the Commission, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Commission during the proceeding, and all proffers of proof and objections and rulings thereon;

004C.08C4 Any notices of any ex parte communications and responses thereto filed pursuant to section 004.01C; and

004C.08C5 The final order.

004C.08D Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Commission record shall constitute the exclusive basis for Commission action in contested cases under the act and for judicial review thereof.

004C.09 Costs: All costs of a formal hearing shall be paid by the party or parties as may be ordered by the Commission.

004C.10 Decision and Order in a Contested Case:

004C.10A A Commission order entered after a hearing shall be written and shall recite the following:

004C.10A1 A discussion of the facts of a basic or underlying nature;

004C.10A2 The ultimate facts; and

004C.10A3 The Commission's reasoning or other authority relied upon by the Commission.

004C.10B Every decision and order rendered by the Commission after a civil penalty hearing is held pursuant to section 75-156 shall be in writing and accompanied by findings of facts and conclusions of law. The decision or order shall be sent to the parties by certified or registered mail.

004C.10C Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.

~~004 RULES OF PRACTICE AND PROCEDURE FOR HEARINGS IN CONTESTED CASES~~

~~004.02 Commencement of a Contested Case~~

~~004.02A The petition, application, or complaint is the initial document filed by or with the Commission that sets forth a claim and request for Commission action. A matter filed with the Commission is deemed to be a contested case if:~~

~~004.02A1 The contested case begins with the filing A person files of a petition, application, or formal complaint and request for hearing, if applicable, with the Commission;~~

~~004.02A2 A person files a formal intervention or protest to a petition, application, or formal complaint within thirty (30) days of the date notice is published;~~

~~004.02A3 upon the filing of a departmental complaint, is filed with the Commission; or~~

~~004.02A4 A matter is declared to be a contested case or upon the Commission's own motion. The petition, application, or complaint is the initial document filed by or with the Commission that sets forth a claim and request for Commission action.~~

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~~004.02B~~ The parties to a contested case shall be the petitioner, applicant, complainant, or other person by whom a contested case is brought and the respondent or person against whom a contested case is brought and includes any formal intervenors.

~~004.02C~~ A party may appear on his or her own behalf in a contested case proceeding or may be represented by an attorney or other representative as permitted by law.

~~004.02D~~ The pleadings in a contested case may include a petition, application, formal complaint, intervention, protest, answer, reply, notice, motion, stipulation, objection or order or other formal written document filed in a proceeding before the Commission. Any pleading filed in a contested case shall meet the following requirements:

~~004.02D1~~ The pleading shall contain a caption specifying the title or nature of the pleading, shall state material factual allegations and state concisely the action the Commission is being requested to take, shall contain the name and address of the petitioner, applicant, or complainant, and shall be signed by the party filing the pleading, or when represented by an attorney, the signature of that attorney.

~~004.02D1a~~ Attorneys shall also include their address, telephone number and bar number.

~~004.02D1b~~ The initial petition or formal complaint shall also contain the name and address of the respondent.

~~004.02D2~~ All pleadings shall be made on white, letter-sized (8 1/2 x 11) paper and shall be legibly typewritten, photostatically reproduced, printed or handwritten. If handwritten, a pleading must be written in ink.

~~004.02E~~ All pleadings shall be filed with the Commission at its official office. Filing may be accomplished by personal delivery or mail and will be received during regular office hours of the Commission.

~~004.02F~~ The Commission shall serve a copy of the petition or formal complaint on each respondent listed in the petition personally or by first class or certified mail. Written proof of such service shall be filed with the Commission. Each respondent who chooses to file a responsive pleading must do so within 20 days from the date of personal service or the date of Commission mailing of the petition or formal complaint.

~~004.02G~~ All pleadings subsequent to the initial petition, application, or formal complaint shall be served by the party

~~filing such pleading upon all attorneys of record or other representatives of record and upon all unrepresented parties. Service shall be made personally or by first class or certified mail. Written proof of such service shall be filed with the Commission.~~

~~004.02H Unless state law provides that a hearing is not required, a hearing date shall be set by the Commission in accordance with statutory requirements. A written notice of the time and place of hearing and the name of the Hearing Officer, if known, shall be served by the Commission upon all attorneys of record or other representatives of record and upon all unrepresented parties. The notice must include a proof of such service and will be filed with the Commission.~~

~~004.02I In computing time prescribed or allowed by these rules and regulations or by any applicable statute in which the method of computing time is not specifically provided, days will be computed by excluding the day of the act or event and including the last day of the period. If the last day of the period falls on a Saturday, Sunday, or state holiday, the period shall include the next working day.~~

~~004.02J Pleadings filed with the Commission will not be withdrawn without approval of the Commission.~~

~~004.02K Any petitioner, applicant, or complainant failing to prosecute his or her petition, application, or complaint within ninety (90) days may be subject to an order to show cause as to why the petition, application, or complaint should not be dismissed.~~

~~004.03 Intervention and Protest in a Contested Case:~~

~~004.03A The following applies to formal intervention in a contested case:~~

~~004.03A1 A petition for formal intervention must be submitted in writing to the Hearing Officer or designee at least five (5) days before the hearing. Copies must be mailed by the petitioner for formal intervention to all parties named in the Hearing Officer's notice of the hearing;~~

~~004.03A2 The petition must state the petitioner's name and address; facts demonstrating that the petitioner's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the petitioner qualifies as a formal intervenor under any provision of law; and~~

~~004.03A3 The Hearing Officer or designee must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the formal intervention.~~

~~004.03A4~~ The Hearing Officer or designee may grant a petition for formal intervention at any time upon determining that the formal intervention sought is in the interests of justice and will not impair the orderly and prompt conduct of the proceedings.

~~004.03A5~~ If a petitioner qualifies for formal intervention, the Hearing Officer or designee may impose conditions upon the formal intervenor's participation in the proceedings, either at the time that formal intervention is granted or at any subsequent time. Those conditions may include:

~~004.03A5a~~ Limiting the formal intervenor's participation to designated issues in which the formal intervenor has a particular interest demonstrated by the petition;

~~004.03A5b~~ Limiting the formal intervenor's use of discovery, cross examination, and other procedures so as to promote the orderly and prompt conduct of the proceedings; and

~~004.03A5c~~ Requiring two or more formal intervenors to combine their presentation of evidence and argument, cross examination, discovery, and other participation in the proceedings.

~~004.03A6~~ The Hearing Officer or designee, at least 24 hours before the hearing, shall issue an order granting or denying each pending petition for intervention, specifying any conditions and briefly stating the reasons for the order.

~~004.03A6a~~ The Hearing Officer or designee may modify the order at any time, stating the reasons for the modification.

~~004.03A6b~~ The Hearing Officer or designee shall promptly give notice of an order granting, denying, or modifying intervention to the petitioner for intervention and to all parties.

~~004.03B~~ The following applies to Informal Intervention in a contested case:

~~004.03B1~~ A petition for informal intervention shall state the petitioner's name and address and shall identify the witness to

~~be offered at the hearing and be accompanied by the statement the witness for the petitioner intends to make at the hearing.~~

~~004.03B2 A petition for informal intervention must be filed with the Commission at least five (5) days before the hearing. Copies must be mailed by the petitioner to all parties named in the Hearing Officer's notice of the hearing.~~

~~004.03B3 Leave to intervene informally will be granted only if the petitioner addresses issues reasonably pertinent to the issues already presented and does not unduly broaden the scope of the proceeding.~~

~~004.03B4 Participation by an informal intervenor is limited to the presentation of a pre-filed statement of a single witness together with exhibits by such witness, and participation in oral argument and submission of briefs. Informal intervenors are not parties and as such are not entitled to cross-examine or otherwise interrogate witnesses in the proceeding presented by any party.~~

~~004.03C The following applies to Protests:~~

~~004.03C1 Except as provided in Sections 004.03C2, 004.03C3, and 004.03C4 and unless otherwise provided in statute, a protest against the granting of any application shall be filed with the Commission within thirty (30) days from the date of publication of notice of the application. A copy of the protest must be served upon all parties.~~

~~004.03C2 Except as otherwise provided in the statutes, a protest against the granting of an application for a certificate authorizing inter-LATA interexchange telecommunications service shall be filed with the Commission within ten (10) days from the date of publication of said notice. A copy of the protest should be served upon all adverse parties, or upon their attorneys of record.~~

~~004.03C3 A protest to the granting of an application for temporary motor carrier authority, which the Commission is empowered to grant after not less than five (5) days notice and without hearing, shall be filed with the Commission within five (5) days after the date such notice is published.~~

~~004.03C4 In certain emergency situations, the Commission has the statutory authority to temporarily alter, amend, or suspend any existing rates in force, or to fix any such rates where none exist by issuing an order which prescribes an emergency rate. A protest to the granting of such emergency rate must be filed within fifteen (15) days after notice of the emergency rate.~~

~~004.03C5 A protest shall set forth the name and address of the protestant, a statement concerning the interest of the protestant in the application, and a request for the relief~~

sought by the protestant. Additionally, the protest shall set forth specifically the grounds upon which it is made and the facts and circumstances relied upon.

004.01 Prohibitions Against Ex Parte Communications:

~~004.01A The prohibitions found in this section shall apply beginning at the time a petition is filed.~~

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~~004.01B With respect to any matter of fact or law at issue in a contested case and notwithstanding any other provision of law, a member, staff, or agent of the Commission shall not during the pendency of any contested case heard before the Commission have any ex parte communication with any party having an interest in the outcome of the contested case. In any proceeding before the Commission in which the public advocate is a party or is appearing for a party, the public advocate shall be considered a party for purposes of the restrictions on ex parte communications.~~

~~004.01C Any Commissioner, or member of commission staff, or agent of the Commission who is or may reasonably be expected to be involved in the decision making process of the contested case who receives or who makes or knowingly causes to be made an ex parte communication shall file in the record of the contested case all such written communications, memoranda stating the substance of all such oral communications, and all written responses and memoranda stating the substance of all oral responses to all the ex parte communications. The filing shall be made within two working days of the receipt or making of the ex parte communication. Notice of the filing, with an opportunity to respond, shall be given to all parties of record.~~

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004.04 Hearing Officer, Criteria:

~~004.04A The Commission may delegate to a Hearing Officer the functions of conducting a prehearing conference, planning conference, and/or hearing and addressing discovery and evidentiary matters and other non-dispositive matters.~~

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~~004.04B A Commissioner who has served as investigator, prosecutor, or advocate in a contested case or in its prehearing stage may not serve as hearing Hearing Officer or assist or advise a hHearing Officer in the same proceeding without the consent of all parties.~~

~~004.04C A Commissioner who has participated in a determination of probable cause or other equivalent preliminary determination in a contested case may serve as Hearing Officer or assist or advise a hHearing Officer in the same proceeding.~~

~~004.04D A Commissioner may serve as Hearing Officer at successive stages of the same contested case.~~

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004.05 Prehearing Procedures:

~~004.05A A Hearing Officer designated to conduct a hearing may determine, subject to the Commission's rules and regulations, whether a prehearing conference will be conducted. If a prehearing conference is not~~

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~~held, a Hearing Officer for the hearing may issue a prehearing order, based on the pleadings, to regulate the conduct of the proceedings.~~

~~004.05A1 If a prehearing conference is conducted:~~

~~004.05A1a The Hearing Officer shall promptly notify the Commission of the determination that a prehearing conference will be conducted. The Commission may assign another Hearing Officer for the prehearing conference, and~~

~~004.05A1b The Hearing Officer for the prehearing conference shall set the time and place of the conference and give reasonable written notice to all parties and to all persons who have filed written petitions to intervene in the matter. The Commission shall give notice to other persons entitled to notice.~~

~~004.05A1c The notice referred to in subsection 004.05A1b shall include the following:~~

~~004.05A1c(i) The names and mailing addresses of all parties and other persons to whom notice is being given by the Hearing Officer;~~

~~004.05A1c(ii) The name, official title, mailing address, and telephone number of any counsel or employee who has been designated to appear for the Commission;~~

~~004.05A1c(iii) The official file or other reference number, the name of the proceeding, and a general description of the subject matter;~~

~~004.05A1c(iv) A statement of the time, place, and nature of the prehearing conference;~~

~~004.05A1c(v) A statement of the legal authority and jurisdiction under which the prehearing conference and the hearing are to be held;~~

~~004.05A1c(vi) The name, official title, mailing address, and telephone number of the Hearing Officer for the prehearing conference;~~

~~004.05A1c(vii) A statement that a party who fails to attend or participate in a prehearing conference, hearing, or other stage of a contested case or who fails to make a good faith effort to comply with a prehearing order may be held in default under the Administrative Procedure Act, and~~

~~004.05A1c(viii) Any other matters that the Hearing Officer considers desirable to expedite the proceedings.~~

~~004.05A2 The Hearing Officer shall conduct a prehearing conference, as may be appropriate, to deal with such matter as exploration of settlement possibilities, preparation of stipulations, clarification of issues, rulings on identity and limitation of the number of witnesses, objections to proffers of evidence, determination of the extent to which direct evidence, rebuttal evidence, or cross-examination will be presented in written form and the~~

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~~extent to which telephone, television, or other electronic means will be used as a substitute for proceedings in person, order of presentation of evidence and cross examination, rulings regarding issuance of subpoenas, discovery orders, and protective orders, and such other matters as will promote the orderly and prompt conduct of the hearing. The Hearing Officer shall issue a prehearing order incorporating the matters determined at the prehearing conference.~~

~~004.05A3 The Hearing Officer may conduct all or part of the prehearing conference by telephone, television, or other electronic means if each participant in the conference has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceeding while it is taking place.~~

~~004.05B The Hearing Officer or staff designated by the Hearing Officer may conduct informal planning conferences during the pendency of an action to discuss scheduling, discovery, and other procedural issues.~~

~~004.06 Discovery in Contested Cases:~~

~~004.06A The use of depositions and discovery in proceedings before the Commission is governed by the rules and regulations of the Nebraska Supreme Court unless otherwise ordered by the Hearing Officer.~~

~~004.06B The Hearing Officer or a designee, at the request of any party or upon the Hearing Officer's own motion, may issue subpoenas, discovery orders, and protective orders in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.~~

~~004.06C Any prehearing motion to compel discovery, motion to quash, motion for protective order or other discovery related motion shall:~~

~~004.06C1 Quote the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena or excerpt of a deposition;~~

~~004.06C2 State the reasons supporting the motion;~~

~~004.06C3 Be accompanied by a statement setting forth the steps or efforts made by the moving party or his or her counsel to resolve by agreement the issues raised and that agreement has not been achieved; and~~

~~004.06C4 Be filed with the Commission. The moving party must serve copies of all such motions to all parties to the contested case.~~

~~004.06D Other than as provided in subsection 004.06C4 above, discovery materials need not be filed with the Commission.~~

~~004.07 Continuances: The Hearing Officer may, in his or her discretion, grant extensions of time or continuances of hearings upon the Hearing Officer's own motion or at the timely request of any party for good cause shown. A party must file a written motion for continuance which states~~

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~~in detail the reasons why a continuance is necessary and serve a copy of the motion on all other parties.~~

~~004.07A Good cause for an extension of time or continuance may include, but is not limited to, the following:~~

~~004.07A1 Illness of the party, legal counsel or witness;~~

~~004.07A2 A change in legal representation; or~~

~~004.07A3 Settlement negotiations are underway.~~

~~004.08 Amendments:~~

~~004.08A A petition may be amended at any time before an answer is filed or is due if notice is given to the respondent or his or her attorney. In all other cases, a petitioner must request permission to amend from the hearing officer.~~

~~004.08B A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A Hearing Officer may also permit amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.~~

~~004.09 Disposition Without Hearing:~~

~~004.09A Unless otherwise precluded by law, disposition of any contested case may be made by stipulation, agreed settlement, consent order, or default and be processed administratively without a hearing.~~

~~004.09B Any application, petition, or other initial pleading which is not opposed through a protest or formal intervention within thirty (30) days of the date notice is published may be processed by use of affidavits and will may be processed administratively without a hearing.~~

~~004.10 Conducting a Contested Case Hearing:~~

~~004.10A At the discretion of the Hearing Officer, the hearing may be conducted in the following order:~~

~~004.10A1 The hearing is called to order by the Hearing Officer. Any preliminary motions, stipulations or agreed orders are entertained.~~

~~004.10A2 Each party may be permitted to make an opening statement. Opening statements take place in the same order as the presentation of evidence.~~

~~004.10B Evidence will be received in the following order. Presentation of evidence by Commission staff may be offered during the hearing at the discretion of the Hearing Officer:~~

~~004.10B1 Evidence is presented by the applicant, petitioner, or complainant;~~

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~~004.10B2 Evidence is presented by the intervenor, protestant, or respondent;~~

~~004.10B3 Rebuttal evidence is presented by the applicant, petitioner, or complainant; and~~

~~004.10B4 Surrebuttal evidence is presented by the intervenor, protestant, or respondent, if permitted by the Hearing Officer.~~

~~004.10C With regard to each witness who testifies, the following examination may be conducted:~~

~~004.10C1 Direct examination conducted by the party who calls the witness;~~

~~004.10C2 Cross examination by the opposing party;~~

~~004.10C3 Redirect examination by the party who called the witness; and~~

~~004.10C4 Recross examination by the opposing party, if permitted by the Hearing Officer.~~

~~004.10D After the evidence is presented, each party may have request the opportunity to make a closing argument, if permitted by the Hearing Officer. Closing arguments shall be made in the same order as the presentation of evidence. The Hearing Officer may limit the time allowed for each party's closing argument, however, each party will be allowed equal time. The Hearing Officer may request that the parties submit file briefs.~~

~~004.11 Evidence:~~

~~004.11A In contested cases the Commission or Hearing Officer may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs and may exclude incompetent, irrelevant, immaterial and unduly repetitious evidence.~~

~~004.11B Any party to a formal hearing before the Commission, from which a decision may be appealed to the courts of this state, may request that the Commission be bound by the rules of evidence applicable in district court by delivering to the Commission, at least three (3) days prior to the holding of the hearing, a written request therefore. Such request shall include the requesting party's agreement to be liable for the payment of costs incurred thereby and upon any appeal or review thereof, including the cost of court reporting services which the requesting party shall procure for the hearing.~~

~~004.11C Documentary evidence may be received in the form of copies or excerpts or incorporated by reference.~~

~~004.11D All evidence including records and documents in the possession of the Commission of which it desires to avail itself shall be offered and made a part of the record in the case. No factual information or evidence other than the record shall be considered in the determination of the case.~~

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~~004.11E A Hearing Officer or designee may administer oaths and issue subpoenas in accordance with the rules of civil procedure except as may otherwise be prescribed by law. Subpoenas and orders issued under this subsection may be enforced by the district court.~~

~~004.11F The Commission shall give effect to the rules of privilege recognized by law.~~

~~004.11G The Commission may take official notice of cognizable facts and in addition may take official notice of general, technical, or scientific facts within its specialized knowledge and the rules and regulations adopted and promulgated by the Commission.~~

~~004.11G1 Parties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of materials so noticed.~~

~~004.11G2 Parties shall be afforded an opportunity to contest facts so noticed.~~

~~004.11G3 The record shall contain a written record of everything officially noticed.~~

~~004.11H The Commission may utilize its experience, technical competence and specialized knowledge in the evaluation of the evidence presented to it.~~

~~004.11I The Hearing Officer may conduct all or part of the hearing by television, or other electronic means if each participant in the hearing has an opportunity to participate in, to hear, if technically feasible, to see the entire proceeding while it is taking place, and oaths can be properly administered to witnesses.~~

~~004.11J Testimony of a witness may be adduced by use of a prepared statement, if the witness is present for cross examination.~~

~~004.11K The Hearing Officer may authorize any party to furnish and serve designated late filed exhibits within a specified time after the close of the hearing.~~

~~004.12 Official Record:~~

~~004.12A The Commission shall prepare an official record, which shall include testimony and exhibits, in each contested case, but it shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the Commission upon request and tender of the cost of preparation.~~

~~004.12B The Commission shall maintain an official record of each contested case under the Administrative Procedure Act for at least four (4) years following the date of the final order.~~

~~004.12C The Commission record shall consist only of the following:~~

~~004.12C1 Notices of all proceedings;~~

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~~004.12C2 Any pleadings, motions, requests, preliminary or intermediate rulings and orders, and similar correspondence to or from the Commission pertaining to the contested case;~~

~~004.12C3 The record of the hearing before the Commission, including all exhibits and evidence introduced during such hearing, a statement of matters officially noticed by the Commission during the proceeding, and all proffers of proof and objections and rulings thereon;~~

~~004.12C4 Any notices of any ex parte communications and responses thereto filed pursuant to section 004.01C; and~~

~~004.12C5 The final order.~~

~~004.12D Except to the extent that the Administrative Procedure Act or another statute provides otherwise, the Commission record shall constitute the exclusive basis for Commission action in contested cases under the act and for judicial review thereof.~~

~~004.13 Costs: All costs of a formal hearing shall be paid by the party or parties as may be ordered by the Commission.~~

~~004.14 Decision and Order in a Contested Case:~~

~~004.14A A Commission order entered after a hearing shall be written and shall recite the following:~~

~~004.14A1 A discussion of the facts of a basic or underlying nature;~~

~~004.14A2 The ultimate facts; and~~

~~004.14A3 The Commission's reasoning or other authority relied upon by the Commission.~~

~~004.14B Every decision and order rendered by the Commission after a civil penalty hearing is held pursuant to section 75-156 shall be in writing and accompanied by findings of facts and conclusions of law. The decision or order shall be sent to the parties by certified or registered mail.~~

~~004.14C Parties to the proceeding shall be notified of the decision and order in person or by mail. A copy of the decision and order and accompanying findings and conclusions shall be delivered or mailed upon request to each party or his or her attorney of record.~~

~~004.14D Every order of the Commission shall become effective ten (10) days after the date of the mailing of a copy of the order to the parties of record except:~~

~~004.14D1 When the Commission prescribes an alternate effective date;~~

~~004.14D2 As otherwise provided with respect to emergency rate orders entered pursuant to section 75-121 and rate orders entered pursuant to section 75-139;~~

~~004.14D3 For cease and desist orders issued pursuant to section 75-133 which shall become effective on the date of entry; or~~

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~~004.14D4 For orders granting temporary approval of a lease of a regulated motor carrier property and certificates or permits sought to be acquired entered pursuant to section 75-319 which shall become effective on the date of entry.~~

~~004.14E When any application has been denied, in whole or in part, a subsequent application covering substantially the same subject matter will not be considered by the Commission within ninety (90) days from the date of the final denial, in whole or in part, of the previous application, except for good cause shown.~~

~~004.15 Motions for Reconsideration and Appeals:~~

~~004.15A Except with respect to rate orders under the State Natural Gas Regulation Act, any party may file a motion for reconsideration with the Commission within ten (10) days after the effective date of the order.~~

~~004.15A1 The filing of a motion for reconsideration shall suspend the time for filing a notice of intention to appeal pending resolution of the motion.~~

~~004.15A2 If the Commission does not dispose of a motion for reconsideration within sixty (60) days after the filing of the motion, the motion shall be deemed denied.~~

~~004.15B Any party to a general rate proceeding under the State Natural Gas Regulation Act may file a motion for reconsideration within thirty (30) days after the day an order setting natural gas rates is entered by the Commission.~~

~~004.15B1 The filing of a motion for reconsideration shall stay the order until the earlier of the date the Commission enters an order resolving the motion or one hundred twenty (120) days from the date of the order setting rates.~~

~~004.15B2 Either party shall have thirty (30) days after the date the Commission enters an order resolving the motion or the expiration of the one hundred twenty (120) day period for considering the motion, whichever is earlier, in which to file an appeal.~~

~~004.15C Appeal of a Commission order shall be taken in the same manner and time as appeals from the district court, except that the appellate court shall conduct a review of the matter de novo on the record. Appeal of a Commission order shall be perfected by filing a notice of intention to appeal with the Executive Director of the Commission within thirty (30) days after the effective date of the order.~~

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005 FORMAL AND DEPARTMENTAL COMPLAINTS:

005.01 Applicability: The following apply to formal complaints and departmental complaints in addition to the requirements set forth in section 004. To the extent a conflict exists between section 004 and 005 with respect to a formal complaint or departmental complaint, section 005 controls.

005.02 Departmental Complaint:

005.02A A departmental complaint shall contain the name of the complainant, the name of the respondent, a clear and concise allegation of each offense in terms of each applicable statute, rule or Commission order, the requested relief, and be signed by the complainant.

005.02B An answer to a departmental complaint shall be filed and shall admit or deny each material allegation of the departmental complaint. The answer shall set forth any affirmative defense which respondent may assert.

005.02B1 The answer shall be filed with the Commission within twenty (20) days after service of the complaint.

005.02B2 Except for good cause shown, failure to answer will be construed as an admission of the allegations in the complaint. The fact that a failure to answer will be construed as an admission to the allegations in the complaint shall be included in the complaint served upon respondent.

005.03 Formal Complaints:

005.03A A formal complaint shall contain the name of the complainant, the name of the respondent, a clear and concise allegation of each offense, the requested relief, and be signed by the complainant.

005.03B An answer to a formal complaint shall be filed and shall admit or deny each material allegation of the complaint. The answer shall set forth any affirmative defense which the defense may assert. The Commission shall have the discretion, upon proper showing, to dismiss the formal complaint or require further action.

005.03B1 The answer shall be filed with the Commission within twenty (20) days after service of the complaint.

005.03B2 Except for good cause shown and except where a Statement of Satisfaction has been filed and accepted, failure to answer will be construed as an admission of the allegations in the complaint.

005.03C A respondent to a formal complaint may file with the Commission a Statement of Satisfaction of the formal complaint.

005.03C1 Such Statement of Satisfaction shall be filed with the Commission within ten (10) days after service of the complaint upon respondent.

005.03C2 Respondent shall serve a copy of the Statement of Satisfaction upon the complainant.

005.03C3 Within five (5) days after receipt of the Statement of Satisfaction by complainant, complainant may file a Statement of Acceptance, a copy of which shall be served upon respondent. The respondent may then move for dismissal at any time prior to the time set for hearing on the complaint.

005.03C4 If a Statement of Satisfaction is filed by the respondent but is not accepted by the complainant, the respondent shall file an answer with the Commission within twenty (20) days from the date of service of the Statement of Satisfaction with a copy thereof being served on complainant.

006 ORDERS TO SHOW CAUSE:

006.01 General: The Commission may, by order, compel any person to whom it has granted authority to show good cause as to why the authority should not be suspended, changed, revoked in whole or in part, or why the holder of the certificate for such authority should not be subject to an administrative fine as provided for in Commission rules.

006.02 Content: An order to show cause shall contain the name of the respondent, a clear and concise allegation of each cause for which the Commission requires a showing, and be signed by the Executive Director. The show cause order shall specifically advise the respondent of the alleged violation or violations and the time and place of the hearing on such order.

006.03 Cease and Desist Order: The Commission may, after proper notice and hearing, enter a cease and desist order or any order the Commission deems just and reasonable.

007 COMMISSION INVESTIGATIONS:

007.01 General: The Commission may, at any time on its own motion, conduct an investigation or order any hearing which the Commission is authorized by law or inherent power to conduct.

007.02 Order to Appear: The Commission may, by order, compel any person to appear in an investigative proceeding. The order will state the purpose or scope of the investigation and the time and place of the hearing.

007.03 Investigations/Penalty: If it shall appear, as the result of an investigative hearing by the Commission, that any person who has been personally served has violated the provisions of any statute over which the Commission has jurisdiction or the rules of the Commission, the Commission may order such person to cease and desist or enter any order justified in the premises.

011 CIVIL PENALTY PROCEDURES:

011.01 Purpose and Scope:

011.01A The purpose of this section is to establish procedures which the Commission will follow when civil penalties are sought against any person as defined in Neb. Rev. Stat. § 75-139.01 pursuant to § 75-156.

011.01B For purposes of these rules, civil penalty shall have the same meaning as administrative fine and these terms may be used interchangeably.

011.02 Assessing Civil Penalties:

011.02A In addition to other penalties and relief provided by law, the Commission may, upon a finding that a violation is proven by clear and convincing evidence, assess a civil penalty of up to ten thousand dollars (\$10,000) per day against any person for each violation.

011.02B The civil penalty assessed under these rules shall not exceed two million dollars (\$2,000,000) per year for each violation. For purposes of this rule, year shall mean calendar year which is the period from January 1 to December 31 inclusive.

011.02C The Commission shall have discretion in determining the appropriate amount of the civil penalty assessed for each violation. In determining the amount of the penalty, the Commission shall consider:

011.02C1 The appropriateness of the penalty in light of the gravity of the violation; and,

011.02C2 The good faith of the violator in attempting to achieve compliance after notification of the violation.

011.03 Initiation of Civil Penalty Proceedings Before the Commission:

011.03A A civil penalty proceeding may be initiated by any person by the filing of a formal complaint or departmental complaint with the Executive Director or the issuance of an order to show cause. The complaint initiating a civil penalty proceeding shall (1) consist of a written pleading signed by the complainant or his or her legal representative containing the names of the complainant and the alleged violator or violators; (2) set forth the date, facts, and nature of each act or Commission upon which each charge of a violation is based; (3) specifically identify the particular statute, certificate, permit, rule, regulation, or order allegedly violated; (4) contain a prayer stating the type of relief, action, or order desired by the complainant; (5) inform the respondent that pursuant to Commission rules, failure to answer will be construed as an admission of the allegations in the complaint; and, (6) that upon failure to pay any civil penalty determined

by the Commission, such civil penalty may be collected by civil action in the District Court of Lancaster County.

011.03A1 In the case of a formal complaint, a hearing fee may be assessed against the complainant in the amount established by the Commission and as provided by law for hearing fees. If the respondent is found to have committed the violation or violations named in the formal complaint, the hearing costs assessed, if any, shall be refunded to the complainant. If the respondent is found to have committed the violation or violations named in the formal complaint, the respondent may be assessed the cost(s) of the hearing.

011.03B Before a formal complaint filed pursuant to an alleged violation of sections 75-301 to 75-390 by anyone other than the Commission can proceed to a hearing, a copy of said complaint shall be delivered to the Executive Director of the Commission. The Director shall have thirty (30) days to intervene in support of said complaint, intervene in opposition to said complaint, or issue a letter advising the complainant that the Commission has taken no position in the proceeding. In the event the Director takes no action after the thirty (30) day period has expired, the complainant may proceed to a hearing on the complaint no earlier than thirty (30) days after notice is served upon the respondent named in the complaint. Nothing contained herein shall preclude the Commission from intervening as otherwise allowed under the rules of the Commission.

011.03C When a complaint is filed with the Commission, wherein the respondent may be subject to a civil penalty under state law and these rules, the Commission shall notify such respondent in writing (1) setting forth the date, facts, and nature of each act or omission upon which each charge of a violation is based; (2) specifically identifying the particular statute, certificate, permit, rule, regulation, or order allegedly violated; (3) that a hearing will be held and give notification of the time, date, and place of such hearing; (4) that, in addition to a civil penalty, the Commission may enforce additional penalties and relief as provided by law; (5) that pursuant to Commission rules, failure to answer will be construed as an admission of the allegations in the complaint. Failure to file an answer or to appear at the hearing allows the Commission to enter an order assessing a civil penalty as provided by law for the violation or violations alleged in the complaint, or the Commission may proceed with a hearing to receive evidence of the alleged violation or violations and may assess civil penalties as provided by law; and, (6) that upon failure to pay any civil penalty determined by the Commission, such civil penalty may be collected by civil action in the District Court of Lancaster County.

011.03D A copy of the complaint described in 011.03A and the notice information specified by 011.03C shall be sent by the

Commission to the respondent pursuant to the Service and Notice provisions as contained in Commission rules.

011.03E Supplemental pleadings filed by a party shall be in writing and be filed with the Commission and distributed by him or her to all interested parties under a certificate of service at any time until five (5) days before the hearing date. Supplemental pleadings filed five (5) days or less prior to the hearing date may be allowed by the Hearing Officer upon a showing of good cause and undue surprise does not disadvantage other parties of record. A civil penalty proceeding shall not be cumulative of all other remedies available under state law and the rules of the Commission. Nothing herein shall be construed so as to preclude the Commission or any other party, person, or entity from seeking any remedy in law or equity not specifically provided for in this section.

011.03F A complaint may be withdrawn by the party who filed the complaint without prejudice to refile upon the same facts if the Commission approves the withdrawal as provided by these rules.

011.04 Answer:

011.04A The respondent shall ~~submit-file with~~ the Commission a written answer in the manner required by these rules no later than twenty (20) days after the date on which notice is given.

011.04B If the respondent fails to timely file an answer as required by this subsection, or fails to appear at the hearing, the Commission may enter an order which assesses a civil penalty as provided by law for the violation or violations alleged in the complaint, or the Commission may proceed with a hearing to receive evidence on the alleged violation or violations and the Commission may assess civil penalties or an administrative fine as provided by law.

011.05 Settlement Orders:

011.05A A respondent may enter into a compromise settlement agreement and proposed final order prior to a hearing pursuant to section 75-157 which does not constitute an admission by the respondent of any alleged violation or violations contained in the civil penalty complaint. Such agreement and proposed final order shall be signed by the respondent and all parties to the proceeding and shall reflect that the respondent consents to the assessment of a specific civil penalty or administrative fine. Settlement of the matters raised by the complaint in a proposed final order containing a recommended penalty are subject to the approval of the Commission.

011.05B If the respondent and all parties to the proceeding enter into a compromise settlement agreement and proposed final order, the settlement of the complaint may include a recommended penalty to the Commission. If a recommended penalty is included

as part of the compromise settlement agreement and proposed final order, simultaneous with the filing of a compromise settlement agreement and proposed final order, the respondent shall remit to the Commission a cashier's check or money order in the amount of the recommended penalty payable to the Treasurer of the State of Nebraska. These funds shall be held in a contingent liability account until appropriately allocated upon final order. The compromise settlement agreement and proposed final order shall be ~~submitted~~ filed with the Commission by the Commission's counsel. If the Commission approves the agreement and proposed order, the civil penalty proceeding shall cease. If the Commission does not approve the proposed order, a hearing on the civil penalty complaint shall be held.

011.06 Post Order Requirements:

011.06A On the issuance of a final order finding that the violation or violations have occurred, the Commission shall inform the respondent or the respondent's legal representative no later than five (5) business days of the rendition of the order and of the amount of the penalty, if any.

011.06B Within the thirty (30) day period immediately following the day on which the Commission's final order is mailed, the respondent who has not previously paid all the civil penalty ordered to be paid shall pay the penalty in full by remitting a cashier's check, electronic transfer or money order to the Commission payable to the Treasurer of the State of Nebraska. The Commission shall then promptly forward the cashier's check or the money order to the State Treasurer as provided by law.

011.07 Collection of Penalty in Lieu of Payment: A civil penalty assessed pursuant to these rules and unpaid shall constitute a debt to the State of Nebraska which may be collected in the manner of a lien foreclosure or sued for and recovered in a proper form of action in the name of the state in the District Court of Lancaster County. Any civil penalty collected by the Commission pursuant to such judicial proceedings shall be transmitted within thirty (30) days from receipt to the Treasurer of the State of Nebraska for deposit in the permanent school fund pursuant to section 75-158.

002 RULE MAKING PETITIONS:

002.01 Petition: Any person may petition the Commission requesting the promulgation, amendment, or repeal of a rule or regulation.

002.02 Form: The petition shall:

002.02A Be clearly designated as a petition for a rule change;

002.02B In the case of a proposed new rule or amendment of an existing rule, shall set forth the desired rule in its entirety;

002.02C In the case of a petition for the repeal of an existing rule, such shall be stated and the rule proposed to be repealed shall either be set forth in full or shall be referred to by the Commission rule number;

002.02D Describe the reason for the rule change;

002.02E Include an address and telephone at which the petitioner can be reached during regular work hours; and

002.02F Be signed by:

002.02F1 The petitioner or his or her attorney in which case the attorney shall also state his or her address and telephone number and bar number; or

002.02F2 A duly authorized officer of the petitioner, if petitioner is a corporation or other legal entity.

002.03 Within sixty (60) days after submission of a petition, the Commission shall:

002.03A Deny the petition in writing, stating its reasons therefor;

002.03B Initiate rulemaking or regulation making proceedings in accordance with the Administrative Procedure Act; or

002.03C If otherwise lawful, adopt a rule or regulation.

003 PETITIONS FOR DECLARATORY ORDER:

003.01 Generally: A request for a declaratory order must be made by a petition that meets the requirements of section 003.

003.02 Who May File: Any person may petition the Commission for issuance of a declaratory order as to the applicability to specified circumstances of a statute, rule, regulation, or order which is within the primary jurisdiction of the Commission.

003.03 When Order Is Appropriate: A declaratory order may be requested on the applicability of a statute, rule, regulation, or order enforced by the Commission. "Applicability" refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03A A declaratory order may be requested only on the applicability of existing statutes and rules and regulations.

003.03B A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.

003.03C A declaratory order is not a mechanism for review or appeal of a decision made by the Commission in a contested case.

003.03D A declaratory order may not be requested to obtain a declaration by the Commission that a statute or regulation is unconstitutional or that a regulation of the Commission is invalid.

003.03E A declaratory order may not be issued by the Commission that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.04 Form of Petition: A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

003.04A A caption, which shall include:

003.04A1 The venue "BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION";

003.04A2 A heading specifying the subject matter and the name of the petitioner; and

003.04A3: The name of the pleading as "PETITION FOR DECLARATORY ORDER".

003.04B The statements required in subsection 003.05 of this chapter.

003.04C The signature of the petitioner, or when represented by an attorney, the signature of the attorney.

003.04D The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, and bar number of the attorney.

003.04E The petition shall be made on white, letter-sized (8-1/2" x 11") paper.

003.04F The petition shall be legibly typewritten, photostatically reproduced, printed, or handwritten. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing.

003.04G Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of

003.04E and 003.04F and, when possible, be reproduced on 8-1/2" x 11" paper or placed in an 8-1/2" x 11" envelope and clearly marked as an attachment to the petition.

003.05 Contents of Petition: To be considered, the petition shall include the following:

003.05A The name and address of the petitioner;

003.05B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, regulation, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.

003.05C The statute, rule, regulation, or order upon which the petitioner seeks issuance of a declaratory order;

003.05D A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order;

003.05E All propositions of law or contentions asserted by the petitioner;

003.05F A demand for the relief to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the Commission should rule and why the Commission should rule in the manner requested; and

003.05G Any documents pertinent to the petition that the petitioner wishes to be considered by the Commission.

003.06 Verification: The Petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

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003.07 Written Consents: The petitioner shall also attach to the petition any written consents obtained from any necessary party that the petition may be determined by use of a declaratory order proceeding.

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003.08 Submission and Service of Declaratory Order Petition:

003.08A The original petition for declaratory order shall be filed with the Commission by mail or in person during the Commission's normal business hours.

003.08B The petition shall be deemed as filed when it is actually received by the Commission. The Commission shall date stamp all petitions upon receipt.

003.08C At the same time the petition is filed with the Commission, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary

parties, including all persons, political subdivisions, corporations, organizations, or other entities who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the Commission.

003.09 Disposition of the Petition:

003.09A Upon the filing of a petition, the Commission may, in its discretion, do one or more of the following:

003.09A1 Require that additional information be ~~submitted~~ filed before the petition will be further considered;

003.09A2 Require a petitioner to provide notice to persons or entities who may be necessary parties and other persons that a request for a declaratory order has been filed with the Commission;

003.09A3 Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition; or

003.09A4 Consider the petition and any attachments without oral presentation.

003.09B Within thirty (30) days after the petition is filed, the Commission shall, in writing:

003.09B1 Issue an order declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

003.09B2 Agree to issue an order by a specified time declaring the applicability of the statute, regulation, rule, or order in question to the specified circumstances; or

003.09B3 Set the matter for specified proceedings as set forth in subsection 003.~~010-09~~ of this Chapter; or

003.09B4 Decline to issue a declaratory ruling, stating the reasons for the Commission's decision.

003.09C Notwithstanding section 003.~~010B-09E~~ of this rule, the Commission may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of section 003.~~014-013~~ of this Chapter. The Commission shall notify the petitioner and, if applicable, any intervenor or necessary party in writing when the Commission determines not to issue a declaratory order.

003.10 Intervention in Declaratory Order Proceeding: Intervention by any person or entity in a declaratory order proceeding shall be allowed when the following requirements are met:

003.10A A petition for intervention must be ~~submitted~~ filed in writing ~~to~~ with the Commission. Copies must be mailed to all parties to the proceeding.

003.10B The petition for intervention shall be submitted to the Commission, in writing, on 8 1/2" x 11" white paper, and shall include each of the following:

003.10B1 The statute, regulation, rule, or order that may apply to or effect the person, property, entity, or facts at issue in the matter;

003.10B2 A statement of facts sufficient to show the intervenor's interest;

003.10B3 A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law;

003.10B4 All propositions of law or contentions asserted by the intervenor; and

003.10B5 A statement of the specific relief requested by the intervenor.

003.10C The Commission must determine that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

003.10D The Commission may, at its discretion, invite any person or entity to file a petition for intervention.

003.10E The Commission shall grant a petition for intervention if the requirements of § 003.~~011~~-010 are satisfied.

003.10F The Commission shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

003.10G The Commission's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

003.11 Declaratory Order Proceedings:

003.11A Oral argument shall be had only on specific order of the Commission. A petitioner, intervenor, necessary party, or

the Commission may ~~submit-file~~ a motion for oral argument ~~to~~ with the ~~Executive Director~~ Commission. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than forty-five (45) days after filing of the petition. Petitioner and all other parties or, when represented, their attorneys, shall be served by the Commission with a notice of the date, time, and location for oral argument. The Commission shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested.

003.11B Oral argument will be made before the Commission. The Hearing Officer shall be in control of the proceeding and shall:

003.11B1 Identify the proceeding and introduce himself or herself and identify each party for the record;

003.11B2 Hear the oral argument of the petitioner, intervenor, or necessary parties; and

003.11B3 Close the proceedings.

003.11C At the declaratory order proceeding, Commission staff shall have the right to present oral argument.

003.11D The Hearing Officer may impose reasonable time limits on the amount of time allocated to each party for oral argument.

003.11E The parties and Commission staff may file briefs in support of their respective positions. The Hearing Officer may fix the time and order of filing briefs and may direct that briefs be ~~submitted-filed~~ prior to the date of oral argument.

003.11F The oral argument may be conducted either in person or by telephone conference call.

003.12 Issuance of Declaratory Order:

003.12A The Commission shall issue its declaratory order within sixty (60) days of the date on which the petition was filed.

003.12B The declaratory order shall be in writing and shall include the following:

003.12B1 The names of all parties to the proceeding upon which the order is based;

003.12B2 The facts upon which the order is based;

003.12B3 The statute, regulation, rule, or order at issue in the matter;

003.12B4 The Commission's conclusion as to the applicability of the statute, regulation, rule, or order to the facts;

003.12B5 The Commission's conclusion as to the legal effect or result of applying the statute, regulation, rule, or order to the facts; and

003.12B6 The reasons relied upon by the Commission to support its conclusions.

003.12C A copy of the declaratory order shall be served upon each party by certified mail, return receipt requested.

003.12D A declaratory order shall have the same status and binding effect as any other order issued in a contested case.

003.12E If the Commission has not issued a declaratory order within sixty (60) days after the petition has been filed, then the petition shall be deemed to have been denied by the Commission.

003.13 Circumstances Under Which Commission Will Not Issue Declaratory Orders:

003.13A Grounds upon which the Commission shall refuse to issue a declaratory order include, but are not limited to, the following:

003.13A1 The petition requests a declaratory order on a matter that is outside the scope of authority of the Commission;

003.13A2 The petition requests review or appeal of a decision made by the Commission in a contested case;

003.13A3 The petition requests a declaratory order on the effect of past conduct;

003.13A4 An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal regulations is pending before the Commission involving the petitioner on substantially the same or similar facts or issues raised in the petition;

003.13A5 The petition seeks a declaration that a statute or rule or regulation is unconstitutional or invalid;

003.13A6 The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

003.13A7 An order would substantially prejudice the rights of a person or entity who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

003.13A8 An order would not resolve the controversy or uncertainty; or

003.13A9 The question posed or facts presented are insufficiently specific, overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

003.13B Grounds upon which the Commission may determine to refuse to issue a declaratory order include, but are not limited to, the following:

003.13B1 Refusal is necessary to assure adequate allocation of Commission resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

003.13B2 The question presented is of such complexity that the Commission has had insufficient opportunity or resources to develop a fully matured ruling; or

003.13B3 The petitioner fails to ~~submit-file~~ any additional information requested by the Commission or ~~submits-files~~ such information after the date established by the Commission.

003.14 Appeal: A declaratory order is subject to review in the manner provided for review of contested cases by § 75-136.

012 SECURITY ISSUANCES:

012.01 Applications: Applications for approval of a security issuance will set forth the details surrounding the proposed indebtedness or issuance and will be accompanied by the following:

012.01A a certified copy of the Articles of Incorporation with amendments to date;

012.01B a certified copy of the minutes from the board of directors' or stockholders' meeting, or other proper corporate authority authorizing the action;

012.01C a certified copy of the by-laws with amendments to date;

012.01D current balance sheet and supporting profit and loss statement; and

012.01E sample of proposed stock certificate.

012.02 Notice: In cases of stock increase and consolidation of stock, a hearing will be held only after proof of publication in a legal newspaper published in the city wherein the common carrier has its principal place of business in the State of Nebraska, or, if no legal newspaper is published in such county, then in some legal newspaper published within the state and having general circulation within such county once each week for two consecutive weeks. The first publication shall be at least sixty (60) days prior to the hearing upon the application for the increase or for the consolidation.

LPB Revisions 5/26/15

EXHIBIT 2

Comments Provided to Commission Staff Counsel on July 13, 2015

Sonya Brakeman

From: Loel P. Brooks
Sent: Monday, July 13, 2015 1:27 PM
To: Melton, Angela
Cc: Sonya Brakeman
Subject: Rule and Regulation No. 192
Attachments: Memo to Angela re Rule and Regulation No. 192 7-13-15.docx

Angela, attached is a Memo regarding our remaining comments on your June 29th Revised Draft. These comments have been approved by Sprint. Sorry to be slow, but I was on vacation when your newest revised version was circulated.

Thanks very much Angela!!

Loel

Loel P. Brooks
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To: Angela Melton
From: Loel P. Brooks
Date: July 13, 2015
Re: PSC “Revised Draft” of Rule and Regulation No. 192 (per Angela Melton’s Draft dated June 29, 2015)

Dear Angela:

We have reviewed your June 29th version of the Rules of Procedure (the “**Revised Draft**”) and appreciate your extensive work on this tedious and important project. We think your reordering and addition of Sections is very useful and addresses many of the issues we discussed at the Workshop. I have prepared and attached a new Section Index for proposes of reference.

There are a few issues that we would like to comment on further as we progress with this project. They fall into three basic categories, but I will address specific suggestions in each category.

1. **Definitions.** The revised draft of the Rules I forwarded to you on May 9 (“**LPB Draft**”) on behalf of Sprint contained a few new definitions designed to provide additional clarity and uniformity to the construction of the Rules, and to facilitate our efforts to distinguish between “Contested Cases” (as defined by statute and Regulation) and uncontested proceedings, which make up a majority of the Commission’s administrative proceedings. In particular, there are three terms that I believe are of particular value, but were not incorporated into your recent Version, that I believe warrant additional consideration:
 - a. “**Proceeding**”. The term “proceeding” has been used historically throughout the rules, but it is not defined. While a “proceeding” is the fundamental administrative vehicle through which the Commission conducts its official business, the Rules often refer to initiating an “action” (002.07), or a “case” (002.09), or intervening in a “matter” (002.12B), none of which are defined. Further, several existing definitions incorporate the term “proceeding”, but do not define what it is. For example, the definition of “pleading” (001.25) (identifying the types of documents that are used in any “proceeding”) and the definition of “Petition” (001.23) provides that it is an “initial document” that “initiates a proceeding”. In addition, there are two categories of “proceedings” which the Commission adjudicates--“contested” and “uncontested”. Given that the statutory definition of “contested case” in the APA and in our existing regulations provides that it is a distinct type of “proceeding” (001.06), and that the APA establishes a host of separate procedural rules for any “proceeding” that constitutes a “contested case”, it seems very important that the Rules have a uniform definition of “proceeding”. By establishing a specific and uniform definition, the usage of the term throughout the Rules provides important internal legal consistency and clarity. I have submitted a proposed definition that I hope would serve this important purpose.
 - b. “**Initial Pleading**”. The term “initial pleading” is also used with some frequency in the Rules but is not defined. For example, the definition of “Application” is “. . . an **initial pleading** seeking Commission action”(001.02). Likewise, “petition”

is defined and an “initial document” [this should say initial “pleading” because that would be consistent--the term “document” is not defined either] that “initiates a proceeding”. This designation is important for two reasons. First, it identifies just those “pleadings” that actually initiate a proceeding. Second, an “initial pleading” establishes the existence of a “proceeding” that not a “contested case”, unless it is a Complaint (Formal or Departmental), which by its nature is contested.

- c. **“Initial Proceeding”**. The filing of an “initial pleading” establishes a “proceeding” before the Commission which, except in limited situations, is **not** contested. New Section 003 specifically provides under what circumstances a “matter” (i.e., an “initial proceeding”) becomes or is deemed to be a “contested case”, which triggers an entire procedural process that does not apply to uncontested proceedings. Since most proceedings processed by the Commission are **not** contested, it is important to preserve the simplified manner of processing initial uncontested proceedings under the Rules. Clearly, the thrust of both of our efforts in reordering and revising the Rules is to delineate and preserve these separate regulatory structures and processes. Defining such proceedings as “initial proceedings” memorializes them as proceedings that are **not contested** until deemed to be so under a separate section of the Rules (i.e., Section 003 in your draft).
2. **Contested Cases**. We agree with your decision to assign a separate Section to Contested Cases. Our LPB Draft did the same thing. We continue to believe that a case may be deemed to be “contested” if the person seeking relief requests a hearing, but we can further discuss that issue. There are two primary areas we feel merit further evaluation and comment arising from your Revised Draft.
 - a. **Formal Interventions**. The Revised Draft retains the very troubling provision permitting an interested person to file a Formal Intervention in a proceeding that has **already been deemed** to be a Contested Case, and to do so within five (5) days prior to the Hearing. This seems to be entirely inconsistent with due process and procedurally undermines the efficient adjudication of Contested Cases by the Commission. At the Workshop, most carriers and commenters agreed with Staff’s recently articulated position that the specific statutes governing the PSC’s procedural authority “trumped” the APA provisions which establish this debilitating procedure. We **urge** the Commission to reconsider this position and to remove the ability of an interested person to formally intervene in a proceeding already determined to be a Contested Case. Justification for this deviation from the APA can be clearly and convincingly provided to the Attorney General, as specifically contemplated under Section 84-909.01 [retaining the right to file an Informal Intervention in a contested Case is, of course, not a problem and is consistent with current practice.] In light of this potentially serious procedural issue, the LPB Draft established a separate Section to deal with Formal Interventions and Protests, as contemplated in the new Section dedicated to Contested Cases and we urge the Commission to consider this approach.

- b. **Other Rules of Practice and Procedure Dealing only with Contested Cases.** We fully support your decision to dedicate Section 002 to “General Rules of Practice and Procedure”, but note that several of the Rules set forth in Section 002 apply only to Contested Cases and should, therefore, be reassigned to Section 003. A list of these Sections follows:
1. **Sections 002.06A; 002.06E; 002.06G.** These Sections deal with service by the Commission, and we understand that according to current practice, as observed by other commenters, that the Commission does not provide service on any type of pleading other than a Formal or Department Complaint, each of which is deemed to be a Contested Case.
 2. **Section 002.08.** This section addresses the criteria and duties of a Hearing Officer in a Contested Case.
 3. **Section 002.12B.** Informal Interventions only occur in Contested Cases.
 4. **Sections 002.12A and C.** Formal Interventions and Protests could occupy a separate Section (as previously mentioned) as they only relate to the establishment of a Contested Case.
3. **Ex Parte Communications.** It is our understanding that your Revised Draft establishes a policy determination that prohibitions against Ex Parte communication will **not apply** to proceedings that are not deemed to be a Contested Case, as set forth in Section 003. While the prohibition will apply at the time an “initial pleading” is filed to establish a “proceeding”, it **will not continue to apply** when the proceeding is deemed to be a Contested Case pursuant to Section 003. We would appreciate your confirmation of this interpretation, as it represents a departure from recent practice.

We have reviewed comments from others regarding the Revised Draft and endorse those comments as we understand them.

Thanks very much for your willingness to consider these additional comments. This is a difficult and tedious project, and we are pleased to be able to provide ongoing input.

REVISED INDEX OF SECTIONS

001	Definitions
002	General Rules of Practice and Procedure
003	Rules of Practice and Procedure for Hearings in Contested Cases
004	Formal and Departmental Complaints
005	Orders to Show Cause
006	Commission Investigations
007	Civil Penalty Procedures
008	Rule Making Petitions
009	Petitions for Declaratory Orders
010	Security Issuances