2011 NERC Nigerian Partnership Forum

"Developing a Clear Record that Forms the Basis of a Reasoned and Informed Commission Decision"

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EXHIBIT A

RAILROADS (EXCERPT)
Act 300 of 1909

462.26 Appeal to court of appeals; injunction; equitable powers; preliminary injunction; additional evidence; judgment on amended order or original order; appeal to circuit court; burden of proof.

Sec. 26.

(1) Except as otherwise provided in section 7 of Act No. 299 of the Public Acts of 1972, being section 460.117 of the Michigan Compiled Laws, section 5 of Act No. 246 of the Public Acts of 1921, being section 460.205 of the Michigan Compiled Laws, section 12 of Act No. 165 of the Public Acts of 1969, being section 483.162 of the Michigan Compiled Laws, section 20 of Act No. 19 of the Public Acts of 1967, being section 486.570 of the Michigan Compiled Laws, and except as otherwise provided in this section, any common carrier or other party in interest, being dissatisfied with any order of the commission fixing any rate or rates, fares, charges, classifications, joint rate or rates, or any order fixing any regulations, practices, or services, may within 30 days from the issuance and notice of that order file an appeal as of right in the court of appeals. The court of appeals shall not have jurisdiction over any appeal that is filed later than the 30-day appeal period provided for in this subsection.

(2) An appeal of any decision or order of the Michigan public service commission that is pending in the circuit court on the effective date of this subsection shall proceed and be decided in that court and appealed pursuant to the applicable law in effect immediately prior to the effective date of this subsection, if on that date, the appeal has progressed beyond the filing of a complaint and answer. All other pending cases shall be transferred promptly by the circuit court to the court of appeals.

(3) An appeal from any commission order that is filed in a timely manner but is incorrectly initiated in either the circuit court for the county of Ingham or the court of appeals shall be transferred by that court, on its own motion or on motion of a party, to the proper court and shall proceed as if timely filed in that court.

(4) No injunction shall issue except upon application to the court of appeals following notice to the commission and a hearing. The court of appeals shall have the same equitable powers as possessed by the circuit court in chancery in the county of Ingham prior to the effective date of subsection (2).

(5) Beginning on the effective date of this subsection and until December 31, 1988, and within the time for filing an appeal, a party seeking a preliminary injunction may apply for such relief pursuant to subsection (4) and may request that the court of appeals transfer such application to the circuit court for the county of Ingham. Upon request, the court of appeals shall transfer an application for a preliminary injunction to the circuit court for a determination. The circuit court shall have the same equitable powers as possessed by the circuit court in chancery in the county of Ingham prior to the effective date of this subsection. The circuit court shall grant or deny an application within the time period prescribed by the court of appeals. An order of the circuit court granting or denying an application shall be transferred by that court to the court of appeals and made part of the record in the pending appeal. An appeal of a circuit court order issued under this subsection shall not be necessary to confer upon the court of appeals full and complete jurisdiction to enforce, vacate, or modify an order of the circuit court.

(6) Within 28 days from the filing of an appeal, a party may make application to the commission to present additional evidence. A copy of the application for additional evidence shall be filed in the court of appeals and the court shall stay further appellate proceedings pending the commission's receipt and consideration of the proposed evidence. If the commission finds that the proposed evidence is different from or in addition to the evidence presented at the original hearing, the commission shall receive the additional evidence. After considering the additional evidence, the commission may alter, modify, amend, or rescind its order relating to the rate or rates, fares, charges, classifications, joint rate or rates, regulations, practice, or service

complained of, and shall report its decision to the court of appeals within the time period prescribed by the court. If the commission rescinds its order, the appeal shall be dismissed. If the commission alters, modifies, or amends its order, that amended order shall take the place of the original order, and the court of appeals shall render its decision based on the amended order. If the original order is not rescinded or amended by the commission, judgment shall be rendered upon the original order.

(7) An appeal from a commission order pertaining to the application of existing commission rules, tariffs, or rate schedules to an individual customer in a contested case shall be filed in the circuit court for the county of Ingham within 30 days of the issuance and notice of an order.

(8) In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.

History: 1909, Act 300, Eff. Sept. 1, 1909 ;-- Am. 1915, Act 145, Eff. Aug. 24, 1915 ;-- CL 1915, 8134 ;-- CL 1929, 11042 ;-- CL 1948, 462.26 ;-- Am. 1951, Act 129, Eff. Sept. 28, 1951 ;-- Am. 1986, Act 312, Eff. Apr. 1, 1987 ;-- Am. 1987, Act 12, Imd. Eff. Mar. 31, 1987

Exhibit B

In re Complaint of Bierman Against CenturyTel of Michigan, Inc.
245 Mich.App. 351, 627 N.W.2d 632
Mich.App.,2001.
April 13, 2001

IN RE COMPLAINT OF BIERMAN AGAINST CENTURYTEL OF MICHIGAN, INC.
Centurytel of Michigan, Inc., d/b/a Centurytel, Appellant,
v.
Michigan Public Service Commission, and Bre Communications, LLC, d/b/a Phone Michigan, Appellees.
Docket No. 219388.
Submitted Feb. 6, 2001, at Lansing.
Decided April 13, 2001, at 9:00 a.m.
Released for Publication June 6, 2001.

Telephone customer filed complaint after provider of basic local telephone exchange service billed calls she had made to her Internet service provider (ISP), through access number that had been obtained by ISP from a competitive local exchange carrier (CLEC), and that was within her local service area, as toll calls. The Public Service Commission (PSC) made finding that provider had engaged in impermissible discriminatory conduct, and imposed fine. Provider appealed. The Court of Appeals, McDonald, J., held that: (1) PSC's tariff required it to treat customer's calls to ISP access number as local calls, even though calls were routed to ISP's equipment in another city outside local calling area; and (2) PSC's determination that provider had discriminated in violation of Michigan Telecommunications Act (MTA), and imposition of $26,000 fine, were neither unlawful nor unreasonable; but (3) PSC lacked authority to award attorney fees to customer and CLEC.

Affirmed in part and reversed in part.

West Headnotes

[1] KeyCite Citing References for this Headnote

⚖317A Public Utilities
⚖317AIII Public Service Commissions or Boards
⚖317AIII(C) Judicial Review or Intervention
⚖317Ak188 Appeal from Orders of Commission
⚖317Ak194 k. Review and Determination in General.

To prove that a Public Service Commission (PSC) order was unlawful, appellant must show that the PSC failed to follow some mandatory provision of applicable statute, or was guilty of an abuse of discretion in the exercise of its judgment. M.C.L.A. § 462.26(8).

[2] KeyCite Citing References for this Headnote

⇦317A Public Utilities
⇦317AIII Public Service Commissions or Boards
⇦317AIII(B) Proceedings Before Commissions
⇦317Ak161 k. In General.

⇦317A Public Utilities ☑ KeyCite Citing References for this Headnote
⇦317AIII Public Service Commissions or Boards
⇦317AIII(C) Judicial Review or Intervention
⇦317Ak188 Appeal from Orders of Commission
⇦317Ak194 k. Review and Determination in General.
Within the confines of its jurisdiction, there is a broad range or "zone" of reasonableness within which the Public Service Commission (PSC) may operate, and a PSC commission decision is unreasonable, and may be overturned, only when it is unsupported by the evidence. M.C.L.A. § 462.26(8).

[3] KeyCite Citing References for this Headnote

⇦317A Public Utilities
⇦317AIII Public Service Commissions or Boards
⇦317AIII(B) Proceedings Before Commissions
⇦317Ak165 k. Evidence.
Findings of fact made by Public Service Commission (PSC) after an evidentiary hearing must be supported by competent, material, and substantial evidence on the whole record.

[4] KeyCite Citing References for this Headnote

⇦317A Public Utilities
⇦317AIII Public Service Commissions or Boards
⇦317AIII(C) Judicial Review or Intervention
⇦317Ak188 Appeal from Orders of Commission
⇦317Ak194 k. Review and Determination in General.
Issues of statutory interpretation are reviewed de novo as issues of law on appeal from determination by Public Service Commission (PSC).

[5] KeyCite Citing References for this Headnote

⇦317A Public Utilities
⇦317AIII Public Service Commissions or Boards
⇦317AIII(C) Judicial Review or Intervention
⇦317Ak188 Appeal from Orders of Commission
⇦317Ak194 k. Review and Determination in General.

Reviewing court accords substantial deference to interpretation given by Public Service Commission (PSC) to its own orders, and ordinarily will uphold those interpretations as long as they are supported by the record or otherwise reasonable.

[6] KeyCite Citing References for this Headnote

⇦372 Telecommunications
⇦372III Telephones
⇦372III(F) Telephone Service
⇦372k854 Competition, Agreements and Connections Between Companies
⇦372k862 k. Access by Wireless, Mobile and Internet Service Providers. (Formerly 372k323)

Public Service Commission (PSC) acted neither unlawfully nor unreasonably by determining that tariff applicable to provider of basic local telephone exchange service required provider to treat calls made by customer to Internet service provider (ISP), through access telephone number that had been obtained by ISP from a competitive local exchange carrier (CLEC), and that was assigned to exchange within local calling area, as local calls, rather than toll calls, even though calls to that number were routed to ISP's equipment in another city located outside local calling area. M.C.L.A. §§ 462.26(8), 484.2102.

[7] KeyCite Citing References for this Headnote

⇦317A Public Utilities
⇦317AII Regulation
⇦317Ak119 Regulation of Charges
⇦317Ak119.1 k. In General.

Rates that a public utility may charge for its regulated services are established through tariffs filed with and approved by the Public Service Commission (PSC), and statutes and tariffs should be interpreted to further PSC's ability to establish and maintain uniform and nondiscriminatory rates.

[8] KeyCite Citing References for this Headnote

⇦372 Telecommunications
⇦372III Telephones
⇦372III(F) Telephone Service
⇦372k850 k. In General. (Formerly 372k267)

Relationship between provider of basic local telephone exchange service and its customers was defined by provider's tariff.

[9] KeyCite Citing References for this Headnote

⇦372 Telecommunications
⇦372III Telephones

⚭372III(F) Telephone Service
⚭372k854 Competition, Agreements and Connections Between Companies
⚭372k862 k. Access by Wireless, Mobile and Internet Service Providers.
(Formerly 372k267)
Determination by Public Service Commission (PSC) that competitive local exchange carrier (CLEC) which had provided access number to Internet service provider (ISP) was not obligated to make technical arrangements with provider of basic local telephone exchange service, through interconnection agreement, before it could activate service to ISP through number assigned to telephone provider's local service area, was neither unlawful nor unreasonable. M.C.L.A. §§ 462.26(8), 484.2203, 484.2303(2).

[10] KeyCite Citing References for this Headnote

⚭372 Telecommunications
⚭372III Telephones
⚭372III(G) Rates and Charges
⚭372k934 k. Discrimination.
(Formerly 372k323)

⚭372 Telecommunications KeyCite Citing References for this Headnote
⚭372III Telephones
⚭372III(H) Penalties
⚭372k1002 k. Violations of Rules or Regulations Concerning Competition.
(Formerly 372k336)
Public Service Commission (PSC) did not act unreasonably or unlawfully in determining that basic local telephone exchange service provider had improperly discriminated, in violation of Michigan Telecommunications Act (MTA), when it treated calls made by customer to Internet service provider (ISP), through access telephone number that had been obtained by ISP from a competitive local exchange carrier (CLEC), and that was assigned to exchange within local calling area, as toll calls, and imposed $26,000 fine against telephone provider, based on $500 per day during period in which discrimination occurred, even though calls in question were routed to ISP's equipment in another city located outside local calling area. M.C.L.A. §§ 484.2305, 484.2601.

[11] KeyCite Citing References for this Headnote

⚭372 Telecommunications
⚭372III Telephones
⚭372III(H) Penalties
⚭372k1004 Actions for Penalties
⚭372k1005 k. In General.
(Formerly 372k336)
Public Service Commission (PSC) could not award attorney fees following its determination that basic local telephone exchange service provider had violated Michigan Telecommunications Act (MTA) by treating calls made by customer to Internet service provider (ISP), through access telephone number that had been obtained by ISP from a

competitive local exchange carrier (CLEC), as toll calls, where PSC did not make determination that telephone provider's position was frivolous. M.C.L.A. §§ 484.2209(1), 484.2601.

[12] KeyCite Citing References for this Headnote

⚭372 Telecommunications
⚭372III Telephones
⚭372III(H) Penalties
⚭372k1004 Actions for Penalties
⚭372k1005 k. In General.
(Formerly 372k336)

Provision of Michigan Telecommunications Act (MTA) which gives Public Services Commission (PSC) power to order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of a violation of MTA does not authorize an award of attorney fees to the prevailing party. M.C.L.A. § 484.2601.

**634 *353 Loomis, Ewert, Parsley, Davis & Gotting, P.C. (by William D. Parsley, Harvey J. Messing, and Gary L. Field), Lansing, for CentruyTel of Michigan, Inc.

Jennifer M. Granholm, Attorney General, Thomas L. Casey, Solicitor General, and David A. Voges and Steven D. Hughey, Assistant Attorneys General, for the Public Service Commission.

Clark Hill P.L.C. (by William R. Ralls and Leland R. Rosier), Okemos, for BRE Communications, LLC.

*354 Dickinson Wright PLLC (by John M. Dempsey, Jeffery V. Stuckey, and Michael P. Calabrese), Lansing, and Michael A. Holmes, Detroit, for amicus curiae Ameritech Michigan.

Before HOLBROOK, JR., P.J., and McDONALD and SAAD, JJ.

McDONALD, J.

CenturyTel of Michigan, Inc., appeals as of right from an April 12, 1999, opinion and order of the Public Service Commission, which concluded that CenturyTel violated its tariff by assessing charges for local calls and illegally discriminated by requiring eleven-digit dialing to a local number serviced by BRE Communications, LLC, doing business as Phone Michigan (hereinafter Phone Michigan). The commission ordered CenturyTel to drop the toll charges to the complainant, Glenda Bierman, to cease rating those calls as toll calls, to pay a fine of $26,000 for violating the Michigan Telecommunications Act (MTA) M.C.L. § 484.2101 et seq. ; MSA 22.1469(101) et seq., and to pay the reasonable attorney fees and costs incurred by Bierman and Phone Michigan. We affirm in all substantive respects, but reverse the award of attorney fees.

Glenda Bierman lives in Newport, Michigan, where basic local exchange telephone service is provided by CenturyTel. CenturyTel's tariff with the Public Service Commission, filed in March of 1993, lists the local exchange coverage for the various areas where CenturyTel provides telephone service. This tariff states that the local calling area includes both the Newport exchange and the Monroe exchange, an area served by Ameritech. In July of 1998 Bierman purchased Internet service from MSEN, an Internet Service Provider*355 (ISP). MSEN provided Bierman with an access telephone number that was assigned to the Monroe exchange and so should have been a local call from Bierman's residence. MSEN advised Bierman that the access number was a local call from her home. Unknown to Bierman, that number was provided to MSEN by a competitive local exchange carrier (CLEC), Phone Michigan, rather than by Ameritech. Phone Michigan obtained the 349 NXX,FN1 which was designated to serve the Monroe exchange. However, calls to the 349 NXX number assigned to MSEN were routed to MSEN's equipment in Flint rather than a Monroe location, in a manner similar to call forwarding. In July and August of 1998 Bierman used the 349 NXX number assigned to MSEN to gain access to MSEN's Internet service and spent approximately 14,300 minutes on line. CenturyTel did not treat these calls as local calls to the Monroe exchange, but instead billed them as toll calls to Flint, which resulted in Bierman receiving additional**635 and unexpected toll charges of approximately $2,500.

FN1. An NXX refers to the first three digits in a block of seven digit telephone numbers. An NXX consists of an assigned block of numbers beginning with those first three digits.

Bierman filed a complaint against CenturyTel with the Public Service Commission, alleging that CenturyTel had violated the MTA. Bierman accused CenturyTel of violating its tariff by billing her for toll charges for the calls to the MSEN access number and argued that CenturyTel's actions were misleading under § 502 of the MTA, M.C.L. § 484.2502; MSA 22.1469(502). Bierman's complaint also alleged that CenturyTel had wrongfully discriminated against competitive local exchange carriers *356 under § 305 of the MTA, M.C.L. § 484.2305; MSA 22.1469(305), by treating other calls to the Monroe exchange as local. Public Service Commission staff participated in the case and supported Bierman's complaint. Phone Michigan was allowed to intervene in the case.

Witnesses on behalf of the commission staff and Phone Michigan testified that, under its tariff, CenturyTel must treat calls from Newport to a Monroe exchange NXX as local calls regardless of who provided the local telephone service for that NXX or where the call was ultimately routed. CenturyTel's tariff did not exclude calls to ISPs, nor was there any requirement that a party must be physically present in the local exchange area to have local call status in the Newport/Monroe extended area of service (EAS). Calls made by CenturyTel customers in Newport calling an Ameritech-provided NXX in the Monroe exchange were treated as local calls. However, calls made from Newport to an NXX assigned to a CLEC like Phone Michigan were billed as toll calls and required to use eleven-digit dialing (1 + area code + number) rather than seven-digit dialing. Requiring eleven-digit dialing to NXXs assigned to CLECs was an inferior connection prohibited by § 305, as well as by the Federal Telecommunications Act, 47 U.S.C. 251(b)(3). The Public Service Commission had previously ruled that calls routed to ISPs via seven-digit

dialing must be treated as local calls. Commission staff argued that CenturyTel could not circumvent the commission's ruling by imposing eleven-digit dialing.

According to witnesses presented by the commission and Phone Michigan, a call to the 349 NXX is considered complete when it reaches that Monroe *357 number, and so should be treated as a local call under CenturyTel's tariff. The manner in which calls are ultimately routed does not affect the manner in which they are rated to the caller. Newport calls to Monroe NXXs served by Ameritech are treated as local calls regardless of whether those calls are ultimately routed outside the Monroe exchange. The routing, rating, and billing instructions on CenturyTel's local exchange switches are specified on the basis of the NXX of the number called, not on where the customer or its receiving equipment is located. CenturyTel specifically set its switching system so that every call to the 349 NXX is rated and billed as a long-distance call despite the fact that it is in the Monroe exchange. In contrast, calls to Ameritech-provided NXXs in the Monroe exchange are rated as local calls regardless of where those calls are ultimately routed or forwarded.

CenturyTel argued that Phone Michigan's 349 NXX was not legitimate and could not be treated as part of the Newport/Monroe local calling area. CenturyTel's witness testified that because Phone Michigan does not have an EAS agreement with CenturyTel, it must route calls to the 349 NXX over the Ameritech toll network to Flint. According to CenturyTel, the fact that the 349 NXX is not physically located in the Monroe exchange requires it to treat those calls as toll calls. **636 It also argued that Phone Michigan did not file the required maps and tariffs with the Public Service Commission and so had no authority to provide basic local exchange service in the Monroe exchange. It is not disputed that Phone Michigan did not have a *358 tariff on file to provide basic telephone service in the Monroe exchange.

Because of the absence of an EAS or interconnection agreement with Phone Michigan, CenturyTel requires that its customers use eleven-digit dialing when calling the 349 NXX in the Monroe exchange. CenturyTel and Phone Michigan attempted to negotiate an EAS agreement, but never came to an agreement. According to CenturyTel's witness, Phone Michigan was unwilling to meet two of CenturyTel's main conditions for an EAS agreement: (1) a proper interconnection agreement regarding the routing of and payment for forwarded calls and (2) the requirement that Phone Michigan's customers must be physically located in the Monroe exchange. Phone Michigan or CenturyTel could petition the Public Service Commission for mediation or arbitration to resolve their dispute over the lack of an EAS, but did not do so. CenturyTel's witness admitted that while the Newport/Monroe local calling area was originally established under an EAS agreement with Ameritech, Ameritech had terminated that EAS contract. However, CenturyTel continues to operate as if the EAS agreement with Ameritech was still in place. Under CenturyTel's tariff, calls to the Monroe exchange are billed as local. Toll access revenue for calls from the Newport exchange that do not terminate in the Monroe exchange is shared between Ameritech and CenturyTel pursuant to a "feature group A revenue sharing agreement."

After an evidentiary hearing, the hearing officer issued a proposal for decision that found that Bierman was entitled to rely on CenturyTel's tariff and *359 could not be charged toll charges for calls to the 349 NXX. The hearing officer found that CenturyTel's tariff did not notify its customers that calls from the Newport exchange to the Monroe exchange would be billed as long distance when Phone Michigan served the party being called or that the charges would depend on the existence of an interconnection agreement between CenturyTel and the telephone company serving the party being called. The hearing officer agreed with the Public Service Commission staff that the routing of a call is separate from the rating of a call, pointing out that calls to numbers served by Ameritech were billed as local calls even if those calls were routed outside the Monroe exchange. Because the calls originate in Newport and terminate in Monroe for NXX purposes, the hearing officer concluded that the calls to the 349 NXX must be billed as local calls under CenturyTel's tariff. The hearing officer ordered that Bierman's telephone bill be adjusted to rate the 349 NXX calls as local. The hearing officer also agreed with CenturyTel in part, by finding that § 303 of the MTA, M.C.L. § 484.2303; MSA 22.1469(303), required an interconnection agreement between CenturyTel and Phone Michigan. The proposal for decision found that Phone Michigan must have an interconnection agreement with CenturyTel and cannot simply rely on CenturyTel's tariff as an alternative to such an arrangement.

CenturyTel filed an exception to the hearing officer's finding that the 349 NXX calls should be billed as local. Phone Michigan and commission staff filed exceptions to the hearing officer's findings that Phone Michigan needed an interconnection agreement *360 with CenturyTel and that CenturyTel did not discriminate against Phone Michigan.

**637 In its opinion and order the Public Service Commission rejected CenturyTel's arguments that it properly treated calls to the 349 NXX as toll calls, finding that "none of these arguments can overcome the effect of the plain language of the tariff which governs CenturyTel's relationship with its customers. Consequently, disputed calls were local calls and must be billed as such." For similar reasons the commission reversed the hearing officer's finding that the MTA required an interconnection agreement between CenturyTel and Phone Michigan, explaining:

It may be true, as CenturyTel asserts, that there are many issues that must be addressed to arrive at a proper interconnection arrangement and that the tariff primarily addresses the issue of pricing, but it cannot be disputed that the technical arrangements needed to complete the calls are functional because Ms. Bierman's calls were completed. If CenturyTel is dissatisfied with the arrangement under the tariffs, there are lawful remedies available through negotiation, arbitration, or the filing of an application or complaint. Failing to comply with its basic local exchange tariff, which requires that it provide EAS to the Monroe exchange for its customers, is not a lawful response to its dispute with Phone Michigan. [Emphasis added].

The commission concluded that CenturyTel discriminated by requiring eleven-digit dialing to the 349 NXX, noting that CenturyTel's actions appeared motivated by a desire to place a competitor at a disadvantage rather than any legitimate reason based on

technology. The commission found that Phone Michigan's failure to file tariff sheets defining the boundaries of *361 its Monroe Exchange did not prevent the commission from concluding that CenturyTel had discriminated, explaining that Phone Michigan's failure to file tariff sheets was not a criminal violation, did not cause CenturyTel's discrimination, was not as serious as CenturyTel's discrimination, and "does not remove Phone Michigan or CenturyTel's own customers from the protections of the MTA against discriminatory and anticompetitive conduct."

The Public Service Commission concluded that it was appropriate to fine CenturyTel for its violations of billing toll charges for local calls to the 349 NXX and requiring eleven-digit dialing for those same calls. The commission found that CenturyTel's actions warranted a fine of $500 a day for each violation, because the conduct was continuous, contrary to the competitive purposes of the MTA, and aimed at Bierman, a party with whom CenturyTel had no dispute. This resulted in a fine of $26,000 against CenturyTel. The commission also ordered CenturyTel to pay the reasonable attorney fees and costs of Bierman and Phone Michigan.

CenturyTel appeals the Public Service Commission's opinion and order as of right, raising the four issues below.

[1] [2] The standard of review for Public Service Commission decisions is provided by M.C.L. § 462.26(8); MSA 22.45(8), which states:

In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable.

*362 To prove that the commission's order was unlawful the appellant must show "that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment." In re MCI Telecommunications Complaint, 460 Mich. 396, 427, 596 N.W.2d 164 (1999). Our Supreme Court has explained that "[t]he hurdle of unreasonableness is equally high. Within the **638 confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the Public Service Commission may operate." Id. A commission decision is unreasonable when it is unsupported by the evidence. In re MCI Telecommunications Corp. Complaint, 240 Mich.App. 292, 303, 612 N.W.2d 826 (2000).
[3] [4] [5] The commission's findings of fact made after an evidentiary hearing must be supported by competent, material, and substantial evidence on the whole record. Id. Issues of statutory interpretation are reviewed de novo as issues of law. In re MCI, 460 Mich. at 413, 596 N.W.2d 164. However, this Court accords substantial deference to the commission's interpretation of its own orders and ordinarily will uphold those interpretations as long as they are supported by the record or otherwise reasonable. In re MCI, 240 Mich.App at 303, 612 N.W.2d 826.

I

[6] CenturyTel argues that its tariff does not require it to treat calls to the MSEN number as local because those calls are routed to Flint rather than a location within the Newport/Monroe local calling area. We find that the Public Service Commission's determination that calls to the 349 NXX from Newport must be *363 billed as local calls was neither unlawful nor unreasonable.

[7] The rates that a public utility may charge for its regulated services are established through tariffs filed with and approved by the Public Service Commission. The statutes and tariffs should be interpreted to further the Public Service Commission's ability to establish and maintain uniform and nondiscriminatory rates. Midland Cogeneration Venture Ltd. Partnership v. Public Service Comm., 199 Mich.App. 286, 309-310, 501 N.W.2d 573 (1993).

Section 102 of the MTA, M.C.L. § 484.2102; 22.1469(102), defines "exchange" and "local calling area" as follows:

(h) "Exchange" means 1 or more contiguous central offices and all associated facilities within a geographical area in which local exchange telecommunication services are offered by a provider.

* * *

(o) "Local calling area" means a geographic area encompassing 1 or more local communities as described in maps, tariffs, or rate schedules filed with and approved by the commission. [Emphasis added].

CenturyTel argues that because the calls to the 349 NXX number were routed outside the Newport/Monroe geographic area, they were not within the Monroe exchange or its local calling area.

Review of the record supports the Public Service Commission's conclusion that the fact that the call was ultimately routed or forwarded outside the local calling area did not mean that it could be billed as a toll call. The 349 NXX was assigned to the Monroe exchange by the North American Number Plan. The *364 evidence before the commission showed that the exchange of a number or NXX did not depend on the geographic location where a call was ultimately received. The commission relied on testimony indicating that a local call is considered completed when it reaches the particular switch for that local number, and that local calls to Monroe numbers served by Ameritech were billed as local calls regardless of whether those calls were routed outside the Monroe geographic area. This testimony was competent, material, and substantial evidence on the whole record and supported the Public Service Commission's findings.

**639 Our review of the MTA supports the Public Service Commission's interpretation and ruling. Among the purposes of the MTA expressed in § 101 are (1) "[a]llow[ing] and encourag[ing] competition to determine the availability, prices, terms, and other conditions of ... services," (2) "[r]estructur[ing] regulation to focus on price and quality of service and not on the provider," and (3) "[e]ncourag[ing] the introduction of new services, the entry of new providers, the development of new technologies...." M.C.L. §

484.2101(2)(b), (c), (d); MSA 22.1469(101)(2)(b), (c), (d). Subsection 202(g) of the MTA, M.C.L. § 484.2202(g); MSA 22.1469(202)(g), directs the Public Service Commission to determine the methods "needed to allow all local exchange customers to access an internet provider by making a local call." Section 356, M.C.L. § 484.2356; MSA 22.1469(356), requires local exchange service providers like CenturyTel to provide for virtual co-location with other providers, apparently to facilitate local-call access to the Internet. The legislative intent expressed by these various sections supports the *365 commission's rejection of CenturyTel's argument that Phone Michigan's customer must be physically located in the Monroe exchange in order for calls to the 349 NXX to be billed as local.

[8] CenturyTel's relationship to its customers was defined by its tariff. According to CenturyTel's tariff, the local calling area for the Newport exchange includes both the Newport and Monroe exchanges. CenturyTel cannot unilaterally modify its billing scheme as stated in its tariff. Because the 349 NXX was within the Monroe exchange, Bierman's calls to MSEN must be billed as local calls under CenturyTel's tariff. CenturyTel has attempted to recast a billing complaint filed against it by one of its own customers, Bierman, into a case over Phone Michigan's tactics and noncompliance with the MTA. Nothing in the record provided indicates that Ms. Bierman was affiliated with Phone Michigan or responsible for its compliance with the MTA. Ms. Bierman simply made calls to another part of CenturyTel's local calling area in the good-faith belief that these were local calls. She should not be made to pay for the fact that CenturyTel and Phone Michigan have not bothered to resolve their disputes.

II

[9] CenturyTel argues that the hearing officer correctly determined that Phone Michigan was obligated to make technical arrangements with it through an interconnection agreement before it could activate service to MSEN through a number assigned to the Monroe exchange. We find that the Public Service Commission's reversal of the hearing officer's determination *366 was neither unlawful nor unreasonable. Phone Michigan's failure to enter into an interconnection agreement with CenturyTel did not permit CenturyTel to violate its own tariff and charge its own customer toll charges for calls to the 349 NXX.

Section 303(2) of the MTA, M.C.L. § 484.2303(2); MSA 22.1469(303)(2) provides:

A telecommunication provider shall not provide basic local exchange service to customers or end-users located within another telecommunication provider's licensed service area except through interconnection arrangements as provided by this act.

Nothing in § 303 or the rest of the MTA indicates that a local exchange service provider may ignore its tariff when billing its own customer's calls based on another provider's violations of § 303. If CenturyTel is dissatisfied with Phone Michigan's tactics or refusal to enter into an interconnection**640 agreement, its remedy is to either file a complaint under § 203 of the MTA, M.C.L. § 484.2203; MSA 22.1469(203), or apply to the Public Service Commission for resolution of the matter under § 204 of the MTA, M.C.L. §

484.2204; MSA 22.1469(204). If Phone Michigan is violating the MTA, CenturyTel should pursue action against Phone Michigan rather than punishing its own customers through hidden and discriminatory pricing.

III

[10] CenturyTel argues that the Public Service Commission erred in finding that CenturyTel had discriminated, and that the commission's decision to fine CenturyTel was unlawful and unreasonable. CenturyTel claims that it acted in good-faith reliance on a reasonable *367 interpretation of its tariff and did not improperly discriminate against calls to Phone Michigan numbers in violation of the MTA. We find that the commission's determination that CenturyTel had discriminated in violation of the MTA was lawful and reasonable. The fine imposed by the commission was likewise lawful and reasonable.

Section 305, M.C.L. § 484.2305; MSA 22.1469(305), provides in relevant part:

(1) A provider of basic local exchange service shall not do any of the following:

(a) Discriminate against another provider by refusing or delaying access service to the local exchange.

(b) Refuse or delay interconnections or provide inferior connections to another provider.

Section 601 of the MTA, M.C.L. § 484.2601; MSA 22.1469(601), provides for fines of up to $500 a day or $1,000 a day, depending on the number of the provider's access lines. Review of the evidentiary record supports the commission's conclusion that CenturyTel acted out of a desire to punish a competitor or place it at a disadvantage rather than out of any concern for Phone Michigan's failure to comply with the MTA. The evidence presented to the commission showed that CenturyTel billed calls to Ameritech customers located in the Monroe exchange as local calls regardless of whether those calls were routed outside the Monroe exchange. Those calls to Ameritech customers were also completed without the caller having to use the area code. In contrast, calls to Phone Michigan's customer could be reached only by using the area code and were billed as toll calls. Although CenturyTel *368 blamed the toll charges and eleven-digit dialing on Phone Michigan's failure to reach any agreement regarding interconnection and billing, CenturyTel never pursued appropriate administrative remedies. Instead it merely set its switch to the 349 NXX to rate those calls as toll calls to Flint and required eleven-digit dialing for those calls.

The Public Service Commission did not inappropriately fine CenturyTel for good-faith misinterpretation of its tariff. As explained above, CenturyTel had adequate administrative remedies to ensure Phone Michigan's compliance with the MTA, but did not pursue them. Instead it merely billed one of its own customers toll charges for calls made to the 349 NXX, without any notice to that customer and in violation of its tariff. In light of the anticompetitive nature of CenturyTel's actions and the fact that they were directed against an innocent customer, the fine of $500 a day does not appear excessive or unwarranted.

IV

[11] [12] Finally, CenturyTel argues that the Public Service Commission erred in awarding appellees attorney fees. We agree that the commission lacked authority **641 to award fees in this case. While § 601 of the MTA, M.C.L. § 484.2601; MSA 22.1469(601), gives the commission power to "order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation," this Court has held that the statute does not authorize an award of attorney fees to the prevailing party. In re Complaint of Southfield against Ameritech of Michigan, 235 Mich.App. 523, 534, 599 N.W.2d 760 (1999). While *369 subsection 209(1) of the MTA, M.C.L. § 484.2209(1); MSA 22.1469 (209)(1), authorizes the commission to award to the prevailing party its costs, "including reasonable attorney fees," if the opposing party's position was frivolous, the commission's opinion and order in this case contained no finding that CenturyTel's position was frivolous.

The decision of the Public Service Commission with respect to attorney fees is reversed; in all other respects, the order of the commission is affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

Mich.App.,2001.
In re Complaint of Bierman Against CenturyTel of Michigan, Inc.
245 Mich.App. 351, 627 N.W.2d 632

EXHIBIT C

ADMINISTRATIVE PROCEDURES ACT OF 1969 (EXCERPT)
Act 306 of 1969

Chapter 4
PROCEDURES IN CONTESTED CASES

24.271 Parties in contested case; time and notice of hearing; service of notice or other process on legislator.

Sec. 71.

(1) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(2) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(a) A statement of the date, hour, place, and nature of the hearing. Unless otherwise specified in the notice the hearing shall be held at the principal office of the agency.

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) A reference to the particular sections of the statutes and rules involved.

(d) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is given, the initial notice may state the issues involved. Thereafter on application the agency or other party shall furnish a more definite and detailed statement on the issues.

(3) A member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter except on a day on which there is a scheduled meeting of the house of which he or she is a member. However, a member of the legislature shall not be privileged from service of notice or other process pursuant to this chapter on a day on which there is a scheduled meeting of the house of which he or she is a member, if such service of notice or process is executed by certified mail, return receipt requested.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1984, Act 28, Imd. Eff. Mar. 12, 1984
Constitutionality: Administrative hearings under the Administrative Procedures Act, however informal, comport with the procedural fairness required by due process in the absence of an explicit statutory requirement that a contested evidentiary hearing be held. Convalescent Center v Blue Cross, 414 Mich 247; 324 NW2d 851 (1982).
Popular Name: Act 306
Popular Name: APA

24.272 Defaults, written answers, evidence, argument, cross-examination.

Sec. 72.

(1) If a party fails to appear in a contested case after proper service of notice, the agency, if no adjournment is granted, may proceed with the hearing and make its decision in the absence of the party.

(2) A party who has been served with a notice of hearing may file a written answer before the date set for hearing.

(3) The parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.

(4) A party may cross-examine a witness, including the author of a document prepared by, on behalf of, or for use of the agency and offered in evidence. A party may submit rebuttal evidence.

History: 1969, Act 306, Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.273 Subpoenas; issuance; revocation.

Sec. 73.

An agency authorized by statute to issue subpoenas, when a written request is made by a party in a contested case, shall issue subpoenas forthwith requiring the attendance and testimony of witnesses and the production of evidence including books, records, correspondence and documents in their possession or under their control. On written request, the agency shall revoke a subpoena if the evidence, the production of which is required, does not relate to a matter in issue, or if the subpoena does not describe with sufficient particularity the evidence the production of which is required, or if for any other reason sufficient in law the subpoena is invalid. Witness fees shall be paid to subpoenaed witnesses in accordance with section 2552 of Act No. 236 of the Public Acts of 1961, as amended, being section 600.2552 of the Compiled Laws of 1948. In case of refusal to comply with a subpoena, the party on whose behalf it was issued may file a petition, in the circuit court for Ingham county or for the county in which the agency hearing is held, for an order requiring compliance.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.274 Oaths; depositions; disclosure of agency records.

Sec. 74.

(1) An officer of an agency may administer an oath or affirmation to a witness in a matter before the agency, certify to official acts and take depositions. A deposition may be used in lieu of other evidence when taken in compliance with the general court rules. An agency authorized to adjudicate contested cases may adopt rules providing for discovery and depositions to the extent and in the manner appropriate to its proceedings.

(2) An agency that relies on a witness in a contested case, whether or not an agency employee, who has made prior statements or reports with respect to the subject matter of his testimony, shall make such statements or reports available to opposing parties for use on cross-examination. On a request for identifiable agency records, with respect to disputed material facts involved in a contested case, except records related solely to the internal procedures of the agency or which are exempt from disclosure by law, an agency shall make such records promptly available to a party.

History: 1969, Act 306, Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.275 Evidence; admissibility, objections, submission in written form.

Sec. 75.

In a contested case the rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but an agency may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. Irrelevant, immaterial or unduly repetitious evidence may be excluded. Effect shall be given to the rules of privilege recognized by law. Objections to offers of evidence may be made and shall be noted in the record. Subject to these requirements, an agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.275a Definitions; hearing where witness testifies as alleged victim of sexual, physical, or psychological abuse; use of dolls or mannequins; support person; notice; ruling on objection; exclusion of persons not necessary to proceeding; section additional to other protections or procedures.

Sec. 75a.

(1) As used in this section:

(a) "Developmental disability" means that term as defined in section 100a of the mental health code, 1974 PA 258, MCL 330.1100a except that, for the purposes of implementing this section, developmental disability includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, and does not include a condition attributable to a physical impairment unaccompanied by a mental impairment.

(b) "Witness" means an alleged victim under subsection (2) who is either of the following:

(i) A person under 16 years of age.

(ii) A person 16 years of age or older with a developmental disability.

(2) This section only applies to a contested case in which a witness testifies as an alleged victim of sexual, physical, or psychological abuse. As used in this subsection, "psychological abuse" means an injury to the witness's mental condition or welfare that is not necessarily permanent but results in substantial and protracted, visibly demonstrable manifestations of mental distress.

(3) If pertinent, the witness shall be permitted the use of dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination.

(4) A witness who is called upon to testify shall be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person shall name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person shall be served upon all parties to the proceeding. The agency shall rule on any objection to the use of a named support person prior to the date at which the witness desires to use the support person.

(5) In a hearing under this section, all persons not necessary to the proceeding shall be excluded during the witness's testimony.

(6) This section is in addition to other protections or procedures afforded to a witness by law or court rule.

History: Add. 1987, Act 46, Eff. Jan. 1, 1988 ;-- Am. 1998, Act 327, Imd. Eff. Aug. 3, 1998
Popular Name: Act 306
Popular Name: APA

24.276 Evidence to be entered on record; documentary evidence.

Sec. 76.

Evidence in a contested case, including records and documents in possession of an agency of which it desires to avail itself, shall be offered and made a part of the record. Other factual information or evidence shall not be considered in determination of the case, except as permitted under section 77. Documentary evidence may be received in the form of a copy or excerpt, if the original is not readily available, or may be incorporated by reference, if the materials so incorporated are available for examination by the parties. Upon timely request, a party shall be given an opportunity to compare the copy with the original when available.

History: 1969, Act 306, Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.277 Official notice of facts; evaluation of evidence.

Sec. 77.

An agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge. The agency shall notify parties at the earliest practicable time of any noticed fact which pertains to a material disputed issue which is being adjudicated, and on timely request the parties shall be given an opportunity before final decision to dispute the fact or its materiality. An agency may use its experience, technical competence and specialized knowledge in the evaluation of evidence presented to it.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.278 Stipulations; disposition of cases, methods.

Sec. 78.

(1) The parties in a contested case by a stipulation in writing filed with the agency may agree upon any fact involved in the controversy, which stipulation shall be used as evidence at the hearing and be binding on the parties thereto. Parties are requested to thus agree upon facts when practicable.

(2) Except as otherwise provided by law, disposition may be made of a contested case by stipulation, agreed settlement, consent order, waiver, default or other method agreed upon by the parties.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.279 Presiding officers; designation; disqualification, inability.

Sec. 79.

An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.280 Presiding officer; powers and duties; "nonmeeting day" defined.

Sec. 80.

(1) A presiding officer may do all of the following:

(a) Administer oaths and affirmations.

(b) Sign and issue subpoenas in the name of the agency, requiring attendance and giving of testimony by witnesses and the production of books, papers, and other documentary evidence.

(c) Provide for the taking of testimony by deposition.

(d) Regulate the course of the hearings, set the time and place for continued hearings, and fix the time for filing of briefs and other documents.

(e) Direct the parties to appear and confer to consider simplification of the issues by consent of the parties.

(f) Act upon an application for an award of costs and fees under sections 121 to 127.

(2) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party in a contested case is a member of the legislature of this state, and the legislature is in session, the contested case shall be continued by the presiding officer to a nonmeeting day.

(3) In order to assure adequate representation for the people of this state, when the presiding officer knows that a party to a contested case is a member of the legislature of this state who serves on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned, or that is scheduled to meet during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet, the contested case shall be continued to a nonmeeting day.

(4) In order to assure adequate representation for the people of this state, when the presiding officer knows that a witness in a contested case is a member of the legislature of this state, and the legislature is in session, or the member is serving on a legislative committee, subcommittee, commission, or council that is scheduled to meet during the legislative session while the legislature is temporarily adjourned or during the interim between legislative sessions after the legislature has adjourned sine die, or when the partisan caucus of which the legislator is a member is scheduled to meet the contested case need not be continued, but the taking of the legislator's testimony, as a witness shall be postponed to the earliest practicable nonmeeting day.

(5) The presiding officer shall notify all parties to the contested case, and their attorneys, of any continuance granted pursuant to this section.

(6) As used in this section, "nonmeeting day" means a day on which there is not a scheduled meeting of the house of which the party or witness is a member, nor a legislative committee meeting or public hearing scheduled by a committee, subcommittee, commission, or council of which he or she is a member, nor a scheduled partisan caucus of the members of the house of which he or she is a member.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970 ;-- Am. 1984, Act 28, Imd. Eff. Mar. 12, 1984 ;-- Am. 1984, Act 196, Imd. Eff. July 3, 1984
Popular Name: Act 306
Popular Name: APA

24.281 Proposals for decision; contents.

Sec. 81.

(1) When the official or a majority of the officials of the agency who are to make a final decision have not heard a contested case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision is served on the parties, and an opportunity is given to each party adversely affected to file exceptions and present written arguments to the officials who are to make the decision. Oral argument may be permitted with consent of the agency.

(2) The proposal for decision shall contain a statement of the reasons therefor and of each issue of fact and law necessary to the proposed decision, prepared by a person who conducted the hearing or who has read the record.

(3) The decision, without further proceedings, shall become the final decision of the agency in the absence of the filing of exceptions or review by action of the agency within the time provided by rule. On appeal from or review of a proposal of decision the agency, except as it may limit the issue upon notice or by rule, shall have all the powers which it would have if it had presided at the hearing.

(4) The parties, by written stipulation or at the hearing, may waive compliance with this section.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.282 Communications by agency staff; limitations; exceptions.

Sec. 82.

Unless required for disposition of an ex parte matter authorized by law, a member or employee of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually related case. This section does not apply to an agency employee, or party representative with professional training in accounting, actuarial science, economics, financial analysis or rate-making, in a contested case before the financial institutions bureau, the insurance bureau or the public service commission insofar as the case involves rate-making or financial practices or conditions.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.285 Final decision and order.

Sec. 85.

A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970 ;-- Am. 1993, Act 83, Eff. Apr. 1, 1994
Popular Name: Act 306
Popular Name: APA

24.286 Official records of hearings.

Sec. 86.

(1) An agency shall prepare an official record of a hearing which shall include:

(a) Notices, pleadings, motions and intermediate rulings.

(b) Questions and offers of proof, objections and rulings thereon.

(c) Evidence presented.

(d) Matters officially noticed, except matters so obvious that a statement of them would serve no useful purpose.

(e) Proposed findings and exceptions.

(f) Any decision, opinion, order or report by the officer presiding at the hearing and by the agency.

(2) Oral proceedings at which evidence is presented shall be recorded, but need not be transcribed unless requested by a party who shall pay for the transcription of the portion requested except as otherwise provided by law.

History: 1969, Act 306, Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

24.287 Rehearings.

Sec. 87.

(1) An agency may order a rehearing in a contested case on its own motion or on request of a party.

(2) Where for justifiable reasons the record of testimony made at the hearing is found by the agency to be inadequate for purposes of judicial review, the agency on its own motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within the time fixed by this act for instituting proceedings for judicial review. A rehearing shall be noticed and conducted in the same manner as an original hearing. The evidence received at the rehearing shall be included in the record for agency reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

History: 1969, Act 306, Eff. July 1, 1970 ;-- Am. 1970, Act 40, Imd. Eff. July 1, 1970
Popular Name: Act 306
Popular Name: APA

EXHIBIT D

R 460.17325 Evidence generally.

Rule 325. (1) The rules of evidence as applied in nonjury civil cases in circuit court shall be followed as far as practicable, but the commission may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Objections to offers of evidence may be made and shall be noted in the record.

(2) Evidence, including records and documents in the possession of the commission, that a party desires or intends to rely on shall be offered and made a part of the record in the proceeding and other factual information or evidence shall not be considered in the determination of the case, except as otherwise permitted by law. Documentary evidence may be received in the form of copies or excerpts. Upon timely request, a party shall be given an opportunity to compare the copy with the original. If the original is so voluminous as to make its entry in evidence impracticable, the evidence may be incorporated by reference if the materials to be incorporated are made available for examination by the parties at a time and place designated by stipulation of the parties or as directed by the presiding officer. The evidence shall not be admitted where a party has failed, upon timely request, to provide other parties with reasonable access to the original document referred to or excerpted.

(3) A party shall have the right of cross-examination and shall have the right to submit rebuttal evidence. Surrebuttal evidence may be permitted at the discretion of the presiding officer or the commission.

History: 1992 AACS.

R 460.17327 Evidence; official notice.

Rule 327. Except as otherwise provided by law, the commission and the presiding officer may take official notice of judicially cognizable facts and may take notice of general, technical, or scientific facts within the commission's specialized knowledge. The commission or the presiding officer shall notify the parties at the earliest practicable time of any noticed fact that pertains to a materially disputed issue that is being adjudicated and, on timely request, the parties shall be given an opportunity before the final decision to dispute the fact or its materiality. The commission may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it.

History: 1992 AACS.

R 460.17329 Evidence; documents and exhibits.

Rule 329. (1) When the evidence consists of technical matters or figures so numerous as to make oral presentation difficult to follow, it shall be presented in exhibit form, supplemented and explained, but not duplicated by testimony.

(2) Documentary exhibits shall be on 1 side only, on paper not exceeding 8 1/2 inches by 11 inches, and have a sufficient margin for binding, preferably a margin of 1 1/2 inches on the left side of each sheet. A larger exhibit shall be folded to not more than 8 1/2 inches by 11 inches, if practicable. An exhibit of 2 or more sheets shall be stapled together and a notation made at the top of the first sheet as to the number of sheets contained in the exhibit. Each page of the exhibit shall be numbered. An exhibit shall show, at the top right-hand corner, the docket number of the proceeding and provide space for the name of the witness and the number and date of the exhibit. Except as otherwise directed by the commission or the presiding officer, all exhibits offered in a proceeding shall be numbered sequentially regardless of the identity of the party offering them. The number of the exhibit shall be preceded with a letter indicating the identity of the party offering it; for example, "A" for applicant, "I" for intervenor, "P" for protestant, and "S" for the staff.

(3) A party introducing an exhibit shall furnish copies to all parties and such additional copies as the presiding officer may direct.

(4) Nothing in this rule shall prohibit the use by a witness of charts, graphs, pictures, or other means of visual demonstration that are large enough to be viewed by the presiding officer and all persons in the hearing room; however, when charts, graphs, pictures, or other means of visual demonstration are used, copies conforming to the requirements of subrule (2) of this rule shall be provided to all parties and the presiding officer, together with such additional copies as the presiding officer may direct, unless the provision of copies would, in the judgment of the presiding officer, be impracticable.

(5) Documentary evidence may be submitted after the close of the record by stipulation of the parties and with the approval of the presiding officer.

(6) Written or printed documents, maps, charts, graphs, pictures, or other means of visual demonstration that are received in evidence shall not be returned to the parties, except upon approval of the commission.

History: 1992 AACS.

R 460.17331 Evidence; testimony in written form.

Rule 331. (1) Direct testimony of a witness under oath shall be offered in written form, except in motor carrier cases or as otherwise provided by the commission or the presiding officer. In motor carrier cases, the presiding officer may require that direct testimony be offered in written form. Unless otherwise ordered by the presiding officer, the testimony shall be filed with the commission and a copy served on each party and the presiding officer not less than 7 days in advance of the session of the proceeding at which it is to be offered. However, if all parties in attendance on the day on which the testimony is offered agree, any part of the 7 days may be waived. In the absence of agreement, the presiding officer may permit the offering of the testimony after providing all parties who are present not less than 24 hours to examine it, unless, for good cause, the presiding officer finds a shorter time to be reasonable.

(2) The presiding officer may authorize any witness to present oral direct testimony.

(3) In any proceeding, a witness whose testimony is submitted in written form shall be made personally available for cross-examination at the time directed by the presiding officer, unless all parties in attendance on that day waive cross-examination of the witness. If the witness whose testimony is submitted in written or exhibit form is not made available for cross-examination, the testimony shall not be received in evidence, except by stipulation of all parties in attendance on the day the testimony is submitted and with the approval of the presiding officer or as otherwise provided by law.

(4) All testimony in written form shall include page and line numbers and shall be in question and answer form.

History: 1992 AACS.