

# Utility Commission Adjudicatory Processes in the US: Two examples

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# The Missouri approach

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# Legal Basis for the Hearing Requirement

## 14<sup>th</sup> Amendment to the US Constitution:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive an person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

# Open Meetings

## Missouri Sunshine Law

- “It is the public policy of this state that meetings, records, votes, actions and deliberations of **public governmental bodies** be open to the public unless otherwise provided by law”

# Open Hearings and Meetings

- Public access is a check on government power to ensure fair and proper hearings
- Openness ensures the government does its job properly
- Open hearings are an outlet for community concern
- Openness enhances the perception of integrity and fairness
- Promotes free discussion of governmental affairs

# Sunshine Law: Public Governmental Bodies

- Legislative, administrative or other governmental entities
- Includes state agencies and officials
- Includes governing bodies of state- supported universities and colleges
- Local political subdivisions
- Publicly owned utility providers

# Meetings Subject to Sunshine Law

## Public Meetings

- Meeting of a public governmental body where public business is discussed, decided or public policy is formulated
- Shall not include an informal gathering of members of a public governmental body for ministerial or social purposes
  - Ministerial: an act or duty required by law without the exercise of judgment or discretion
- Any vote of the body must be done in public, unless the law specifically allows otherwise

# Procedure for Open Hearings: Due Process of Law

- Notice of the date, time and place
- Notice of the issues to be considered
- Sufficient time to appear and an opportunity to be heard
- Delivered to all parties to the case
- Notice is available to the public via the Commission's website and its Electronic Filing System

# Procedure for Open Meetings

- If meeting by telephone, internet or electronic means, the location where the public may observe and attend
- 24 hour notice required, excluding weekends and holidays
- Notice must be posted at the principal office of the body holding the meeting
- Must make copies of the notice available to news media
- The public and press can attend the meeting

# Types of Hearings

- Evidentiary Hearings
- Motions Hearings
- Local Public Hearings
- Closed Hearings

# Hearings

- Formal part of the adjudicative process
- Forum for parties to cases to present evidence and argument
- Hearings are held in a courtroom setting open to the public

# Evidentiary Hearings

- Hearings where evidence such as testimony and documents are offered into the official record
- Contested cases require an evidentiary hearing and allow cross-examination

# Motions Hearings

- Hearings where legal issues are argued but no evidence is proffered

# Local Public Hearings

- Local Public Hearings are held in the area where customers of utilities are served
- Held during the course of a case requesting a rate increase or other major case
- Customers are sworn by taking an oath and then testify
- Customers give testimony about quality of service and the rates they pay

# Closed Hearings

- By law, closed hearings at the Commission are allowed only if confidential or proprietary information is being disclosed
- The closed session will be recorded by a court reporter and a video clip is kept
- The transcript of the closed hearing will be placed in EFIS and marked HC or P

# Meetings at the Missouri Public Service Commission

- Deliberative Decision Making Meetings
- Working or Operational Meetings
- Closed Meetings

# Deliberative Decision Making Meetings

- At the Missouri Commission deliberations are conducted in a public meeting called an Agenda Meeting
- Commissioners discuss cases and policy in a public forum
- The meetings are open to the public
- The meeting room must be large enough to accommodate the anticipated attendees
- Commissioners vote yes or no for a proposition or order

# Items that may be addressed at open meetings

- Only items identified on the Notice can be discussed
- The Chairman is in control of what items are place on the Notice for discussion or vote
- The Chairman may withdraw any item on the Notice at any time

# Who prepares the items for open meetings?

- Judges who preside over cases and hearings
- Commissioners who submit questions for discussion
- Staff who bring policy questions to the Commissioners for direction from them
- The Chairman must approve the form of the agenda item

# The form of questions decided at open meetings

Why is the form of the question important?

- Decisions must be made by majority vote of the Commissioners
- If an even number of Commissioners is participating in a vote, the Commission may deadlock
- Example: Shall the Commission promulgate a rule to encourage electric utilities to generate renewable energy?

# Posing the question at deliberative decision-making meetings

- Shall the Commission grant the company's application for a rate increase?
- Did the company violate the law?
- Should the Commission appeal the court's decision finding its renewable energy standard's rule unlawful?

# Deliberative Decision Making Meetings

- Frequency: Generally held once per week
- Chairman decides when the meetings are held, how often, and where
- There is no legal requirement regarding how often the meetings are held
- But without such meetings, the Commission could not function since all decisions must be by majority vote at a public meeting

# Working or Operations Meetings

- Commissioners may meet and discuss any issue as long as a quorum is not present
- Such meetings are not subject to the sunshine law

# Closed Meetings

- Closed meetings are allowed only as the law provides for them
- Notice must be provided that a closed meeting may occur
- Specific procedures must be followed to close the meeting
  - An announcement made at the open meeting
  - Reference to the statute that allows closure
  - State the topic that will be discussed
  - Notes must be taken of the meeting and any vote taken

# Closed Meetings

- Less than a quorum of Commissioners may meet to discuss public business
- The law allows closed meetings with a quorum present for issues such as:
  - Discussions with attorneys on legal issues
  - Hiring, firing, disciplining employees
  - Software codes for electronic data processing
  - Specifications for bidding on contracts for services or goods
  - Operational guidelines and policies to deal with terrorist activities
  - Security systems

# Decisions of the Commission

- Public Meeting
- 24 hour notice of items to be decided
- “A majority of the commissioners shall constitute a quorum for the transaction of any business...and may hold meetings of the commission at any time or place within the state.”
- A majority of the quorum is required to decide a case, issue or policy

# Examples

## 3 Commissioners

- Majority of Commissioners is a quorum = 2
- Majority of a quorum = 2

## 4 Commissioners

- Majority is a quorum = 3
- Majority of quorum = 2
- But if the vote is 2-2 the proposition does not pass

# Procedure for Making a Regulatory Decision

- The regulated company files an application with the Commission asking for something
- A person or company files a complaint against a regulated company alleging the regulated company violated a statute, rule, tariff, or decision of the Commission
- The Commission begins a rulemaking case to make a rule or regulation

# Time Frames for Decisions

- Rate increase case: the law allows up to 11 months to reach a decision
- Merger, sale of assets, financing, tariff changes: no deadline
- Complaint case: no deadline
- Rulemaking: no deadline

# Refusal of the Commission to process a filed case

It is possible the company could file a petition with a court of law seeking a judgment in prohibition or mandamus that would direct the Commission to act or be held in contempt; it is possible such a judgment could apply to Commissioners personally and result in fines or jail until the contempt is purged

# Types of Decisions made at Open Hearings and Meetings

- Hearings: only rulings on evidentiary issues or procedural matters
- Deliberative Decision Making Meetings
  - Commissioners vote
  - Majority vote passes the proposition
  - Statutes say the Commission issues a “Report and Order” as the final decision in a contested case
  - Interlocutory rulings and decisions in uncontested cases are by “Order”

# Types of Decisions

- A filing to increase customer rates begins when the company files a new tariff with the charges
- The tariffs are marked to become effective in 30 days (set by statute)
- The Commission suspends the tariffs for up to 11 months to make a decision
- Staff completes an audit of the company's costs and revenues

# How a Matter Moves to Commissioners for a Vote

- Administrative Hearing Judges preside over evidentiary hearings
- When the hearings are concluded, the Judge prepares a draft order and circulates it to Commissioners
- Commissioners talk to the Judge about whether they agree with the Judge's proposal
- The proposed order is placed on the Agenda for a vote

# Compliance with the Report and Order

- The company files new tariffs that are consistent with the Commissions findings in the Report and Order
- Staff reviews the new tariffs and files a recommendation to approve them or reject them
- Once the compliance tariffs are accepted by the Commission, new rates go into effect

# Application for Certificate of Convenience and Necessity

- Grants authority to a company or person to provide utility service
- “The commission shall have the authority to grant the permission and approval ... whenever it shall after due hearing determine ... the right, privilege or franchise is necessary or convenient for the public service.”

# Documenting Decisions of the Commission

- Deliberative Decision Making Meeting –Agenda Meeting
- Minutes of the meeting are taken by the Secretary of the Commission
- All votes and who made them are recorded
- The Minutes are published after the meeting, i.e. posted, made public
- The Minutes are available on the Commission's website and in its Electronic Filing and Information System

# Documenting the Decision

- Agenda meetings are webcast live over the internet
- A video clip is kept and available to the public for later viewing
- After the Agenda meeting concludes, the decision or order is filed in the Electronic Filing and Information System (EFIS) with the case
- Orders and decisions become effective once filed in EFIS
- The decision is posted on the web page

# Documenting the Decision

- The decision is provided to the regulated company and all parties to the case when it is published in EFIS
- Parties can then ask for reconsideration or rehearing of the decision
- If rehearing is denied, parties may appeal

# Disagreements Among Commissioners

- When Commissioners disagree with the majority decision, they can file a dissenting opinion, which is published in EFIS with the majority opinion
- Commissioners may also prepare and file a concurring opinion, which says they agree with the majority decision but that they reached a conclusion based on different evidence or law

# Failure or refusal to comply with a Commission order

Commission to investigate mandamus or injunctive actions, when--hearings, when held--parties, when joined--form of final judgment.

386.360. 1. Whenever the commission shall be of the opinion that a public utility, municipal gas system, person or corporation is failing or omitting or about to fail or omit to do anything required of it by law or by order or decision of the commission, or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order or decision of the commission, it shall direct the general counsel to the commission to commence an action or proceeding in any circuit court of the state of Missouri in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunctions.

# The Kentucky process

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# Process is based in statute (KRS 278) and regulation (807 KAR 5)

- Varies with type of case – statutory deadlines in some cases; abbreviated in others
- All parties entitled to due process and fair hearing
- Court cases over time have delineated process

# Full process applies in major cases

## Initiated by applicant


- Significant rate adjustments
- Major construction projects

## Initiated by Commission

- Major investigations
- Administrative cases

# Full process is divided into three phases

- Initiation/preparation
- Discovery/evidentiary hearing
- Decisional

The background is a solid dark blue color with a pattern of lighter blue curved lines that create a grid-like effect, resembling a globe or a stylized grid.

# **The Kentucky process: a base rate case for a major utility**

# Initiation

## Prior to application

- Notice of intent by applicant – minimum 30 days before application
- Public notice required

## Application filed

- Review for compliance with filing requirements
- Commission staff assigned
- Intervention requests received & reviewed
- Informal conference

# Initiation

## Intervention

- Requests for intervention can come as soon as notice of intent is filed
- Attorney General – only party entitled to intervene – represents ratepayers in general
- Other parties must represent particular interest and provide additional information
- Full intervenors – represented by legal counsel
- Limited intervention permitted

# Initiation

## The informal conference

- Parties notified in advance
- Publicly disclosed on PSC schedule
- Commission staff only – no Commissioners
- Open to public
- Main purpose is to set schedule

# Discovery

- Application includes pre-filed testimony
- Intervenors may pre-file testimony
- Data requests (written questions) from Commission staff to parties (applicant, intervenors filing testimony)
- Data requests from parties to each other
- May be multiple rounds of questions and answers
- All written testimony and answers are sworn – rules of perjury apply

# Discovery

## Disclosure of documents

- All case documents become public records when filed – unless covered by confidentiality request
- Generally posted on website within 24 hours
- Confidentiality granted in limited circumstances
- Confidentiality usually granted to protect certain financial information

# Evidentiary hearing

- Held at PSC offices – broadcast via PSC website
- Published notice by applicant – proof of publication required at hearing
- No quorum required – Commission may appoint hearing officer
- Hearing is not decisional – except for emergency rulings; rulings on motions or procedure

# Evidentiary hearing

## Order of testimony

- Applicant
- Intervenors

## Process of testimony

- Adoption of pre-filed testimony (revisions if needed)
- Cross examination – intervenors, PSC staff, commissioners
- Re-direct
- Re-cross

## Disposition of post-hearing data requests, briefs

# Public comments

## Public meetings

- Held prior to/separate from evidentiary hearing
- At Commission's discretion
- Within utility's service territory
- Solely for information/comment
- Current format:
  - Information session presented by staff
  - Public comments with Commissioners
  - No presentations by applicant/intervenors

# Reaching a Decision

## Process itself is not open to public

- Staff team reviews case record
- Team prepares report with options and recommendations (may include draft order)
- Team report reviewed by executive staff
- Team may discuss case with Commission prior to decision
- Commission may hold decisional meeting (agenda)
- Decision may be made at agenda or afterwards
- Agenda meetings documented in minutes, which become public record

# Reaching a Decision

## Requirements for a decision

- Final orders require a quorum
- Final orders require a majority decision
- Commissioners may dissent in whole or in part
- Commissioner in minority may write dissent which becomes part of the published order

# Reaching a Decision

## Publication of decisions

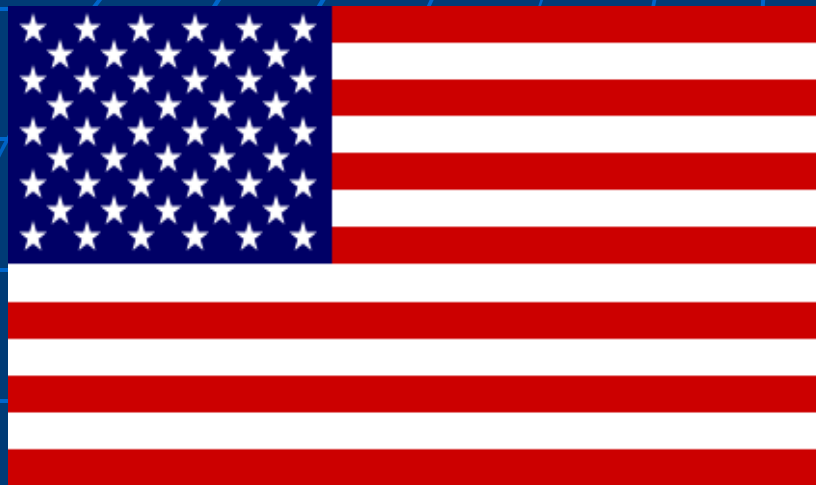
- “The Commission speaks through its orders”
- All decisions – even procedural – are in the form of an order
- All orders are public
- All orders are posted on website when issued
- Paper copies served on parties
- Original orders are permanent record

# Media/public access

**All aspects of the process are open to the public and the news media except:**

- Commission's internal deliberations and associated staff-produced documents
- Documents granted confidential treatment and any proceedings in which those documents are discussed

# Питання?



***Щиро дякуємо!***

**THANK YOU**