1960

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NEW RULES OF PRACTICE AND PROCEDURE BEFORE THE NEBRASKA RAILWAY COMMISSION*

I. INTRODUCTION

During the past twelve years, several articles in this Review have discussed practice and procedure before the Nebraska State Railway Commission by surveying the procedural framework and organization of the Commission,1 by analyzing the Rules of Practice and Procedure adopted in 1950,2 and by presenting and solving some of the specific problems facing an attorney in preparing and presenting his case before the Commission.3 Since this topic was last presented,4 however, significant statutory additions, revisions of the Commission's rules of practice, and Supreme Court opinions have altered procedure before the Commission.

The 1959 Session of the Legislature passed L.B. 362,5 commonly referred to as the “Administrative Procedure Act.” Contemporaneously with this legislation, and consistent with the existent statutory

* The Rules, published by the Commission, are set out herein in full with the permission of the Nebraska State Railway Commission.

1 Overcash, Practice and Procedure Before the Nebraska State Railway Commission, 28 NEB. L. REV. 242 (1949).

2 Overcash, Rules of Practice and Procedure Recently Adopted by the State Railway Commission, 30 NEB. L. REV. 263 (1950). This article still serves as an excellent interpretive guide to those portions of the old rules which have been incorporated into the new rules.

3 Harding, Practice and Procedure Before the Nebraska State Railway Commission, 37 NEB. L. REV. 486 (1958). In this article Mr. Harding molds his experience in the motor transportation field into a useful analysis of the problems facing an attorney appearing before the Commission in a motor carrier proceeding. Except for specific references to rules which have now been changed, and except for the effect of recent court decisions bearing on procedure, the greater portion of Mr. Harding's article is still applicable and serves as an informative guide.

4 Ibid.

provisions, the Commission began the task of revising all of its existing rules and regulations to include the Rules of Practice and Procedure. After a public hearing on the proposals, these rules were enacted by the Commission, Rule and Regulation Order Number 2, approved by the Attorney General, and filed with the Secretary of State, thereby becoming official on August 3, 1960.

With the exception of the theory of composition, which follows the introduction, the organization of this article consists of a rule by rule analysis and explanation of the Commission's new Rules of Practice and Procedure and a discussion of recent Supreme Court decisions as applicable. It is hoped that the remarks made in connection with the particular section of the rules will show the history and intention behind each rule and furnish a guide to their interpretation.

II. THEORY OF COMPOSITION

In rewriting the new rules, primary concern was given to a logical and systematic organization of subject matter. One of the most frequent criticisms of the old rules was not in their content,

7 Valuable contributions to these rules of practice were made by Prof. Henry Grether, who supervised the entire revisional project, and by Mr. J. Henry Holst, former Chief Examiner of the Motor Transportation Department.
8 The validity of the hearing notice was challenged on the basis that it did not satisfy the requirements of NEB. REV. STAT. §§ 84-907 and -909 (Supp. 1959). The notice was published in the Omaha World Herald, the Lincoln Journal, and the Lincoln Star more than ten days prior to the date of hearing. Individual notice was not sent to all parties, as this was determined to be impracticable by the Commission Secretary. The proposals were reproduced and distributed in accordance with every request.
9 The Commission formerly enacted its rules and regulations through consecutively numbered general orders. Under this system, a given regulation was referred to merely as General Order Number 101, etc., rather than as a section in an article in a chapter of a codified book of regulations, as under the new system. However, for any section of this new "code" to come into effect, it must be accomplished through a Commission order. To avoid confusion with the old system, the term "General Order" was eliminated, and the term "Rule and Regulation Order" was adopted. Thus, all future amendments or deletions, whether a sentence or an entire chapter, will be effectuated by Rule and Regulation Orders.
10 As required by NEB. REV. STAT. § 84-905.01 (Reissue 1958) and by NEB. REV. STAT. § 84-908 (Reissue 1958).
11 As required by NEB. REV. STAT. § 84-906 (Reissue 1958).
but in their organization. Therefore, to preserve the valuable portions of the old rules and to add desirable new provisions, but yet to arrange the material into a workable framework, the old rules were read critically and this material, with other suggestions, was placed in the following five categories:

1. General administrative provisions (Rules 1 and 2).
2. Specific types of proceedings (Rules 3, 4 and 5).
3. Chronological process of any matter before the Commission (Rule 6).
5. Pleading forms (Rule 8).

The rules were further divided by the use of a decimal system, as used in the old rules. It is anticipated that any future changes in these rules may be accomplished by merely inserting the change into the framework of the rules, rather than by tacking it onto the end, thereby avoiding unnecessary confusion.

III. GENERAL

Rule 1. General.

1.1 Scope and Application. These rules govern practice and procedure before the Nebraska State Railway Commission unless otherwise specifically directed by the Commission in any proceeding. Practice and procedure before this Commission is also governed by the applicable Revised Statutes of Nebraska and the decisions of the Nebraska Supreme Court. In the absence of a specific rule or order of the Commission, the statutory rules and practice obtaining in proceedings in the District Courts of the State shall be applicable, including provisions as to deposition discoveries, and pre-hearing conferences.

The first sentence of this Rule is nearly the same as Rule 1.1 (b) of the old rules, and allows the Commission to waive its rules if it so desires. This provision was retained at the insistence of the Commission, so that it would not have its hands tied in an emergency. The legality of such a provision is questionable in the light of the Supreme Court statement that the Commission’s violation

Helpful suggestions were obtained from the rules of practice of other Commissions, particularly the Interstate Commerce Commission, the Railroad Commission of Texas, the Colorado Public Utilities Commission, the Kansas State Corporation Commission, the California Public Utilities Commission, the Ohio Public Utilities Commission, and the Illinois Commerce Commission, and from material prepared by the National Association of Railroad and Utility Commissioners.
of its own rules, made for its own proceedings, and for the protec-
tion of the parties thereto, constitutes an arbitrary and unrea-
sonable act. However, the precise question raised by a waiver of
rules, when such a waiver is specifically provided for in the rules,
has not been expressly passed upon by the Court and remains a
matter of speculation. The remainder of Rule 1.1 is in accordance
with the constitutional concept that the Legislature and the Su-
preme Court both may govern the Commission’s procedures.

1.2 Practice. Practice of law before the Commission is governed by stat-
utes of the State and the decisions of the Supreme Court. Appearances be-
tween the Commission are also governed by Rule 6.7. These rules shall not
interfere with or prohibit anyone from transacting his own business before
the Commission. Nothing herein contained shall prohibit staff members
of the Commission, who are admitted to practice law in Nebraska, from
interrogating witnesses or otherwise participating in proceedings before
the Commission.

The Court, in State v. Childe, said that one must be admitted
to practice law before he could appear in a representative capacity
before the Commission. However, it is emphasized that anyone
may appear before the Commission on his own behalf.

The proposed final draft provided that a partner could appear
on behalf of his partnership, and that an officer of a corporation
could appear on behalf of the corporation. After a violent objection
to these proposals at the public hearing, the provisions were elimi-
nated. The rationale behind the elimination of corporate officers
was that since the corporation is a separate legal entity, distinct
from its officers, a distinction could be drawn from a purely pro
se appearance. Although a much more difficult question arose in
regard to the partner, that provision was eliminated so that these
rules would in no way contradict the controlling expressions of the
Court on this subject. Likewise, members of the Commission Staff
who are not admitted to practice law may not interrogate witnesses

13 Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 51, 87 N.W.2d
14 NEB. CONST. art. IV, § 20.
15 139 Neb. 91, 295 N.W. 381 (1941); 147 Neb. 527, 23 N.W.2d 720 (1946).
16 NEB. REV. STAT. c. 21, art. 1 (Reissue 1954).
17 State v. Childe, 139 Neb. 91, 295 N.W. 381 (1941); 147 Neb. 527, 23 N.W.2d 720 (1946). See also Nicklaus v. Abel Const. Co., 164 Neb. 842, 83 N.W.2d
904 (1957).
or otherwise participate in Commission proceedings unless acting as hearing Examiner.

1.3 Communications. All correspondence should be addressed to the State Railway Commission, State Capitol Building, Lincoln 9, Nebraska. Each piece of correspondence shall embrace only one subject, should clearly state the file number of the proceeding involved, and shall include the name and address of the sender.

1.4 Office. The Commission office is located in the southwest corner of the second floor of the Capitol Building. Office hours are from 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m., Monday through Friday. Commission files are located in the office, and are public records open to examination. When the filing of a pleading or the doing of any act is required on or before a given date which falls on a Saturday, Sunday, or any legal holiday on which the Commission offices are closed, the pleading or act need not be filed nor done until the next succeeding working day.

These rules are designed to encourage administrative efficiency and make matters concerning communications, office hours, and office location definite and certain.

1.5 Definitions. As used in this chapter, unless the context otherwise requires:

a) Pleading shall mean any written application, petition, protest, complaint, answer, or motion used in any proceeding before the Commission.

b) Proceeding shall mean an application for any right which the Commission is empowered to grant, or a formal complaint, or an investigation instituted on motion of the Commission.

Rule 2. Parties.

2.1 Parties Classified. Parties to a proceeding are:

a) Applicants. In proceedings involving applications for authority or permission which the Commission is empowered to grant or deny, the parties on whose behalf the applications are made are termed applicants.

b) Protestants. Persons objecting to the granting of an application are protestants.

c) Commission Staff. Persons who appear in a proceeding by virtue of their Commission employment are Commission Staff.

d) Complainants. Persons filing a complaint with the Commission of any violation subject to the jurisdiction of the Commission are complainants.

e) Defendants. Persons within the jurisdiction of the Commission against whom any complaint is filed are defendants.

f) Respondents. Persons ordered by the Commission to appear in a proceeding are respondents.
The significant addition in Rule 2.1 is the inclusion of the Commission Staff. As this staff appears in many proceedings, it was felt that they should be placed on the same footing as any other party, and classified as such.

2.2 Other Persons. No persons other than those designated above, and who have not met the applicable requirements of these rules, are parties to any proceeding.

Rule 2.2 is a significant addition in that it gives an exclusionary interpretation to the classification set forth in Rule 2.1. This was felt necessary because of the statutory provision that "In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice" and "opportunity shall be afforded all parties to present evidence and argument with respect thereto." Thus by the restrictions in this rule, only those persons who are "parties" and have complied with the other applicable provisions of the rules, may appear and be heard in the absence of waiver of rules by the Commission. Such a definition seems valid, in the absence of any definition of "parties" by the Legislature. Thus the problem of the person appearing at a hearing without warning, and launching a surprise attack on the applicant, is avoided.

IV. TYPE OF PROCEEDINGS

A. APPLICATION

Rule 3. Applications.

3.1 Parties. The only parties to application proceedings are applicants, protestants, respondents, and Commission Staff.

3.2 Form. If the Commission has prescribed official forms in Rule 8, they shall be used as specified. Except as otherwise provided in Rule 8, a formal application shall show the venue "BEFORE THE NEBRASKA STATE RAILWAY COMMISSION," shall be entitled, "in the Matter of the Application of" (specifying the name of the applicant and the subject matter), and shall be designated in the heading as an "Application." All applications shall set forth the facts on which the application is based, a request for whatever Commission action is being sought, and a reference to the applicable laws, rules and regulations. The application shall contain such further statements as may be required by any provision of law. The application shall be subscribed and verified by the applicant, or by a duly authorized officer of the applicant, if it be a corporation or organization, or for the applicant by his attorney.

18 NEB. REV. STAT. § 84-913 (Supp. 1959).
At the present time, Rule 3.2 includes old Rule 3.9 and portions of old Rule 3.2 but will eventually be revised and incorporated into Rule 8.

### 3.3 Protests

Except as provided in Rule 3.4, a protest against the granting of an application shall set forth specifically the grounds upon which it is made, shall contain a concise statement of the interest of protestant in the proceedings, shall be subscribed and verified by the protestant, or by a duly authorized officer of the protestant, if it be a corporation or organization, or for the protestant by its attorney; shall be filed with the Commission on the seventh day prior to the date of the hearing; and shall show service of a copy thereof on the applicant or his attorney.

Rule 3.3 is the same as old Rule 3.11, except for the requirement of verification. Although this matter was disputed at the public hearing, the Commission felt that all pleadings alleging fact should be verified.

### 3.4 Informal Protest

Any individual, other than a competing carrier or utility, a labor union, a municipality, a corporation, or an association, may appear at a hearing on his own behalf as a protestant, and may participate by making a statement for the record only, without meeting the requirements of Rule 3.3.

The above rule is a significant addition to the rules. This rule was not in the final proposed draft, upon which the public hearing was held, but was inserted in response to comments made at that hearing. The provision allows any individual, appearing pro se at a public-type hearing, such as a railroad discontinuance or a bus line route change or fare increase, to appear and be heard without filing a formal protest seven days prior to the hearing, or without meeting any of the other formal requirements of Rule 3.3.

However, Rule 3.4 was carefully drawn to prevent its use as a subterfuge of Rule 3.3, and to prevent last minute surprise attacks in motor transportation or other closely contested proceedings. Thus, competing carriers, labor unions, municipalities, and other associations are prohibited from utilizing this rule. The success of the rule is entirely dependent upon its conservative application and strict enforcement by the hearing Examiners.

This Rule, in substance the same as old Rules 3.12 and 3.13, effectively replaces the applicant's fear as to last minute surprise attacks. The Examiners are no longer forced to wrangle with a determination of "affirmative relief" or the undue broadening of issues, as was necessary under the old rules.
3.5 Order for Respondents to Appear. The Commission may by order ask any person, subject to its jurisdiction, to appear as respondent in an application proceeding. This order shall name those persons to appear as respondents, shall state the purpose or scope of their appearance, shall state the time and place of the hearing, and shall be served on respondents either by first class mail, return receipt requested, or personally by an officer of the law.

This rule was added to enable amplification of a record if the Commission so desires. However, it is not anticipated that this provision will often be used. Those persons asking to appear as respondents are protected by the requirement that the Commission in its order "shall state the purpose or scope" of the respondents’ appearance.

3.6 Order of Evidence. Evidence will ordinarily be received in the following order: (1) applicants; (2) protestants; (3) Commission Staff; and (4) rebuttal by applicants.

3.7 Informal Applications. Matters which under the law may be acted upon without a hearing may be handled by correspondence.

3.8 Security Issuances. Applications for approval of a security issuance shall set forth the details surrounding the proposed indebtedness or issuance and shall be accompanied by: (a) a certified copy of the Articles of Incorporation with amendments to date; (b) a certified copy of minutes of Board of Directors or stockholders, or other proper corporate authority authorizing the action; (c) a certified copy of bylaws with amendments to date; (d) current balance sheet and supporting profit and loss statement. Hearings will be held only after proof of sixty days publication in cases of stock increase, as provided in section 75-701 to 75-703 R.R.S. 1943. The order will not be issued until payment is made of the charges prescribed by Statute. A sample stock certificate is required.

Rule 3.6 is the same as that in old Rule 4.3 (b). Rule 3.7 refers only to matters not coming within the statutory definition of a "contested case." Rule 3.8 is the same as old Rule 9.1 except for the statutory reference concerning the sixty days publication.

3.9 Rules and Regulations. An application for the promulgation, amendment, or repeal of any Commission rule or regulation shall state the precise wording of the proposed rule or addition, or the precise wording of the present regulation to be deleted to repealed, and shall state briefly the reasons for such promulgation, amendment, or repeal. All such requests will be considered and acted upon by the Commission on or about July 1 and January 1 of each year, in the manner provided by Statute.

19 NEB. REV. STAT. § 84-901 (3) (Supp. 1959).
The above rule is a new provision, added after the public hearing, and necessitated by the new Administrative Procedure Act. The Commission plans to open its rules and regulations to revisionary suggestions twice each year, accounting for the specification of calendar dates in the rules. All proposals arising under this rule, plus those originating from the Commission, will be discussed at a public hearing, and either adopted or rejected in the manner provided for by statutes.

3.10 Subsequent Applications. 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 90 days from the date of the final denial in whole or in part of the previous application, except for good cause shown.

Rule 3.10 is similar to old Rule 13.1, except that the latter applied only to motor carrier applications, while the former has been broadened to cover all types of applications.

Under old Rule 11.1, an application for temporary authority could be made and the application granted if an emergency or other good cause was shown, and it was the Commission's policy occasionally to grant such temporary certificates. This provision was eliminated from the present rules because of statements by the Court that a temporary certificate is subject to the same requirements under the statute as any other certificate of convenience and necessity. Needless to say, the Commission would not be restricted in granting authority of a temporary nature, if all requirements of a regular authority were met. The restriction applies only where the Commission hastily grants temporary authority without adequate notice and hearing, or without any other requisite of due process of law.

B. Complaints


4.1 Parties. The only parties to a complaint proceeding are complainants and defendants.
The significant change in the above rule, limiting the parties in a complaint to the complainant and defendant, and eliminating intervenors, respondents, and Commission staff from the proceedings, was not in the final draft, but was suggested at the public hearing. The purpose of this change is to eliminate the situation arising when the Commission files a complaint against a party and the defendant's competitors intervene for the purpose of harassing the defendant. The rule would also prevent a party from intervening on the side of either defendant or complainant and hampering the effectiveness of a carefully prepared case.

4.2 Form. A complaint of any violation subject to the jurisdiction of the Commission may be filed by any person, organization or corporation. Each complaint shall show the venue “BEFORE THE NEBRASKA STATE RAILWAY COMMISSION”; shall contain a heading showing the name of the complainant and the name of the defendant; shall specifically advise the defendant of the alleged violations; shall concisely set forth all material facts upon which the complaint is based; and shall be subscribed and verified by at least one complainant, or by a duly authorized officer of the complainant if it be a corporation or organization, or for the complainant by his attorney.

4.3 Copies and Service. Every complaint must be accompanied by copies in sufficient number to enable the Commission to serve one on each defendant and retain an original and three copies for its own use. The Commission will serve the complaint on each defendant in the manner required by law.

Rule 4.2 is almost the same as old Rules 3.1 and 3.2, and will later be revised and incorporated into Rule 8. Rule 4.3 is more specific than old Rule 3.3 in that the language “and such other copies as the Commission may require” was eliminated.

4.4 Satisfaction of Complaint. A statement of satisfaction may be filed by the defendant if he desires to satisfy the complaint. Such statement shall state the satisfaction which the defendant is willing to give, shall be filed within ten days of the date of the mailing of the complaint, shall be subscribed and verified in the same manner as a complaint, shall include sufficient copies to provide one copy for each party and an original and three copies for the Commission. The Commission shall immediately forward a copy thereof to each complainant, either by certified mail or by personal service. Within five days of receipt of statement of satisfaction, the complainant shall notify the Commission in writing whether the satisfaction meets the complaint. If the complainant so notifies the Commission that the satisfaction does not meet the complaint, the Commission shall give written notice to the defendant to answer. Otherwise the Commission shall in its sole and absolute discretion determine whether to dismiss the complaint or notify the defendant to answer.
Although discussing the same subject, Rule 4.4 gives a more detailed guide to the procedure to be followed by the complainant, defendant, and Commission in the satisfaction of a complaint, than did the old Rule 3.4.

4.5 Answers. The caption of an answer shall be the same as that of the complaint, except that it shall contain the word "ANSWER." An answer shall completely advise all parties as to the nature of the defense, shall specifically admit or deny each material allegation of the pleading being answered, and shall be subscribed and verified by the defendant, or by a duly authorized officer of the defendant if it be a corporation or organization, or for the defendant by his attorney. Unless otherwise ordered by the Commission, answer day shall be twenty days from the date of service of the complaint by the Commission.

4.6 Informal Complaints. Any person may informally complain with respect to any matter within the jurisdiction of the Commission by letter or other writing addressed to the Commission, setting forth his name and address and that of any person or persons complained of and a concise statement of the allegations with respect to which the complaint is made. An informal complaint is without prejudice to the right to file a formal complaint with reference to same subject matter. If an informal complaint so warrants, the Commission will, by correspondence or by conference, endeavor to adjust it to the mutual satisfaction of all parties concerned.

4.7 Order of Evidence. Evidence will ordinarily be received in the following order: (1) Complainant; (2) Defendant; and (3) Rebuttal by Complainant.

These rules are essentially the same as the material found in old Rules 3.5, 3.6, 3.7, 3.8, and 4.3 (c).

The provisions of Rule 4 are intended to meet the situation previously covered by old Rules 10.1 and 10.2, which provided for the issuance of an "order to show cause" prior to revocation, change, or suspension of a certificate. Such a proceeding can be handled under the procedural framework of a complaint and still meet the requirements of section 75-238.24 The Commission, as complainant, will merely institute a complaint against the certificate holder, rather than an order to show cause, and the complaint will specify wherein the holder has "willfully failed" to comply with the required rules or statutes.

Not only does this accomplish the desired result of simplifying and condensing the rules, but it answers the problem of burden of proof. Considerable controversy has arisen under the old rule as to whether the Commission, instituting the order, or the re-

24 NEB. REV. STAT. § 75-238 (Reissue 1958).
spondent, who was “ordered to appear and show good cause,” had the burden of proof at the hearing. Some felt that the Commission, as instigator of the action and preferer of charges, should bear the burden of bringing forth the evidence. Others argued that the term “order to show cause,” as used in a probate or other proceeding, meant that the respondent must appear and bear the burden of telling the court why a certain rule or decree should not take effect or be executed. This difference of opinion resulted in the dismissal of several Commission prosecutions. Under the new rules the problem is rendered moot, since in a complaint proceeding, the complainant, in this case the Commission, clearly has the burden of proving the allegations in its complaint.

By eliminating the order to show cause and inserting in its place the complaint, still another problem is remedied. Previously the Commission stated in its order to show cause that the respondent must appear at a given time and place and show good cause why his certificate should not be revoked for willful failure to comply with a given rule or regulation. Upon failure of respondent to so appear or show good cause, the Commission would automatically enter an order altering, suspending, or revoking the certificate. However, the Court recently stated that the order to show cause is not self-executing on the date specified therein, and that it must be implemented with an additional complaint and hearing, before the certificate can be altered, suspended, or revoked by the Commission. The effect of this decision was to render the order to show cause useless. Fortunately, the desired result can be accomplished by using a complaint proceeding, as previously discussed. For all of the above reasons, elimination of the order to show cause from the new rules was mandatory.

C. COMMISSION INVESTIGATIONS


5.1 Parties. The only parties to a Commission investigation are the Commission Staff and respondents.

Rule 5 is an addition to the rules providing for procedures to

be followed by the Commission in investigatory proceedings. These provisions were inserted out of consideration for those parties who might be investigated, so that they would be informed of the procedure used during such investigation. Although Rule 5.1 limits parties to an investigation proceeding, if the Commission feels additional parties are necessary it needs only to name them as respondents.

5.2 Scope. The Commission may at any time on its own motion, make an investigation or order any hearing which the Commission is authorized either by law or inherent power to conduct.

The Legislature has given the Commission power to investigate any and all cases of alleged neglect or violation of law by any railway or common carrier doing business in the state. In addition to this specific statutory grant, the current view is that an administrative agency such as the Commission has an expanding inherent regulatory power, which may, in some circumstances, extend to information relating to activities beyond the agency's jurisdiction.

5.3 Order for Respondents to Appear. The Commission may by order ask any person to appear as respondent in an investigation proceeding. This order shall name those persons to appear as respondents, shall state the purpose or scope of their appearance, shall state the time and place of the hearing, and shall be served on respondents either by first-class mail, return receipt requested, or personally by an officer of the law.

5.4 Evidence. The evidentiary provisions of Rule 7 shall also apply to investigation proceedings. The Commission may, through its staff or otherwise, secure and present such evidence as it may consider necessary or desirable in any investigation proceedings, in addition to the evidence presented by respondents. Evidence will ordinarily be received in the following order: (1) Commission Staff, (2) Respondents, and (3) Rebuttal by Commission Staff.

Rule 5.3 is nearly identical to Rule 3.5. Rule 5.4 refers to Rule 7 and is strictly for clarification. Although investigation proceedings may seem less formal than others, and, although the Commission may normally present considerable evidence, it must be in accordance with Rule 7. The order of receiving evidence is patterned after Rule 4.8.

27 NEB. REV. STAT. § 75-202 (Reissue 1958).
28 DAVIS, ADMINISTRATIVE LAW, §§ 3.01-.02 (1958).
29 Id. § 3.10.
V. PROCEDURE

A chronological analysis of any matter passing through the administrative process for the Commission was not given in the old rules. However, in drafting the new rules it was felt desirable to inform the persons appearing before the Commission precisely what should be done at what particular time.


6.1 Setting of Hearings. Upon instigation of proceedings, the time and place of each hearing will be set by the Commission or its departments.

Upon the institution of a proceeding, necessary information is then communicated to all interested persons by a notice of hearing, in accordance with the statutory requirements. Most notices are sent from the office of the Secretary, although the Motor Transportation Department issues its own notices. Inadequate notice and hearing will normally render the outcome of the proceeding invalid.

A curious historical development regarding notice and hearing has taken place in one segment of the motor transportation field. After World War II, it was the practice of the Commission to grant transfers of motor carrier authority without notice of hearing. In 1949, the Nebraska Supreme Court said that certificates so transferred did not meet the necessary requirements of Section 75-230 and were therefore invalid. However, the Commission continued to treat such certificates as though they were in full force and effect. In 1957 the Court re-emphasized that these certificates were void, and further held that they were subject to collateral injunctive attack by competing certificate holders.

The 1959 Session of the Legislature then enacted L.B. 578, which validated and protected from collateral attack all certificates and permits issued without notice or hearing prior to the 1949 Court

30 Supra note 18; and NEB. REV. STAT. § 75-229 (Reissue 1958). NEB. REV. STAT. § 75-109.01 (Supp. 1959) also requires that a matter be set for hearing within six months of the date on which the original pleading instigating the proceeding is filed.


32 NEB. REV. STAT. (Reissue 1958).


In 1960, the Court, in three cases which were in the administrative process prior to the enactment of L.B. 578, held that this curative legislation did not apply to the instant cases, since a case must be determined on the law existing when the judgment is rendered. However, the Court did allow evidence of past bona fide operations under these “void” certificates to be used in proving public convenience and necessity, so that in practical result, the purpose of the legislation was fulfilled. Thus, one can see at least one situation where inadequate notice and hearing did not prove fatal to the prior outcome of the proceeding.

6.2 Filing and Withdrawal of Pleadings, Motions and Exceptions. Unless otherwise provided in Rules 4.3, 4.4 and 8, the original and one copy of all pleadings, motions and exceptions will be filed with the Commission. The original copy shall be accompanied by a certificate showing service thereof on all parties to the proceedings or their attorneys and the date of service. Such service shall be made by delivery in person or by first-class mail or express, properly addressed with charges prepaid, one copy to each party. Any party making a filing with the Commission may not withdraw the filing without Commission approval.

6.3 Receipt for Filing Pleadings, Motions and Exceptions. If a receipt for filing of any pleading, document or paper is desired, letters of transmittal shall be sent in duplicate to the Commission. One copy showing date of receipt will be returned to the sender.

The above rules are a compilation of old Rules 3.3, 3.14, 3.17, and 3.15.

6.4 Continuances. Any party who desires a continuance shall, immediately upon receipt of notice of hearing, or as soon thereafter as facts requiring such continuance come to his knowledge, notify the Commission in writing, by letter or telegram, of said desire, stating in detail the reasons why such continuance is necessary. Any such party may be required to submit affidavits in support of such request. For good cause shown, the Commission, its department heads or Examiners, may grant such a continuance and may at any time order a continuance on its own motion. Only under exceptional circumstances will requests for continuance of a hearing be considered unless submitted on or before the seventh day prior to the hearing date.

This rule, although similar to old Rule 4.6, has two noticeable changes. Notification of the desire for a continuance can be made by telegram, and a continuance may be granted by an Examiner

35 Neb. Laws c. 342, p. 1227; NEB. REV. STAT, § 75-231.01 (Supp. 1959).
during the conduct of a hearing. Although the Court has approved such a continuance by an Examiner at a hearing, saying that old Rule 4.6 applied only to continuances prior to the hearing, such authorization was not specifically provided for in the rules, and Examiners have been reluctant to grant continuances under these circumstances. The Commission's power to grant or deny the requests for continuances is quite broad, and such rulings will not be disturbed unless there is an abuse of discretion.

6.5 Consolidation. Where two or more proceedings are legally or factually related, they may be heard and considered together on a consolidated record, unless any party would be prejudiced thereby.

6.6 Conduct of Hearings. Hearings will be conducted by Commissioners or Examiners, who, among other things, will open the proceedings; enter into the record the notice of hearing; take appearances; act on pleadings not previously filed; hear the evidence in the order provided in Rules 3.6, 4.7 and 5.4; rule on motions and objections; interrogate any witnesses; and close the proceedings. Examiners have no power to take any action involving a final determination of the proceedings. The record in any case shall not be affected by any change of Examiners during the conduct of the hearing.

6.7 Appearances. Any individual may appear on his own behalf before the Commission. An individual may appear on behalf of another only if, a) he is admitted to practice law before the Nebraska Supreme Court, or b) he is admitted to practice law before the supreme court of any state and is accompanied by a person admitted to practice law before the Nebraska Supreme Court.

Rule 6.5 is similar to old Rule 4.9 and Rule 6.6 is essentially the same as old rules 4.2 and 4.10. Rule 6.7 must be considered in conjunction with Rule 1.1, and has already been discussed in that connection.

6.8 Briefs. Submission of briefs may be required by the Commission. Any party desiring to submit a brief may do so by indicating such desire at the close of the hearing. The time in which briefs shall be filed and the number of copies required will be fixed at the close of the hearing by the presiding Commissioner or Examiner.

6.9 Oral Argument. Ordinarily no oral argument will be permitted at the close of the hearing. However, the Commission or Examiner may request or permit such argument. The Commission will hear oral argument

37 Ferguson v. Rogers, 164 Neb. 85, 88, 81 N.W.2d 915, 918, (1957).
38 In re Yellow Cab and Baggage Co., 126 Neb. 138, 253 N.W. 80 (1934).
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on motions for rehearing, where there is a prior request therefor in writing. Unless otherwise ordered by the Commission, oral argument will be limited to twenty minutes on each side.

6.10 Motion for Rehearing. Motion for rehearing shall be filed within ten days after the mailing of a copy of the order by the Commission to the parties.

The notable difference between old Rule 6.2 and the new Rule 6.8 is the language which guarantees any party the right to submit a brief by expressing this desire at the close of the hearing. Rule 6.9 is the same as old Rule 6.1, except that the speaking time allotted to each side has been decreased from 30 to 20 minutes. Rule 6.10 is the same as old Rule 3.16 and is in accordance with the statutory provision.39

6.11 Appeal to Supreme Court. Any party may appeal from an order of the Commission to the Nebraska Supreme Court by one of the two following procedures:

a) Direct appeal. On direct appeal the notice of appeal, the statutory docket fee, and a $75.00 bond or undertaking shall be filed with the Secretary of the Commission within one month of the date of entry of the Commission order from which appeal is taken.

b) Indirect appeal. On indirect appeal a motion for rehearing shall first be filed. Notice of appeal, the statutory docket fee, and a $75.00 bond or undertaking shall then be filed with the Secretary of the Commission within one month of the date of entry of the Commission order over-ruling the motion for rehearing.

In either type of appeal, appellant shall file a praecipe with the Commission, specifying the pleadings to be included in the transcript. The evidence as certified by the court reporter and Commission Chairman as the true bill of exceptions, along with the pleadings and filings, constitute the complete record. The Secretary of the Commission will indicate on the transcript the parties appellant and appellee.

Rule 6.11 embraces the content of old Rules 7.1 and 7.2. The Supreme Court has been active in specifying procedure for appeal from the Commission, and has set forth the following excellent guide:

The Legislature left it optional, as distinguished from mandatory, whether or not the party aggrieved would timely file a motion for rehearing. If he files a motion for rehearing in time, he may have one month from the ruling thereon in which to appeal, thereby presenting for consideration and review not only errors of law which allegedly occurred during the hearing, but also whether or

not the complete record discloses that the Commission acted within the scope of its authority or was arbitrary and unreasonable. If he does not file a motion for rehearing in time, but the appeal is within one month from the entry of the order to which complaint is made, as in this case, the Court will not consider or review any assigned errors of law which occurred during the hearing, but will determine only whether the Commission acted within the scope of its authority or whether it was arbitrary and unreasonable.40

To appeal an order under § 75-405, either a substantial right, a property right, a pecuniary right, or some right other than a general interest common to the public must be adversely affected.41 Thus, an action such as the overruling of a motion to dismiss a complaint, an order properly setting a matter for hearing, or a minute entry preceding a formal order, is merely interlocutory and therefore not appealable.

In computing the one month allowed by § 75-406, the Court has stated that a calendar month terminates with the day of the succeeding month numerically corresponding with the day of its beginning, less one. Consequently, where the Commission overruled a motion for rehearing on the thirteenth day of one month, an appellant filed notice of appeal on the fourteenth day of the following month, the time for filing had expired and the appeal was dismissed.47

The Commission must now take determinative action in a proceeding within a specific period of time. In matters heard by the Commission a decision must be rendered within 30 days from the date of the hearing, while on matters heard by an examiner the decision must be rendered within 30 days from the date of oral argument. Upon complaint of a "secondary boycott," the matter must be heard from three to ten days after filing of the complaint and must be determined within seven days after the date of the

41 NEB. REV. STAT. (Reissue 1958).
42 Nebraska Public Power Co. v. Omaha Ice & Cold Storage, 147 Neb. 324, 23 N.W.2d 312 (1946); Airline Ground Service v. Checker Cab, 151 Neb. 837, 39 N.W.2d 809 (1949).
46 NEB. REV. STAT. (Reissue 1958).
47 Ruan v. Peak, 163 Neb. 319, 79 N.W.2d 575 (1956).
48 NEB. REV. STAT. § 75-109.01 (Supp. 1959).
hearing.\footnote{NEB. REV. STAT. § 75-238.02 (Supp. 1959).} In addition to these statutory requirements, the Court has expressed its disapproval of such delay by stating that a loss sustained by the Commission's unreasonable delay in processing an application, is for all practical purposes, the taking of property without due process.\footnote{Chicago & N.W. Ry. v. Save the Trains Assn., 167 Neb. 61, 91 N.W.2d 312 (1958).}

It should also be noted that the new Administrative Procedure Act requires the Commission to make findings of fact in its orders.\footnote{NEB. REV. STAT. § 84-915 (Reissue 1958).} However, from a study of the Commission's orders, it would appear that the statute has been interpreted to require only findings of ultimate fact.\footnote{The normal language in Commission orders in regard to fact finding is as follows: "The Commission, upon due consideration of the evidence adduced at the hearing, the Examiner's report and recommendation, the Exceptions thereto and oral arguments thereon, and being fully advised in the premises, is of the opinion and finds that . . . (specifying the action to be taken)."} Although the Court had previously excused the Commission from making basic findings as a foundation for the finding of ultimate fact,\footnote{Ferguson v. Rogers, 164 Neb. 85, 81 N.W.2d 915 (1957).} such an interpretation now seems strained in the light of the legislative language that "The findings shall consist of a concise statement of the conclusion upon each contested issue of fact."\footnote{Supra note 51.} Fortunately, this problem will soon be solved, since at the time of this writing, the question has been raised in an appeal pending before the Supreme Court.\footnote{Basin Truck Co. v. All Nebraska Railroads, Docket No. 34847.}

Although old Rule 4.7 provided for an Examiner's report and recommendation, for exceptions thereto, and for oral argument on the same before the Commission, this was eliminated from the rules. As previously stated, if the rules provided for an Examiner's report, it must be rendered.\footnote{Skeedee Independent Tel. Co. v. Farm Bureau, 166 Neb. 49, 51, 87 N.W.2d 715, 717 (1958).} However, nothing in the nature of a fair hearing would require such a report. If it is not required by statute or rule, then it can safely be assumed that the report and recommendation need not be rendered.

Under the present procedure, the Examiner normally prepares a report and presents it to the Commission in executive session. At this time the Commission expresses its opinion of the report, and
the Examiner is told to bring the matter back at a later date, during which time he drafts an order reflecting the opinion of the Commission. This order is then brought before the Commission, is signed by the Commissioners, and is entered into the minutes. From this date of entry the provisions for a motion for rehearing and for an appeal apply.

Although some question has existed in the past as to when an order is final and out of the Commission's hands, and when it can reverse itself, during the past year the Supreme Court has provided the answer. Where the Commission denied an application, and then after hearing argument on a motion for rehearing, it reversed itself and granted the application, the Court held that it was within its right. However, where an application was granted and a protestant's motion for rehearing was overruled, the Court held that the Commission thereby lost jurisdiction to reconsider its action, and a subsequent order denying the application was null and void.

VI. EVIDENCE

Rule 7. Evidence.

7.1 General. Evidence which would be admissible in civil actions under the Revised Statutes of Nebraska is admissible before the Commission. While the Commission is not bound to follow the technical common law rules of evidence, the record shall be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs.

The first sentence of this rule, admitting evidence admissible under the statutes, refers to sections 25-1201 to -12,119 and applicable Court decisions. However, the second sentence indicates less stringent requirements for admissibility in administrative proceedings, and actually sets as the basic criteria that "the records shall be supported by evidence which possesses probative value commonly accepted by reasonable men in the conduct of their affairs." This phraseology is derived from section 84-914, which in turn was taken from section 9 of the Model State Administrative

59 NEB. REV. STAT. (Reissue 1956) and (Supp. 1959).
60 NEB. REV. STAT. (Supp. 1959).
Procedure Act, and reflects the modern trend in administrative evidence. Professor Davis states:

The direction of movement on evidence problems throughout the legal system, in the judicial process as well as in the administrative process, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon “the kind of evidence on which responsible persons are accustomed to relying in serious affairs.”

Thus the common law exclusionary rules are disregarded, except those pertaining to privilege, and inclusion or exclusion becomes a question for determination in the conscience of the hearing Examiner.

7.2 Filing and Serving Exhibits Prior to Hearing. In any proceeding where detailed or complicated exhibits are to be used, the Commission, or its staff may require any party to file and serve copies of such exhibits or other necessary information within a specified time in advance of the hearing in order to enable the other parties and the Commission staff to study same and prepare cross examination with references thereto.

7.3 Copies of Exhibits. Parties shall furnish accurate copies of all documentary evidence offered at the hearing to the Official Reporter, the presiding Commissioners or Examiner, and all parties to the proceeding.

7.4 Official Files. Any party desiring to introduce into evidence any part or parts of official files, shall obtain copies thereof in advance of the hearing.

7.5 Stipulations. Parties to any proceeding may agree upon any facts involved in the controversy, either by written stipulation entered into the record as an exhibit, or by oral agreement stated on the record; provided, that the Commission shall not be irrevocably bound by such stipulation.

7.6 Cumulative Evidence. The presiding Commissioner or Examiner may exclude evidence which is cumulative or repetitious.

7.7 Abstracts from Documents. When documents are numerous, such as freight bills or bills of lading, the Commissioner or Examiner may refuse to receive in evidence more than a limited number alleged and appearing to be representative. The party will be required to abstract in orderly fashion the relevant data from these documents, affording other parties reasonable opportunity to examine both the documents and the abstract, and thereupon offer the abstract in evidence in exhibit form.

7.8 Material in Books, Papers or Documents. Relevant portions of books, papers, or documents, shall be plainly designated and distinguished from all irrelevant portions before the relevant material may be offered into evidence. Where the irrelevant material in the book, paper, or document is voluminous so as to encumber the record, the book, paper or document may be marked for identification and the relevant material read into the record. Upon direction of the presiding Commissioner or Examiner, a true

61 9C UNIFORM LAWS ANNOTATED 179 (1957).
62 DAVIS, ADMINISTRATIVE LAW CASES 247 (1960).
copy of the relevant matter may be received as an exhibit, provided that copies are delivered to all parties of record and provided all parties of record are afforded an opportunity to examine the book, paper, or document, and to offer in evidence in like manner other portions thereof, if found to be material and relevant.

7.9 Late Filed Exhibits. The presiding Commissioner or Examiner may authorize any party to furnish and serve designated late filed exhibits within a specified time after the close of the hearing.

Rules 7.2 through 7.9 are essentially the same as provisions found in the old rules. Rule 7.5 was rewritten so that the Commission would not be bound by any revision of fact by parties through a stipulation.

7.10 Subpoenas. Subpoenas requiring the attendance of witnesses will be issued by a Commissioner or by the Secretary of the Commission on written application of any party, or on order of the Commission. Subpoenas for the production of papers, books, or documents, unless directed by the Commission on its own motion, will be issued only upon application in writing, stating specifically which papers, books, or documents are required and the facts expected to be proved thereby. The subpoena shall be served in the manner provided by law. All parties directed to produce such books, papers or documents shall furnish and deliver same at the time and place specified by the Commission to the Secretary or other designated employee or agent of the Commission.

The provisions in Rule 7.10 are authorized by sections 75-203 and 84-914 (2).64 The statement that "a subpoena must be served in the manner provided by law" refers to sections 25-1226 to -1228, and -1236.65

7.11 Witness Fee. Any witness who is summoned and responds thereto is entitled to the same fee as is paid for like service in the District Courts of Nebraska, such fee to be paid by the party at whose instance the witness's testimony is to be taken.

7.12 Depositions. The use of depositions in proceedings before the Commission is governed by the Revised Statutes of Nebraska except as herein-after provided:

a) Time for Taking. All depositions within this state shall be taken at least ten days prior to the date of the hearing, and all depositions outside of this state shall be taken at least thirty days prior to the date of the hearing, except for good cause shown in writing.

63 NEB. REV. STAT. (Reissue 1958).
64 NEB. REV. STAT. (Supp. 1959).
65 NEB. REV. STAT. (Reissue 1954).
b) Request and Order. A deposition will be taken only on the order of the Commission. This order may issue on the Commission's own initiative, or on good cause shown in a petition by any party to a proceeding. This petition requesting that a deposition be taken shall be filed with the Commission with due regard to the time provisions in Rule 7.12 (a) above; and shall clearly set forth the name and address of the witness, the place, where, when, time, and reasons why taken, and the name and office of the official before whom taken. The Commission order that a deposition be taken shall specify the witness whose deposition is to be taken; shall state the time, the place, and the official before whom taken; and shall be served on all parties of record.

c) Written Interrogatories. Parties served with the order for the taking of a deposition may promptly transmit written interrogatories to the hearing officer, who shall propound all proper questions to the witness and record the answers verbatim. These interrogatories need not be served upon the party at whose instance the deposition is taken. No other interrogatories shall be used before the Commission.

d) Filing. The officer taking the deposition shall promptly seal the deposition along with all exhibits in an envelope, endorsed with the title of the proceeding, and send same by registered mail to the Secretary of the Commission. The deposition shall reach the Commission, except for good cause shown, at least five days prior to the date of the hearing at which it is to be offered as evidence. The party taking the deposition shall give prompt notice of its filing to all parties of record.

Rule 7.11 was added in consideration of those persons called and is similar to sections 33-139 and -140. Under Rule 7.12, the use of depositions and written interrogatories in Commission proceedings is governed by sections 25-1267.01 to -1267.44, with the specified exceptions.

VII. PLEADING FORMS

Rule 8. Forms.

8.1 The Commission has approved certain forms for use by its Departments in connection with proceedings before the Commission which are available upon request and which should be used where applicable. These include the following:

a) Accounting: Rate Revision Form (Telephone Companies): File original.

c) Motor Transportation Department: Application (New or Extension) for the Transportation of Passengers.
Application (New or Extension) for the Transportation of Property.
Application for Acquisition or Lease of Operating Authority.

Public Warehouse: Application for License to Conduct the Business of a Public Warehouseman.

It will be noticed that this rule is identical with old Rule 8 and duplicates material covered in Rules 3.2 and 4.2. The Commission plans to reorganize and renumber all pleading forms at a future date and upon completion, they will compose Rule 8.

VIII. CONCLUSION

Although the revision of the forms in Rule 8 is not yet complete, the rules in their present status represent a commendable step in the right direction. Prior to the recent revision, the rules of practice had not been revised for over ten years, and several other Commission rules and orders had not been altered for nearly half a century. Thus the present Commission is to commended for taking the initiative in molding a maze of outdated general orders into a modern, comprehensible body of rules and regulations.

The purpose of the Commission in this entire revisitional project has been to simplify and facilitate the daily working relationship between the Commission and the public. Consistent with this purpose, it is hoped that this article will better acquaint the public, and more particularly the Bar, with matters of practice and procedure before the Commission, and will thereby in some small degree help to enhance that important segment of the Commission-public relationship.

Samuel Van Pelt, ’61