

In the Matter of the Commission, on) RULE AND REGULATION NO. 147
its own motion, seeking to amend)
Title 291, Chapter 1, Rules of) ORDER ADOPTING REVISIONS TO
Commission Procedure, Section 013,) PREVIOUSLY PROPOSED
Show Cause Orders, Section 021,) AMENDMENTS TO EXISTING
Appeals, and Section 027, Civil) COMMISSION RULES; ORDER
Penalty Procedures, in accordance) SETTING HEARING
with the provisions of LB 1285 [2000])
to eliminate obsolete sections, and)
to clarify and harmonize existing)
sections.) ENTERED: January 9, 2001

BY THE COMMISSION:

On April 4, 2000, LB 1285 [2000] went into effect upon the Governor's signature. LB 1285, which added codified state law at 75-132.01 and 75-617 and amended existing state law, provides that the Commission may administratively fine persons in non-compliance with Commission orders and changes the effective date of Commission orders. Accordingly, on May 10, 2000, the Commission proposed amendments to its Rules of Commission Procedure, codified at Title 291, Chapter 1, notably Rules 013, 021 and 027. The Commission also provided a period for comment which extended until May 26, 2000. On May 16, 2000, the Commission extended the comment period until June 16, 2000. On May 31, 2000, the Commission voted to proceed to a public hearing on the proposed rules. Notice of the hearing was published in The Daily Record on June 1, 2000, in the Omaha World Herald on June 2, 2000, and in the Lincoln Journal Star on June 3, 2000. On July 11, 2000, the Commission held a public hearing on the proposed amendments. The only testimony received at the July 11 hearing was from Jack Shultz, who summarized his prefiled comments. No other member of the public was present at the hearing.

On September 26, 2000, the Commission entered an order proposing revisions to the previously proposed amendments, opening another round of public comment and setting a public hearing for October 18, 2000. The October hearing was rescheduled for November 21, 2000. Notice of the hearing was published in The Daily Record and the Omaha World Herald on October 18, 2000, and in the Lincoln Journal Star on October 20, 2000. The only written comments received were from AT&T on November 13, 2000. The only person testifying at the hearing was Jack Shultz, appearing for the Nebraska Telecommunications Association.

OPINIONS AND FINDINGS

We first address the filed written comments of AT&T. First, AT&T identifies an incorrect cross-reference found in Rule 021.04A3. The rule begins, "As provided in 021.04D..." The correct cross-reference should be to Rule 021.04B, as AT&T points out. We adopt that change in our final draft.

The AT&T comments also point out a grammatical correction in Rule 027.03A suggesting a change from "their" to "the person's" which we also adopt in our final draft.

In Rule 027.03A, the Commission Rules detail the requirements for a complaint to impose civil penalties. In the proposed draft of the rules, the Commission included subpart (6) which reads, "any other matter required by statute." The AT&T comments suggest eliminating this catch-all provision. While the inclusion of such a section would allow the rules to be flexible should the state law governing these requirements change, we have removed subpart (6) in the final draft so that practitioners wholly on these rules are not misled to believe that other requirements may exist.

Finally, AT&T correctly notes a grammatical error in the title of Rule 027.09. We adopt the suggestion to change the title of this rule to read, "*Collection of Penalty in Lieu of Payment.*"

The only other comment received was the testimony of Jack Shultz at the public hearing held on November 21, testifying for the Nebraska Telephone Association (NTA).

Mr. Shultz suggested that Rule 021.04A3 might include additional language to point out that in some instances an order of the Commission is stayed under the law. However, Mr. Shultz did testify that the language of the rule was accurate as written. As such, we decline to adopt the NTA suggestion.

Next, the NTA suggests a change to Rule 021.04B. It should be noted that the amendment to Rule 021.04B contains all new language. Mr. Shultz argued that, while the section correctly outlined how a party to a Commission order could apply to the Commission for a stay of the Commission order while an appeal was pending. Mr. Shultz' concern is that practitioners might be misled if the language in that Rule does not point out that application for a Commission stay can not be granted once an appeal to either the district court or the Court of Appeals has been perfected. The Rule as offered now begins,

021.04B If a party of record to a telecommunications order commences an appeal and one or more parties apply to the Commission for a stay of a Commission order, the Commission may order a stay of the Commission order only if the Commission...

The NTA Suggestion would have the Rule begin,

021.04B ~~If~~ Before a party of record to a telecommunications order commences an appeal, ~~and~~ one or more parties may apply to the Commission for a stay of a Commission order, the Commission may order a stay of the Commission order only if the Commission...

We adopt the NTA suggestion and adopt these changes into our proposed amendments to the rule.

During the hearing, the NTA also reiterated their desire to include a definition of what constitutes a violation. Their concern remains that the Commission would consider a single act that affects numerous subscribers as a multiple violation. In our last order, we went to considerable lengths to allay those concerns. Mr. Shultz testified that he "had a greater comfort level" after reading the Commission's last order.

The Commission feels that there is a wealth of testimony that would prevent the Commission from abusing their fining authority in the manner described by Mr. Shultz including the legislative history of LB 1285; the statements by state senators on the floor during debate on the bill, including discussion directly on point with this issue; this Commission's commitments as expressed in our last order; and assurances given during the November 21, 2000 public hearing. We remain concerned that an attempt to define violation would result in greater ambiguity rather than greater clarity. The NTA did not take us up on our invitation to suggest a viable definition. As such, we feel confident that this Commission has addressed the concerns of the NTA and find that no amending language should be added at this time and, therefore, make no changes.

Next, the NTA argues that the Commission should revise Rule 027.02C in two ways. Rule 027.02C lists a set of factors that the Commission may consider in determining the amount of a civil penalty. Except for

language added to what was formerly Rule 027.02B5, the list of factors precedes the passage of LB 1285 and was instituted when the Commission had fining authority only against motor carriers. NTA first argues that the language in the sentence preceding the list of factors should be changed from "may" to "shall" and argues, second, that the list should encompass only the two factors found in Neb. Rev. Stat. § 75-156(1) (Cum. Supp. 2000). We adopt both suggestions from the NTA so that Rule 027.02C (formerly Rule 027.02B) is amended to read,

~~027.02B~~ 027.02C Discretion to Determine Penalty: The Commission shall have discretion in determining the appropriate amount of the civil penalty assessed for each violation. In determining the amount of the penalty for a violation of a telecommunications order, the Commission may shall consider:

~~027.02B1~~ 027.02C1 The defendant's history of previous violations. The appropriateness of the penalty in light of the gravity of the violation; and,

~~027.02B2~~ The gravity of the violation or violations.

~~027.02B3~~ 027.02C2 The good faith of the violator in attempting to achieve compliance after notification of the violation is given.

~~027.02B4~~ Any hazard to the health or safety of the public caused by the violation or violations.

~~027.02B5~~ The economic benefit gained by the violation or violations.

~~027.02B6~~ The amount necessary to deter future violations.

~~027.02B7~~ Other circumstances as the public welfare may require.

These changes adopt the recommendations made by NTA. However, because much of the language in this section of the rules existed prior to LB 1285 and were adopted relative to the Commission's fining authority over common carriers other than telecommunications carriers, they are retained as Rule 027.02D and its subsections. Therefore, we include the following new section in order to re-incorporate those old sections into the new proposed amendments to the rules.

027.02D Discretion to Determine Civil Penalties for Violations of Orders Other than Telecommunications Orders: In determining the appropriate amount of civil penalty for violations of orders other than telecommunications orders, the Commission may consider:

027.02D1 The defender's history or previous violations;

027.02D2 The gravity of the violation or violations;

027.02D3 The good faith of the defendant in attempting to achieve compliance after notification of the violation or violations is given to the alleged offender;

027.02D4 Any hazard to the health or safety of the public caused by the violation or violations;

027.02D5 The economic benefit gained by the violation or violations;

027.02D6 The amount necessary to deter violations;

027.02D7 Other circumstances as the public welfare may require.

Having addressed the concerns, suggestions, and comments from the second round of comments and the second public hearing, we turn our attention to whether the changes made to the proposed amendments to the rules in this order require yet a third round of public comment and another public hearing.

The state's Administrative Procedures Act (codified at Neb. Rev. Stat. §84-901 to 84-920) prohibits a state agency from adopting a rule or regulation that is "substantially different" from the proposed rule or regulation. Neb. Rev. Stat. §84-907.05(1)(Reissue 1999). This set of rules is the third set of amendments to the rules. The Commission's first order in this docket on May 10, 2000, proposed amendments to the existing rules and allowed for a period of filed comments. A public hearing was held on July 11, 2000. On September 26, the Commission issued new proposed amendments that incorporated responses to the comments and suggestions made by the public. We again allowed a period of public comment and held a public meeting on November 21, 2000. We now must answer the threshold question of whether the changes incorporated in this order are "substantially different" than those offered in the September 26 order.

In order to determine whether this change constitutes a "substantially different" rule from those that have been open to public comment, we look to the statutes for the standard to be applied. Specifically, section 84-907.05 puts forth a three-part test to determine if an adopted rule is "substantially different from the proposed rule or regulation" contained in the public notice.

To determine whether the new rule or regulation is "substantially different" we must consider 1) the extent to which all persons affected by the adopted rule had adequate notice that their interests would be affected (notice component); 2) the extent to which the subject matter of the adopted rule or the issues determined by the rule are different from the proposed rule (issues component); and, 3) the extent to which the effects of the adopted rule differ from the effects of the proposed rule (and, the effects component). See Neb. Rev. Stat. §84-907.05(2)(a)(b) and (c).

In summary, the changes in this order: 1) corrected errors in grammar and internal references; 2) declines to adopt a suggestion by NTA to amend certain clarifying language because the language as written was accurate on its face; 3) adopted clarifying language so that practitioners would know that the opportunity to ask the Commission for a stay of one of its orders must occur prior to appealing the order; 4) adopted a change in the language setting out the criteria the Commission could consider in setting a civil fine. The resulting language exactly mirrored the enacting statute; and 5) added a new section so that we could retain the factors to be considered when the Commission entered fines for other common carriers under its jurisdiction so that this section remain unchanged. This action was necessary because LB 1285 did not change any of the provisions of law relating to fines against carriers other than telecommunications companies.

We find that adequate notice was given of each of these changes. After each change of the prior changes in the proposed rules, we allowed for a period for filed written comments. We also held a public hearing. We note for the record that this Commission duly considered each suggestion and comment and, in effect, adopted in whole or in part the vast majority of the suggestions offered. In the few instances where we did not adopt offered suggestions, the Commission gave reasoned replies to explain our decision. In short, we find that all interested parties received not only ample notice, but adequate opportunity to provide input to these amendments to the rules. We, therefore, find that the notice

component of §84-907.05 has been satisfied.

The second component of §84-907.05 is the issues component. That part of the statute asks if the subject matter of the adopted rule or the issues determined by the rule are substantially different from the previous proposed rule. As noted, there were no new issues that were brought before the Commission in this last round of comments. The one suggestion from the NTA that went unadopted was a reiteration of previous concerns raised. We find that these proposed rules, therefore, satisfy the issues component of the statute.

The third component of the statute is concerned about the extent to which the effects of the adopted rule differ from the effects of the proposed rule. Clearly, the effects are not substantially different. The changes we adopt in Rules 027.02C and 027.02D are the most extensive. But even in these changes, the Commission was careful to retain the same set of criteria that existed in the Commission's rules prior to the passage of LB 1285 for carriers under the Commission's jurisdiction other than telecommunications carriers which were the subject of LB 1285. In adopting the suggested changes of the NTA, we adopt language that exactly mirror the provisions of LB 1285 as codified at §75-156(1) (Cum. Supp. 2000). The NTA objected to the listing of additional criteria that were not specifically mentioned in the act. Since the Commission in this final revision eliminated those additional criteria but retained the original criteria which were statutorily expressed, no change in effect has occurred. We therefore find that we satisfy the third component of §84-907.05 and find that there has been no substantial change in the effects of these revisions upon persons under the Commission's jurisdiction.

Notwithstanding these findings, the Commission wishes to act on the side of caution. Accordingly, we set a hearing on these proposed amendments for February 13, 2001. If no substantive changes are made as a result of that hearing, these proposed rules will be approved.

ORDER

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that a public hearing be set for Tuesday, February 13, 2001, at 1:30 p.m. on the proposed language offered in our order entered September 26, 2000 under this docket along with the proposed amendment language in our order of today.

IT IS FURTHER ORDERED that the full draft of the language of the proposed rule with the amendments adopted be made an appendix to this order and incorporated into this order.

MADE AND ENTERED in Lincoln, Nebraska on this 9th day of January, 2001.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

APPENDIX A

013 SHOW CAUSE ORDERS

013.01 Show Cause Order: The Commission may, by order, compel any person to whom it has granted authority to show good cause as to why the authority should not be suspended, changed, or ~~or~~ revoked in whole or in part, or why the holder of the certificate for

such authority shall not be subject to an administrative fine as provided for in Commission rules.

013.02 Content: The show cause order ~~will~~ shall specifically advise the respondent of the alleged violation or violations and the time and place of the hearing on such order.

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

021 Appeals: A party seeking to obtain reversal, modification, or vacation of an order entered by the Commission may seek such review as provided by this section. other than an order entered pursuant to Section 75-322.02 R.R.S. 1943, as amended, may appeal from such order to the Nebraska Supreme Court by using one of the procedures provided in 021.01 and 021.02. Orders entered pursuant to Section 75-322.02, R.R.S. 1943, as amended, may be appealed by using either 021.01, 021.02, or the appeal procedure provided in 021.04. (1) A party seeking to obtain reversal, modification, or vacation of an order entered by the Commission pursuant to section 75-156 (1)(b) may appeal such order in accordance with the state's Administrative Procedures Act. (2) A party seeking to obtain reversal, modification, or vacation of an order entered pursuant to section 75-156 to 75-158, other than section 75-156(1)(b), may (a) seek review of the Court of Appeal as provided in section 75-137 as set forth in section 021.01 and 021.02 of these rules or (b) seek judicial review of the order under section 75-136.01 as set forth in section 021.04A of these rules; (3) Any interested party seeking to obtain reversal, modification, or vacation of a Commission order entered by the Commission under Neb. Rev. Stat. sections 75-109, 75-604, 75-609, and 75-609.01 or 86-801 to 86-810 may, after all administrative remedies before the Commission have been exhausted, appeal in accordance with the state's Administrative Procedures Act. (4) A party seeking to obtain reversal, modification, or vacation of any other order of the Commission not otherwise provided for in this section may appeal pursuant to section 75-137 using the procedures provided for in 021.01 and 021.02.

021.01 Direct Appeals: On direct appeal, a notice of appeal, statutory docket fee, and seventy-five dollar (\$75.00) cost bond or undertaking shall be filed with the Executive Director within the thirty (30) day period immediately following the day on which a copy of the Commission's order is mailed to the party appealing.

021.02 Indirect Appeal; Motion for Rehearing or Reconsideration: On indirect appeal, a motion for rehearing or reconsideration must first be filed within the ten (10) day period immediately following the day on which a copy of the Commission's order is mailed to the party appealing. If the Commission overrules the motion for rehearing or reconsideration, a notice of appeal, statutory docket fee, and seventy-five dollar (\$75.00) cost bond or undertaking must be filed with the Commission within the thirty (30) day period immediately following the day on which a copy of the Commission's order overruling the motion for rehearing or reconsideration to the party appealing is mailed. If the Commission does not enter an order ruling on the motion for rehearing or reconsideration within thirty (30) days after such motion is filed, an appeal to the Supreme Court may be perfected by filing a notice of appeal, and any statutory docket fee and \$75.00 cost bond or undertaking in an amount pursuant to state law before the Commission enters an order ruling on the motion for rehearing or reconsideration.

021.02A Oral Argument: The Commission shall hear oral argument on motions for rehearing or reconsideration if a request is filed at the time such motion for rehearing or

reconsideration is filed by the moving party or by request filed within seven (7) days of the filing of the motion by the opposing party. Unless otherwise ordered by the Commission, the parties of record shall be allowed twenty (20) minutes each for oral argument.

021.03 Procedure: In either a direct or indirect appeal, appellant shall: (A) certify to the Commission that a copy of the notice of appeal was mailed or personally delivered to other parties and attorneys of record; and (B) shall file a praecipe with the Executive Director specifying the pleadings or other matters to be included in the transcript. The evidence as certified by the official stenographer and the Executive Director as the true bill of exceptions, along with the pleadings and filings, constitutes the complete record. The other parties of record shall, within twenty (20) days of filing of the notice of appeal, inform the Executive Director in writing whether they intend to become parties to the appeal. The Executive Director shall indicate on the transcript the ~~parties~~ appellant and appellee parties.

~~021.04 Appeal of Order Entered Pursuant to Section 75-322.02 R.R.S. 1943, As Amended Orders: In the case of an order entered pursuant to Section 75-322.02 R.R.S. 1943, as amended, the party may (A) seek the review of the Supreme Court as provided in 021.01 and 021.02; or (B) seek judicial review of the order under 021.04. Subdivisions (A) and (B) are mutually exclusive and the choice of either shall govern the appeal process.~~

021.04A Proceedings for Review: The following procedures may be utilized for review pursuant to Rule 021(2):

021.04A1 Proceedings for review of an order entered pursuant to ~~Section 75-322.02 R.R.S. 1943, as amended,~~ section 021(2) of these rules shall be instituted by filing a petition in the District Court of Lancaster County or in the district court of the county in which the party is domiciled within the thirty (30) day period immediately following the day on which the Commission's order is mailed to the party appealing. All parties of record shall be made parties to the proceedings for review.

021.04A2 Summons shall be served within thirty (30) days of the filing of the petition in the manner provided for service of a summons in a civil action. The court, at its discretion, may permit other interested persons to intervene.

021.04A3 ~~The filing of the petition or the service of the summons upon the Commission shall not automatically stay enforcement of the decision.~~ As provided in 021.04D, the The Commission may stay enforcement of a decision, ~~or the court may order a stay after notice to the Commission of application for a stay upon such terms as it deems proper, and may shall~~ require the party requesting such stay to give bond in the amount specified in the order entered by the Commission. ~~and conditioned as the court directs.~~

021.04A4 Within fifteen (15) days after service of the petition, or within such further

time as the court for good cause shown allows, the Commission shall prepare and transmit to the court the verbatim testimony transcribed by the official stenographer, including all exhibits, which shall constitute the bill of exceptions. The pleadings, order appealed, and bill of exceptions duly certified to by the Executive Director shall constitute the complete record. In addition, if the defendant requests a stay of the Commission's order, the Commission shall also transfer the cashier's check, money order, electronic transfer or supersedeas bond it received from the defendant. ~~pursuant to 021.04E1.~~ Such transfer shall satisfy the bond requirement of 021.04A3.

021.04A5 A copy of the original order appealed, certified to be a true and correct copy by the Executive Director or a Commissioner, shall be admitted in evidence as prima facie evidence of every fact found and that such order is prima facie just and reasonable.

~~021.04B Review of the Record~~

021.04A6 The review shall be conducted by the court without a jury de novo on the record of the Commission.

~~021.04C Decision of the District Court~~ The court may affirm the decision of the Commission, remand the case for further proceedings, or reverse or modify the decision if the substantial rights of the petitioner may have been prejudiced because the decision is:

~~021.04C1~~ in violation of constitutional provisions; ~~021.04C2~~ in excess of the statutory authority or jurisdiction of the Commission; or, ~~021.04C3~~ Arbitrary arbitrary or capricious.

021.04B Stays of a Commission Telecommunications Order:

Before a party of record to a telecommunications order commences an appeal, one or more parties may apply to the Commission for a stay of a Commission order. The Commission may order a stay of the Commission order only if the Commission finds that (a) the applicant for the stay is likely to prevail when the matter is finally decided, (b) without relief, the applicant will suffer irreparable injury, and (c) the grant of a stay to the applicant will not substantially harm other parties to the proceeding. The Commission may require the party requesting a stay to give bond in an amount or upon conditions as the Commission may direct. The grant or denial of a stay shall not be considered to be a final order.

021.04B1 For purposes of this section, a telecommunications order shall mean an order entered by the Commission pursuant to the Intrastate Pay-Per-Call Regulation Act, the Nebraska Telecommunications Universal Service Fund Act, the Telecommunications Relay System Act, subsection (2) of Neb. Rev. Stat. section 75-109, or sections 75-604 to 75-616, 86-801 to 86-811, 86-1001 to 86-1009, 86-1201 to 86-1222.

~~021.04D~~ 021.04C Appeal to the Court of Appeals or to the Supreme Court: The Commission or ~~such~~ any party

to
the proceedings shall have the right to appeal the
decision of the District Court or the Court of Appeals
~~to the Supreme Court~~ under the same rules ~~as~~
now

provided ~~for~~ by law for appeals to the Supreme Court,
except in no case shall security for such appeal be
required when security is taken by the Commission.

~~021.04E~~ 021.04D Judicial Review and Failure
to Perfect
Appeal:

~~021.04E1~~ 021.04D1 If the
defendant against whom
a penalty is assessed seeks judicial review as
authorized by the statute, the defendant shall
forward to the Commission a cashier's check or
money order payable to the Treasurer of the
State of Nebraska for placement in a contingent
liability account in the amount of the penalty
assessed by the Commission. As an alternative
to paying the penalty into a contingent
liability account, the defendant may post with
the Commission a supersedeas bond approved by
the Commission and payable to the Treasurer of
the State of Nebraska for the amount of the
penalty, which will remain in effect until all
judicial review of the order or decision is
final. The defendant shall either remit the
payment or post an approved supersedeas bond
with the Commission within the thirty (30) day
period immediately following the day on which
the Commission's order is mailed. If the
defendant is unable financially to comply with
the requirements of this rule, the defendant
seeking judicial review shall, within the same
thirty (30) day period, file with the general
counsel of the Commission an affidavit stating
his/her financial inability and shall attach
thereto a balance sheet describing, with
particularity, the defendant's assets and
liabilities. If the general counsel concludes
that the balance sheet and affidavit
sufficiently show the defendant's financial
inability to comply with this rule, the
Commission may waive payment of the civil
penalty into the contingent liability account
or the posting of a supersedeas bond.

~~021.04E2~~ 021.04D2 (A) Failure
to pay the
penalty in full, (B) failure to forward the
amount of the penalty for placement in a
contingent liability account, (C) failure to
post a supersedeas bond, or (D) failure to
obtain a waiver from the Commission of such
requirements within the thirty (30) day period
immediately following the day on which the
Commission's order is mailed shall result in a
waiver of all legal rights to judicial review.

~~021.04F~~ 002.04E Unfavorable Appellate
Determination: In
the event the final appellate determination is against
the defendant, within thirty (30) days of the date the
decision of the appeals court becomes final, the
Commission shall forward to the Treasurer of the State
of Nebraska the cashier's check, money order or

supersedeas bond held by the Commission, plus any interest which may have accrued, pending the outcome of the appellate process.

~~021.04G~~ 002.04F Favorable Appellate

Determination: In the event the final appellate determination is in favor of the defendant, said defendant shall be absolved of all liability for payment of the amount of the penalty. Within thirty (30) days of the date the decision of the appeals court becomes final, the Commission shall return the amount of the penalty assessed and paid, plus any interest which may have accrued, with a certificate of its return or shall release the supersedeas bond by Commission order, as shall be required under the circumstances.

027 CIVIL PENALTY PROCEDURES

027.01 Purpose and Scope:

027.01A The purpose of this section is to establish hearing and related procedures which the Commission will follow when civil penalties are sought against any person as defined in Neb. Rev. Stat. section 75-139.01 ~~, motor carrier, common carrier, or contract carrier~~ pursuant to ~~Section 75-322.02 R.R.S. 1943, as amended~~ section 75-156.

027.01B The section establishes procedures to interpret, clarify and supplement requirements, definitions, and procedures described in the statutes specified in 027.01A. The Commission will follow the requirements, definitions, and procedures in these statutes and rules.

027.01C For purposes of these rules, civil penalty shall have the same meaning as administrative fine and these terms may be used interchangeably.

027.02 Assessing Civil Penalties:

027.02A Authority of the Commission: In addition to other penalties and relief provided by law, the Commission may upon a finding that the violation is proven by clear and convincing evidence, assess a civil penalty of up to ~~five~~ ten thousand dollars ~~(\$5000)~~ (\$10,000) per day against any person, ~~motor carrier, common carrier, or contract carrier~~ for each violation of: (1) any provision of Chapter 75, Article 3 sections 75-301 to 75-390, or Section section 75-126 as such section applies to any person or carrier specified in Chapter 75, Article 3 sections 75-301 to 75-390; (2) a Commission order entered pursuant to the Intrastate Pay-Per-Call Regulation Act, the Nebraska Telecommunications Universal Service Fund Act, the Telecommunications Relay System Act, subsection (2) of section 75-109, or sections 75-604 to 75-616, 86-801 to 86-811, 86-1001 to 86-1009, or 86-1201 to 86-1222; (3) any interconnection agreement or agreement of a similar nature approved by the Commission pursuant to section 75-109(2); (4) a self-enforcing provision of an interconnection agreement or an agreement of a similar nature approved by the Commission ~~(2)~~ (5) any term, condition, or limitation of any certificate or permit issued pursuant to Chapter 75, Article 3; sections 75-301 to 75-390; or, (3) ~~(3)~~ (6) any rule, regulation, or order of the Commission issued under

027.02B The civil penalty assessed under these rules shall not exceed two million dollars (\$2,000,000) per year for each violation. For purposes of section 021 of these rules, year shall mean calendar year which is the period from January 1 to December 31 inclusive.

~~027.02B~~ 027.02C Discretion to Determine
Penalty: The
Commission shall have discretion in determining the appropriate amount of the civil penalty assessed for each violation. In determining the amount of the penalty for a violation of a telecommunications order, the Commission ~~may~~ shall consider:

~~027.02B1~~ 027.02C1
~~The defender's history of previous violations.~~ The appropriateness of the penalty in light of the gravity of the violation; and,

~~027.02B2~~ The gravity of the violation or violations.

~~027.02B3~~ 027.02C2 The good faith of the ~~defendant~~ violator in attempting to achieve compliance after notification of the violation is given.

~~027.02B4~~ Any hazard to the health or safety of the public caused by the violation or violations.

~~027.02B5~~ The economic benefit gained by the violation or violations.

~~027.02B6~~ The amount necessary to deter future violations.

~~027.02B7~~ Other circumstances as the public welfare may require.

~~027.02B~~ 027.02D Discretion to Determine
Penalty: The
Commission shall have discretion in determining the appropriate amount of the civil penalty assessed for each violation other than a telecommunications carrier. In determining the amount of the penalty, the Commission may consider:

~~027.02B1~~ 027.02D1 The defender's history of previous violations.

~~027.02B2~~ 027.02D2 The gravity of the violation or violations.

~~027.02B3~~ 027.02D3 The good faith of the defendant in attempting to achieve compliance after notification of the violation is given.

~~027.02B4~~ 027.02D4 Any hazard to the health or

safety of the public caused by the violation or violations.

~~027.02B5~~ 027.02D5 The economic benefit gained by the violation or violations.

~~027.02B6~~ 027.02D6 The amount necessary to deter future violations.

~~027.02B7~~ 027.02D7 Other circumstances as the public welfare may require.

027.03 Initiation of Civil Penalty Proceedings Before the Commission:

027.03A Complainants and Complaints: A civil penalty proceeding may be initiated by any ~~entity, carrier, shipper, association, the Commission, other state or~~ federal agencies, or by any person as defined in section 75-139.01 ~~whomsoever~~ or their legal representative. The complaint initiating a civil penalty proceeding shall be filed with the Executive Director and shall conform to the requirements of 005.03 (departmental complaint), ~~or~~ 005.05 (formal complaint) or 013.01 (show cause order), as the case may be, and further shall: (1) consist of a ~~signed,~~ written pleading signed by the complainant or his or her legal representative containing the names of the complainant and the alleged violator(s) violator or violators; (2) set forth the date, facts, and nature of each act or omission upon which each charge of a violation is based; (3) specifically identify the particular statute, certificate, permit, rule, regulation, or order ~~purportedly~~ allegedly violated; (4) contain a prayer stating the type of relief, action, or order desired by the complainant; (5) inform the defendant that pursuant to ~~005.08 (formal complaint) or 005.09 (department complaint), as the case may be,~~ Commission rules, failure to answer will be construed as an admission of the allegations in the complaint. Failure to file an answer or to appear at the hearing allows the Commission to enter an order assessing a civil penalty as provided by law for the violation(s) alleged in the civil penalty complaint, or the Commission may proceed with a hearing to receive evidence of the alleged violation(s) and it may assess civil penalties as provided by law pursuant to 027.04B and, (6) that upon failure to pay any civil penalty determined by the Commission, such civil penalty may be collected by civil action in the District Court of Lancaster County. ~~(6) any other matter required by statute.~~

027.03A1 In the case of a formal complaint, a hearing fee ~~will~~ may be assessed against the complainant in the amount established by the Commission and as provided by law for hearing fees. If the defendant is found to have committed the ~~violation(s)~~ violation or violations named in the formal complaint, the hearing costs assessed, if any, shall ~~not~~ be refunded to the complainant. ~~and assessed against the defendant~~ If the defendant is found to have committed the violation or violations named in the formal complaint, the defendant may be assessed the costs of the hearing.

~~027.03B Director of Transportation Department~~

Delivery

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

~~027.03C Complaints Prepared by the Director of the Transportation Department: Civil penalty complaints initiated by the Commission shall be initially prepared by and filed with the Executive Director by the Director of the Transportation Department.~~

~~027.03D~~ 027.03C Notice to Defendant: When a ~~defendant in~~ a civil penalty complaint is filed with the Executive Director, is accused of violating any provision listed in 027.02A wherein the defendant may be subject to a civil penalty under state law and these rules, the Commission shall notify such defendant in writing (1) setting forth the date, facts, and nature of each act or omission upon which each charge of a violation is based; (2) specifically identifying the particular statute, certificate, permit, rule, regulation, or order ~~purportedly allegedly~~ violated; (3) that a hearing will be held and give notification of the time, date, and place of such hearing; (4) that, in addition to a civil penalty, the Commission may enforce additional penalties and relief as provided by law; (5) that pursuant to ~~005.08 (formal complaint) or 005.09 (departmental complaint), as the case may be~~ Commission rules, failure to answer will be construed as an admission of the allegations in the complaint. Failure to file an answer or to appear at the hearing allows the Commission to enter an order assessing a civil penalty as provided by law for the ~~violation(s)~~ violation or violations alleged in the civil penalty complaint, or the Commission may proceed with a hearing to receive evidence of the alleged ~~violation(s)~~ violation or violations and may assess civil penalties as provided by law ~~pursuant to 027.4B~~; and, (6) that upon failure to pay any civil penalty determined by the Commission, such civil penalty may be collected by civil action in the District Court of Lancaster County.

~~027.03E~~ 027.03D Method for Notice of Civil Penalty

Complaint and Hearing: A copy of the civil penalty complaint described in 027.03A and the notice information specified by ~~027.03D~~ 027.03C shall be sent by the Commission to the defendant pursuant to the Service and Notice provisions ~~of 011 by the Commission~~ as contained in Commission rules.

Other Remedies

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

~~027.03G~~ 027.03F Withdrawal of Complaint: A

civil penalty

complaint may be withdrawn by the party who filed ~~same~~ the complaint without prejudice to refileing upon the same facts if the Commission approves the withdrawal as provided by ~~008~~ these rules.

027.04 Answer

027.04A Form: The defendant shall submit to the Commission a written answer in the manner required by (1) 005.08(formal complaint); or, (2) 005.09 (departmental complaint), but in either case the answer shall be filed no later than twenty (20) days after the date on which notice is given.

027.04B Failure to Properly File Answer: If the defendant fails to timely file an answer as required by this subsection, or fails to appear at the hearing, the Commission may enter an order which assesses a civil penalty as provided by law for the ~~violation(s)~~ violation or violations alleged in the ~~civil penalty~~ complaint, or the Commission may proceed with a hearing to receive evidence on the alleged violation or violations and the Commission may assess civil penalties or an administrative fine as provided by law.

027.05 Settlement Orders:

027.05A Compromise Prior to Complaint Hearing: A defendant may enter into a compromise settlement agreement and proposed final order prior to a hearing pursuant to ~~Section 75-322.02 R.R.S. 1943, as amended~~ section 75-157 which does not constitute an admission by the defendant of any alleged ~~violation(s)~~ violation or violations contained in the civil penalty complaint. Such agreement and proposed final order shall be signed by the defendant and all parties to the proceeding and shall reflect that the defendant consents to the assessment of a specific civil penalty or administrative fine. Settlement of the matters raised by the civil penalty complaint in a proposed final order containing a recommended penalty are subject to the approval of the Commission.

027.05B Contingent Liability Account Deposit: Submission of Compromise to Commission: If the defendant and all parties to the proceeding enter into a compromise settlement agreement and proposed final order, the settlement of the complaint ~~shall~~ may include a recommended penalty to the Commission. If a recommended

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

027.06 Findings of Fact and Conclusions of Law: Every decision and final order rendered by the Commission after a civil penalty hearing is held shall be in writing and accompanied by a finding of facts and conclusions of law. ~~The decision or~~ The order entering a civil penalty may, at the discretion of the Commission, provide for a prescribed timetable for the payment of such fines. A copy of the order shall be sent to the parties of record by certified or registered mail.

027.07 Final Commission Order: Except in the event of a compromise settlement agreement entered into pursuant to the provision of 027.05A which specifically provides that there will not be a finding that a defendant is in violation of a provision found in 027.02A, nothing in these rules shall prohibit the Commission from issuing a final order in which the Commission enters a finding that the defendant is found to be in violation of a provision found in 027.02A notwithstanding that such a defendant may already be subject to the annual fine limitation as prescribed in section 027.02B.

~~027.07 Final Commission Order With No Civil Penalty Assessed:~~
~~In the event the Commission enters a final order in which the Commission does not assess a civil penalty, the Commission shall return any portion of the civil penalty which might have been received by the Commission with a certificate of its return.~~

027.08 Post Order Requirements:

027.08A Issuance of a Final Order Finding Occurrence of a Violation: On the issuance of a final order finding that the ~~violation(s)~~ violation or violations have occurred, the Commission shall inform the defendant or ~~his/her~~ the defendant's legal representative as soon as ~~as~~ practicable no later than five (5) business days of the rendition of the order and of the amount of the penalty, if any.

027.08B Payment of the Administrative ~~Penalty~~ Fine:
Within the thirty (30) day period immediately following the day on which the Commission's final order is mailed, the defendant who has not previously paid all the civil penalty ordered to be paid shall pay the penalty in full by remitting a cashier's check, electronic transfer or money order to the Commission payable to the Treasurer of the State of Nebraska who shall credit the full amount to the permanent school fund. ~~The Commission shall then promptly forward the cashier's check or the money order to the State Treasurer as provided by law.~~

027.08C Judicial Review: Judicial review of a Commission

order assessing a civil penalty entered pursuant to 027
shall be conducted pursuant to the appeal procedures
found in 021.04.

027.09 Collection of Penalty in Lieu of Failure to Pay: A
civil penalty assessed pursuant to ~~this~~ these
~~rule~~ rules and
unpaid shall constitute a debt to the State of Nebraska which may
be collected in the manner of a lien foreclosure or sued for and
recovered in a proper form of action in the name of the state in
the District Court of Lancaster County. Any civil penalty
collected by the Commission pursuant to such judicial proceedings
shall be transmitted within thirty (30) days from receipt to the
Treasurer of the State of Nebraska for deposit in the permanent
school fund pursuant to ~~Section 75-322.04, R.R.S. 1943, as~~
~~amended~~ section 75-158.

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