WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1986

ENROLLED
SENATE BILL NO. 278

(By Senator Clonkovich, Mr. President, et al)

PASSED February 25, 1986
In Effect 90 days from Passage
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Senate Bill No. 278
(BY SENATORS TONKOVICH, MR. PRESIDENT AND BOETTNER)

[Passed February 25, 1986; in effect ninety days from passage.]

AN ACT to amend and reenact section one, article one, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact section four-a, article two of said chapter; and to further amend said article by adding thereto a new section, designated section four-d; and to amend article three of said chapter by adding thereto a new section, designated section three-b, all relating generally to intrastate rail carriers and the powers, duties and authority of the public service commission with respect thereto; certain legislative purposes and policies with respect thereto; establishing procedures for the establishment of intrastate rail carrier rate-making; providing for appeals from the public service commission to the interstate commerce commission; providing for open access to the tracks and facilities of rail carriers and establishing the criteria and conditions therefor; and limiting the conditions under which a rail carrier may discontinue or abandon use of rail trackage in this state.
Be it enacted by the Legislature of West Virginia:

That section one, article one, chapter twenty-four of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; that section four-a, article two of said chapter be amended and reenacted; that said article be further amended by adding thereto a new section, designated section four-d; and that article three of said chapter be amended by adding thereto a new section, designated section three-b, all to read as follows:

ARTICLE 1. GENERAL PROVISIONS.

§24-1-1. Legislative purpose and policy; plan for internal reorganization; promulgation of plan as rule; cooperation with joint committee on government and finance.

(a) It is the purpose and policy of the Legislature in enacting this chapter to confer upon the public service commission of this state the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:

1. Ensure fair and prompt regulation of public utilities in the interest of the using and consuming public;
2. Provide the availability of adequate, economical and reliable utility services throughout the state;
3. Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state's energy resources, such as coal;
4. Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference, applied in a manner consistent with the purposes and policies set forth in article two-a of this chapter, and based primarily on the costs of providing these services;
5. Encourage energy conservation and the effective and efficient management of regulated utility enterprises; and
6. Encourage and support open and competitive marketing of rail carrier services by providing to all rail carriers access to tracks as provided in section three-b,
It is the purpose of the Legislature to remove artificial barriers to rail carrier service, stimulate competition, stimulate the free flow of goods and passengers throughout the state and promote the expansion of the tourist industry, thereby improving the economic condition of the state.

(b) The Legislature creates the public service commission to exercise the legislative powers delegated to it. The public service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the state's economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

(c) The Legislature directs the public service commission to identify, explore and consider the potential benefits or risks associated with emerging and state-of-the-art concepts in utility management, rate design and conservation. The commission may conduct inquiries and hold hearings regarding such concepts in order to provide utilities subject to its jurisdiction and other interested persons the opportunity to comment, and shall report to the governor and the Legislature regarding its findings and policies to each of these areas not later than the first day of the regular session of the Legislature in the year one thousand nine hundred eighty-five, and every two years thereafter.

(d) It is legislative policy to ensure that the Legislature and the general public become better informed regarding the regulation of public utilities in this state and the conduct of the business of the public service commission. To aid in the achievement of this policy, the public service commission annually shall present to the joint committee on government and finance, created by article three, chapter four of this code, or a subcommittee designated by the joint committee, a management summary report which describes in a concise manner:

(1) The major activities of the commission for the year especially as such activities relate to the implementation of the provisions of this chapter;

(2) Important policy decisions reached and initiatives undertaken during the year;
(3) The current balance of supply and demand for natural gas and electric utility services in the state and forecast of the probable balance for the next ten years; and
(4) Other information considered by the commission to be important including recommendations for statutory reform and the reasons for such recommendations.
(e) In addition to any other studies and reports required to be conducted and made by the public service commission pursuant to any other provision of this section, the commission shall study and initially report to the Legislature no later than the first day of the regular session of the Legislature in the year one thousand nine hundred eighty, upon:
(1) The extent to which natural gas wells or wells heretofore supplying gas utilities in this state have been capped off or shut in; the number of such wells, their probable extent of future production and the reasons given and any justification for, capping off or shutting in such wells, the reasons, if any, why persons engaged or heretofore engaged in the development of gas wells in this state or the Appalachian areas have been discouraged from drilling, developing or selling the production of such wells and whether there are fixed policies by any utility or group of utilities to avoid the purchase of natural gas produced in the Appalachian region of the United States generally and in West Virginia specifically.
(2) The extent of the export and import of natural gas utility supplies in West Virginia.
(3) The cumulative effect of the practices mentioned in subdivisions (1) and (2) of this subsection upon rates theretofore and hereafter charged gas utility customers in West Virginia.
In carrying out the provisions of this section the commission shall have jurisdiction over such persons, whether public utilities or not, as may be in the opinion of the commission necessary to the exercise of its mandate and may compel attendance before it, take testimony under oath and compel the production of papers or other documents. Upon reasonable request by the commission, all other state agencies shall cooperate with the commission in carrying out the provisions and requirements of this subsection.
(f) No later than the first day of the regular session of the
Legislature in the year one thousand nine hundred eighty, the public service commission shall submit to the Legislature a plan for internal reorganization which plan shall specifically address the following:

(1) A division within the public service commission which shall include the office of the commissioners, the hearing examiners and such support staff as may be necessary to carry out the functions of decision making and general supervision of the commission, which functions shall not include advocacy in cases before the commission;

(2) The creation of a division which shall act as an advocate for the position of and in the interest of all customers;

(3) The means and procedures by which the division to be created pursuant to the provisions of subdivision (2) of this subsection shall protect the interests of each class of customers and the means by which the commission will assure that such division will be financially and departmentally independent of the division created by subdivision (1) of this subsection;

(4) The creation of a division within the public service commission which shall assume the duties and responsibilities now charged to the commissioners with regard to motor carriers which division shall exist separately from those divisions set out in subdivisions (1) and (2) of this subsection and which shall relieve the commissioners of all except minimal administrative responsibilities as to motor carriers and which plan shall provide for a hearing procedure to relieve the commissioners from hearing motor carrier cases;

(5) Which members of the staff of the public service commission shall be exempted from the salary schedules or pay plan adopted by the civil service commission and identify such staff members by job classification or designation, together with the salary or salary ranges for each such job classification or designation;

(6) The manner in which the commission will strengthen its knowledge and independent capacity to analyze key conditions and trends in the industries it regulates extending from general industry analysis and supply-demand forecasting to continuing and more thorough scrutiny of the capacity planning, construction
management, operating performance and financial
condition of the major companies within these industries.
Such plan shall be based on the concept that each of the
divisions mentioned in subdivisions (1), (2) and (4) of this
subsection shall exist independently of the others and the
plan shall discourage ex parte communications between
them by such means as the commission shall direct,
including, but not limited to, separate clerical and
professional staffing for each division. Further, the public
service commission is directed to incorporate within the
said plan to the fullest extent possible the
recommendations presented to the subcommittee on the
public service commission of the joint committee on
government and finance in a final report dated February,
one thousand nine hundred seventy-nine, and entitled “A
Plan for Regulatory Reform and Management
Improvement.”
The commission shall before the fifth day of January, one
thousand nine hundred eighty, adopt said plan by order,
which order shall promulgate the same as a rule of the
commission to be effective upon the date specified in said
order, which date shall be no later than the thirty-first day
of December, one thousand nine hundred eighty. Certified
copies of such order and rule shall be filed on the first day of
the regular session of the Legislature, one thousand nine
hundred eighty, by the chairman of the commission with the
clerk of each house of the Legislature, the governor and the
secretary of state. The chairman of the commission shall
also file with the office of the secretary of state the receipt of
the clerk of each house and of the governor, which receipt
shall evidence compliance with this section.
Upon the filing of a certified copy of such order and rule,
the clerk of each house of the Legislature shall report the
same to their respective houses and the presiding officer
thereof shall refer the same to appropriate standing
committee or committees.
Within the limits of funds appropriated therefor, the rule
of the public service commission shall be effective upon the
date specified in the order of the commission promulgating
it unless an alternative plan be adopted by general law or
unless the rule is disapproved by a concurrent resolution of
the Legislature adopted prior to adjournment sine die of the
regular session of the Legislature to be held in the year one
thousand nine hundred eighty: Provided, That if such rule
is approved in part and disapproved in part by a concurrent
resolution of the Legislature adopted prior to such
adjournment, such rule shall be effective to the extent and
only to the extent that the same is approved by such
concurrent resolution.

The rules promulgated and made effective pursuant to
this section shall be effective notwithstanding any other
provisions of this code for the promulgation of rules or
regulations.

(g) The public service commission is hereby directed to
cooperate with the joint committee on government and
finance of the Legislature in its review, examination and
study of the administrative operations and enforcement
record of the railroad safety division of the public service
commission and any similar studies.

(h) (1) The Legislature hereby finds that rates for
natural gas charged to customers of all classes have risen
dramatically in recent years to the extent that such
increases have adversely affected all customer classes. The
Legislature further finds that it must take action necessary
to mitigate the adverse consequences of these dramatic rate
increases.

(2) The Legislature further finds that the practices of
natural gas utilities in purchasing high-priced gas supplies,
in purchasing gas supplies from out-of-state sources when
West Virginia possesses abundant natural gas, and in
securing supplies, directly or indirectly by contractual
agreements including take-or-pay provisions, indefinite
price escalators, or most-favored nation clauses have
contributed to the dramatic increase in natural gas prices. It
is therefore the policy of the Legislature to discourage such
purchasing practices in order to protect all customer
classes.

(3) The Legislature further finds that it is in the best
interests of the citizens of West Virginia to encourage the
transportation of natural gas in intrastate commerce by
interstate or intrastate pipelines or by local distribution
companies in order to provide competition in the natural
gas industry and in order to provide natural gas to
consumers at the lowest possible price.

(i) The Legislature further finds that transactions
between utilities and affiliates are a contributing factor to
the increase in natural gas and electricity prices and tend to confuse consideration of a proper rate of return calculation. The Legislature therefore finds that it is imperative that the public service commission have the opportunity to properly study the issue of proper rate of return for lengthy periods of time and to limit the return of a utility to a proper level when compared to return or profit that affiliates earn on transactions with sister utilities.

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.


1 After the thirtieth day of June, one thousand nine hundred eighty-one, no public utility subject to this chapter except those utilities subject to the provisions of section four-b and section four-d of this article, shall change, suspend or annul any rate, joint rate, charge, rental or classification except after thirty days’ notice to the commission and the public, which notice shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates or charges shall go into effect; but the commission may enter an order suspending the proposed rate as hereinafter provided. The proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time, and kept open to public inspection: Provided, That the commission may, in its discretion, and for good cause shown, allow changes upon less time than the notice herein specified, or may modify the requirements of this section in respect to publishing, posting and filing of tariffs, either by particular instructions or by general order. Whenever there shall be filed with the commission any schedule stating a change in the rates or charges, or joint rates or charges, or stating a new individual or joint rate or charge or joint classification or any new individual or joint regulation or practice affecting any rate or charge, the commission may either upon complaint or upon its own initiative without complaint enter upon a hearing concerning the propriety of such rate, charge, classification, regulation or practice; and, if the commission so orders, it may proceed without answer or other form of pleading by the interested parties, but upon reasonable notice, and, pending such hearing and the
decisions thereon, the commission, upon filing with such
thereby a statement in writing of its reasons for such
suspension, may suspend the operation of such schedule
and defer the use of such rate, charge, classification,
regulation or practice, but not for a longer period than two
hundred seventy days beyond the time when such rate,
charge, classification, regulation or practice would
otherwise go into effect; and after full hearing, whether
completed before or after the rate, charge, classification,
regulation or practice goes into effect, the commission may
make such order in reference to such rate, charge,
classification, regulation or practice as would be proper in a
proceeding initiated after the rate, charge, classification,
regulation or practice had become effective: Provided, That
in the case of a public utility having two thousand five
hundred customers or less and which is not principally
owned by any other public utility corporation or public
utility holding corporation, the commission may suspend
the operation of such schedule and defer the use of such
rate, charge, classification, regulation or practice, but not
for a longer period than one hundred twenty days beyond
the time when such rate, charge, classification, regulation
or practice would otherwise go into effect; and in the case of
a public utility having more than two thousand five
hundred customers, but not more than five thousand
customers, and which is not principally owned by any other
public utility corporation or public utility holding
corporation, the commission may suspend the operation of
such schedule and defer the use of such rate, charge,
classification, regulation or practice, but not for a longer
period than one hundred fifty days beyond the time when
such rate, charge, classification, regulation or practice
would otherwise go into effect; and in the case of a public
utility having more than five thousand customers, but not
more than seven thousand five hundred customers, and
which is not principally owned by any other public utility
corporation or public utility holding corporation, the
commission may suspend the operation of such schedule
and defer the use of such rate, charge, classification,
regulation or practice, but not for a longer period than one
hundred eighty days beyond the time when such rate,
charge, classification, regulation or practice would
otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, classification, regulation or practice goes into effect, the commission may make such order in reference to such rate, charge, classification, regulation or practice as would be proper in a proceeding initiated after the rate, charge, classification, regulation or practice had become effective: Provided, however, That if any such hearing and decision thereon is not concluded within the periods of suspension, as above stated, such rate, charge, classification, regulation or practice shall go into effect at the end of such period not subject to refund: Provided further, That if any such rate, charge, classification, regulation or practice goes into effect because of the failure of the commission to reach a decision, the same shall not preclude the commission from rendering a decision with respect thereto which would disapprove, reduce or modify any such proposed rate, charge, classification, regulation or practice, in whole or in part, but any such disapproval, reduction or modification shall not be deemed to require a refund to the customers of such utility as to any rate, charge, classification, regulation or practice so disapproved, reduced or modified. The fact of any rate, charge, classification, regulation or practice going into effect by reason of the commission's failure to act thereon shall not affect the commission's power and authority to subsequently act with respect to any such application or change in any rate, charge, classification, regulation or practice. Any rate, charge, classification, regulation or practice which shall be approved, disapproved, modified or changed, in whole or in part, by decision of the commission shall remain in effect as so approved, disapproved, modified or changed during the period or pendency of any subsequent hearing thereon or appeal therefrom. Orders of the commission affecting rates, charges, classifications, regulations or practices which have gone into effect automatically at the end of the suspension period are prospective in effect only.

At any hearing involving a rate sought to be increased or involving the change of any rate, charge, classification, regulation or practice, the burden of proof to show the justness and reasonableness of the increased rate or proposed increased rate, or the proposed change of rate, charge, classification, regulation or practice shall be upon
the public utility making application for such change. The commission shall, whenever practicable and within budgetary constraints, conduct one or more public hearings within the area served by the public utility making application for such increase or change, for the purpose of obtaining comments and evidence on the matter from local ratepayers.

Each public utility subject to the provisions of this section shall be required to establish, in a written report which shall be incorporated into each general rate case application, that it has thoroughly investigated and considered the emerging and state-of-the-art concepts in the utility management, rate design and conservation as reported by the commission under subsection (c), section one, article one of this chapter, as alternatives to, or in mitigation of, any rate increase. The utility report shall contain as to each concept considered the reasons for adoption or rejection of each. When in any case pending before the commission all evidence shall have been taken and the hearing completed, the commission shall render a decision in such case. The failure of the commission to render a decision with respect to any such proposed change in any such rate, charge, classification, regulation or practice within the various time periods specified in this section after the application therefor shall constitute neglect of duty on the part of the commission and each member thereof.

Where more than twenty members of the public are affected by a proposed change in rates, it shall be a sufficient notice to the public within the meaning of this section if such notice is published as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the community where the majority of the resident members of the public affected by such change reside or, in case of nonresidents, have their principal place of business within this state.

The commission may order rates into effect subject to refund, plus interest in the discretion of the commission, in cases in which the commission determines that a temporary or interim rate increase is necessary for the utility to avoid financial distress, or in which the costs upon which these
rates are based are subject to modification by the
commission or another regulatory commission and to
refund to the public utility. In such case the commission
may require such public utility to enter into a bond in an
amount deemed by the commission to be reasonable and
conditioned upon the refund to the persons or parties
entitled thereto of the amount of the excess if such rates so
put into effect are subsequently determined to be higher
than those finally fixed for such utility.

No utility may make application for a general rate
increase while another general rate application is pending
before the commission and not finally acted upon, except
pursuant to the provisions of the next preceding paragraph
of this section. The provisions of this paragraph shall not be
construed so as to prohibit any such rate application from
being made while a previous application which has been
finally acted upon by the commission is pending before or
upon appeal to the West Virginia supreme court of appeals.

§24-2-4d. Procedures for intrastate rail carrier rate-making
and complaints.

Inasmuch as the commission retains authority over
intrastate rail rates and complaints pursuant to 49 United
States Code §11501 and other federal law, and inasmuch as
the commission's procedures are subject to periodic review
and certification by the interstate commerce commission
for compliance with federal standards, the general rate-
making procedures set forth in section four-a, article two,
chapter twenty-four of this code, shall not be applied to
intrastate railroad rates. The commission shall promulgate
its rules and regulations for the government of intrastate
rail rates. Such rules shall contain notice requirements,
grounds for rate suspension and the permitted suspension
period, procedures for protest, standards for determining
market dominance and rate reasonableness, burdens of
proof, refund provisions, contract rate procedures and
trackage rights. These rules shall also contain procedures
for complaints and filing of contract rates. All final orders
of the commission concerning intrastate rail rates shall be
appealable to the interstate commerce commission in
conformance with federally established standards of
review.
ARTICLE 3. DUTIES AND PRIVILEGES OF PUBLIC UTILITIES SUBJECT TO REGULATIONS OF COMMISSION.

§24-3-3b. Access to privately owned railroad track and adjoining facilities.

(a) The Legislature finds that article eleven, section nine of the West Virginia constitution declares railroads in this state to be public highways free to all persons for the transportation of their persons and property, under such regulations as shall be prescribed by the Legislature. It is the policy of this state to protect and promote the economic well-being of its citizens and toward that end to assure the availability of rail transportation services. It is the purpose of this section to promote such vital goals by all available means not in conflict with authority exercised by the federal government in the area of rail transportation.

(b) Rail carriers owning rail tracks located within the borders of this state shall provide open access to such tracks, together with all reasonable, necessary and proper operating facilities for the transportation of passengers and goods to other rail carriers including private carriers transporting their own goods: Provided, That where both the accessed and accessing carrier are negotiating a contract with any person for the transportation of passengers or goods, the accessed carrier shall have the right of first refusal on such contract. The accessed carrier and the accessing carrier shall jointly agree upon a reasonable fee for such access. If the parties cannot reach an agreement on a reasonable access fee, the public service commission shall set a fee pursuant to the provisions of subsection (c) of this section, after taking into consideration the factors set forth in said subsection (c) and giving such weight to each as it may deem appropriate.

(c) The commission shall promulgate regulations providing for the establishment and payment of reasonable access fees to the accessed carrier by the accessing carrier and the orderly, efficient and safe utilization of accessed rails and facilities. In establishing access fees, the commission shall consider: The capital investment made by the accessed carrier; a reasonable rate of return thereon; depreciation; costs involved in track maintenance and operation; the necessary use of the accessed carrier's employees and facilities; any loss of employment or wages
by employees of the accessed carrier that might reasonably
be anticipated because of the activities of the accessing
carrier; other reasonable and necessary expenses incurred
by the accessed carrier; and the accessing carrier’s usage of
the accessed track and facilities in relation to the total use
of such track and facilities.
(d) Except as required for safety and efficient
operation, no carrier providing access under this section
may require the use of its facilities by an accessing carrier.
(e) Rail carriers seeking access under this section shall
comply with all applicable interstate commerce
commission rules and regulations.
(f) All safety regulations of the federal railroad
administration are applicable to rail carriers seeking access
under this section, unless waived by the public service
commission.
(g) No rail carrier owning rail tracks in the state of West
Virginia shall discontinue or abandon use of such trackage
without first obtaining authority from the commission to do
so, unless the same be done under uniform rules and
regulations filed by such rail carrier with the public service
commission and approved by said commission.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within approved this the 5th day of March, 1986.

Governor