

Appellate Review and Enforcement of Agency Decisions

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Summary of Commission Powers

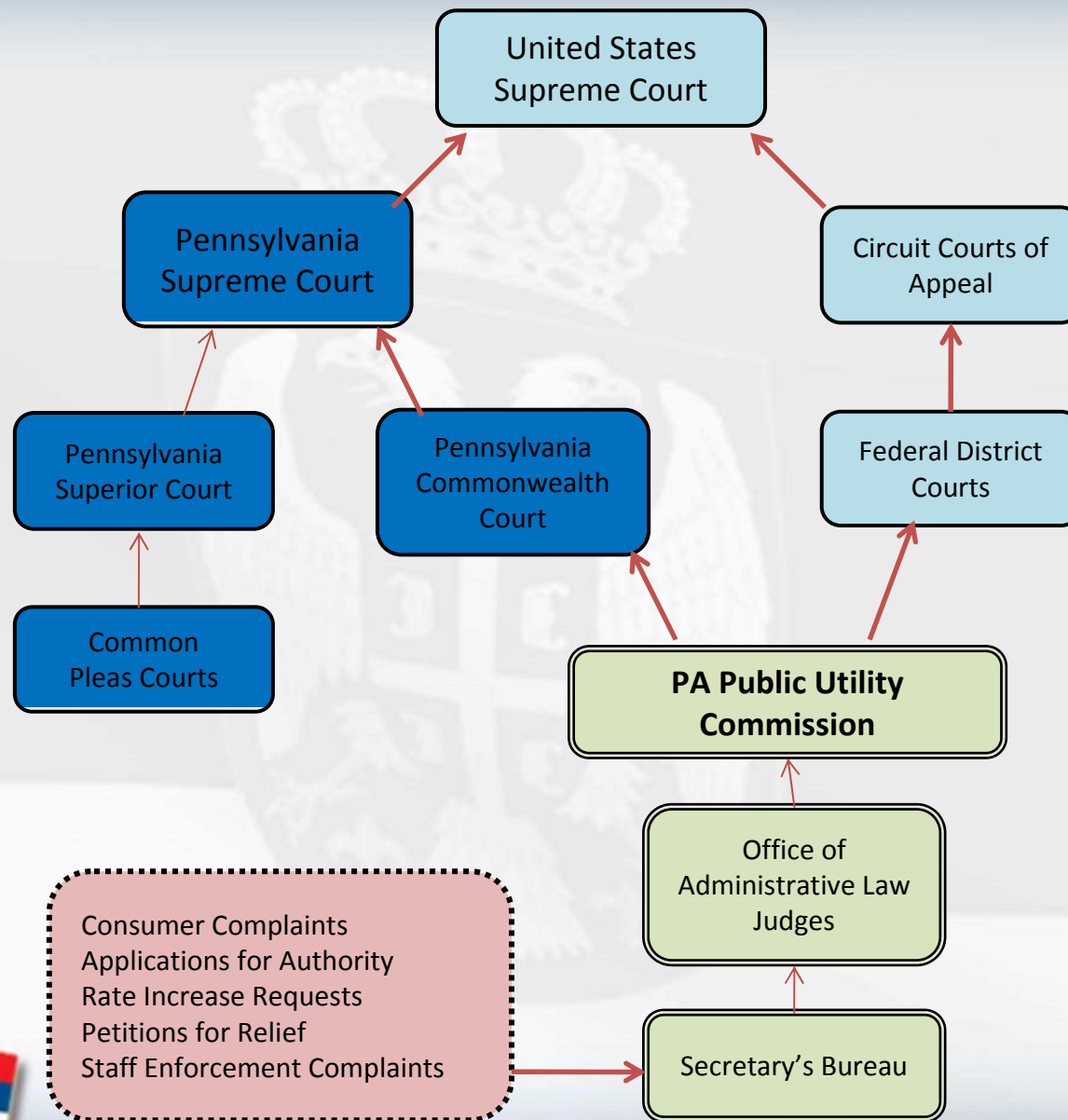
- Pennsylvania Public Utility Commission is an “independent” administrative agency with broad regulatory powers over public utilities
 - Approve market entry, set standards for entry
 - Establish service territories and duties
 - Approve mergers/sales, set conditions for approval
 - Approve rate/tariff changes, set rates at just and reasonable level and decide rate structure
 - Adjudicate/decide consumer complaints
 - Investigate and prosecute utilities for violations of law or Commission’s regulations



Judicial Review

- Under **United States Constitution** and **Pennsylvania Constitution**, the Commission's decisions are subject to "judicial review"
- Based on "separation of powers" among three branches of our government (legislative, executive and judicial), and statutory limits on executive powers
 - State court system – Commonwealth Court of PA
 - Federal court system – Middle District Court





State Law Basis for Judicial Review

- PA Constitution, Article 5, Section 9
 - there shall be a **right of appeal** from a court of law or from an administrative agency to an appellate court as provided by law
- Administrative Agency Law, Section 702
 - any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest shall have the **right to appeal** that adjudication to an appellate court



Where to file?

- Commonwealth Court of PA
 - Appeals filed for alleged violations of state law
- Middle District Federal Court
 - Appeals filed for alleged violations of federal law
- Removal Practice
 - cases with “federal law” issues first filed in Commonwealth Court can, by motion, be transferred to Middle District Federal Court



What to file?

Petition for Review

- For appeal to Commonwealth Court, Must File “Petition for Review”
- Petition must include
 - Basis for court’s jurisdiction
 - Names of petitioner and government unit
 - Reference to order being challenged
 - Statement of objection to order
 - Statement of relief sought
 - Attach copy of order



How to file? Petition for Review

- “Statement of Objections” Must Be Specific, Not Recitation of Court’s Scope of Review
 - Must identify specific errors of law
 - Must identify specific violation of constitutional rights
 - Specific findings not supported by substantial evidence
- Include “Proof of Service”
 - Must serve copies on agency, parties below and PA’s Attorney General and certify service to court
- No new evidence
 - Appellate court does not accept new evidence, must rely on record made before Commission



Basic Requirements for Appeal to Commonwealth Court

- Commission's action must be an "adjudication" (not policy statement or regulation)
- State law generally requires that agency action be a "final order" before appeal can be taken
- Person seeking to appeal must be "aggrieved" by Commission's action
- Appeal of agency order must be filed "within 30 days" or face dismissal



What is an “adjudication” ?

- Judicial review by appellate court is only available for “adjudications”, which carry obligations re due process and other rights
- Definition
 - “any final order, decree, decision or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations” of the parties to the proceeding
- Excluded actions include:
 - policy statements, issuance of regulations, procedural decisions, etc.



What is a “final order” ?

- Definition of final order
 - Disposes of all claims
 - Aggrieved party is “put out of court”
 - Practice effect of order is “final determination” on issue presented
- Interlocutory Review Sometimes Permitted
 - Commission agrees to interlocutory review
 - Court determines that interlocutory review is appropriate for “collateral order” that decides, with finality, critical issue



Preservation of Issues

- PA State Court Rules – require party to preserve issues for appellate review
 - did you present issue to Commission first, did you litigate the issues, did you file exceptions, etc.
- Rationale – must allow agency to address and resolve issues before parties resort to appeal
- Failure to Preserve Issue – results in dismissal of issue or entire appeal



Party must be “aggrieved” by Commission’s order

- Key requirements for “aggrievement”
 - Party below who participated and preserved issues
 - Must be a party who is harmed/aggrieved by Commission’s order
- Definition of Aggrievement
 - Party must have “direct interest” in subject matter
 - Party’s interest must be “immediate and substantial”, not speculative and remote
 - May allow appeal of trade association if members are directly affected
 - Consider interests of consumer vs. legislator



Time Limits to Appeal

- State court appeals – parties must file within 30 days
 - Jurisdictional requirement
 - If late, appeal must be dismissed
- Federal court appeals – parties have up to 2 years, but usually file within 30 to 60 days



Standard of Review

- Commonwealth Court Standard of Review – limited to:
 - violation of constitutional rights (due process, confiscations, etc.)
 - error of law (Public Utility Code, Sunshine Act, Administrative Agency Law, etc.)
 - lack of “substantial evidence” to support Commission’s determination



Role of Appellate Court

- Commonwealth Court will not “second-guess” factual determinations if supported by “substantial evidence”
- Substantial evidence is “such relevant evidence as reasonable mind can accept as adequate to support a conclusion”
 - Other evidence standards (not used) – preponderance of the evidence and beyond a reasonable doubt
- No inquiry into “wisdom” of agency’s decision



Deference to Agency's Judgment

- Commonwealth Court will give “deference” to agency’s legal interpretations regarding:
- Agency’s Statute
 - agency’s interpretation of statute for which it has enforcement responsibility is entitled to “great deference” and will not be reversed unless interpretation is deemed to be “clearly erroneous”
- Agency’s Regulations
 - agency’s interpretation of its own regulations is given deference when (1) interpretation is consistent with regulation and (2) consistent with underlying statute



Adequacy of Commission Decision

- Text of Commission Order
 - Identify/address issues presented
 - Decide/resolve issue presented
 - Explain reasoning for decision and cite to record evidence that supports decision
- Absence of formal findings on all issues is not critical, does not preclude judicial review
 - decision is adequate for review where Commission chooses among several fully developed positions developed below



Abuse of Discretion

- Abuse of Discretion – arises in situations where government action is “manifestly unreasonable or is the result of partiality, prejudice, bias or ill will” – rarely invoked
 - **Legal Basis** - although not listed in AAL, abuse of discretion standard is considered part of requirement that agency's decision be “in accordance with law”
 - **Rationale** - because agency has “first hand” knowledge of case, appellate court will not substitute its judgment
- Denial of Reconsideration – abuse of discretion standard used, instead of normal error of law or lack of substantial evidence – difficult standard to meet



Preliminary Motions

- Several potential grounds for dismissal of appeals
 - Not a final order/interlocutory
 - Lack of aggrievement/standing
 - Late filed appeal (over 30 days)
 - Failure to preserve issues
 - Failure to exhaust administrative remedies
- File motion to quash/dismiss as early as possible in appellate process



Exhaustion of Administrative Remedies

- Exhaustion Requirement
 - Judicial review not available until aggrieved party has used review processes available before agency
- Rationale
 - allows agency to exercise its discretion and consider party's claims and arguments for reconsideration of staff decisions made at intermediate levels
- Some Commission examples
 - review of staff decisions, review of ALJ decisions, Secretarial Letters, etc.



Review of Agency's Procedures

- Due Process Hearing
 - U. S. Constitution requires that government provide “notice and opportunity to be heard” to citizens before depriving person of liberty or property
- Key Elements
 - Fair notice of hearing and issues
 - Opportunity to be heard (briefs, comments, etc.)
 - Oral hearing for contested facts
 - Agency must state basis for decision
 - Agency decision must be impartial
 - No commingling of functions



Impartial Decision Maker

- Agency decision maker must
 - Have no “conflict of interest” (financial interest, personal interest or bias in matter)
 - Agency member’s pre-disposition regarding a matter of law or policy is not disqualifying
 - Base agency decision solely on record created by parties, no *ex parte* communications with parties
 - Agency members may not rely on evidence or “secret reports” not presented in record below



Ex Parte Communications

- Ex Parte Prohibition
 - Under PA law, Commissioners and their advisors may not have “off the record” communications with any persons regarding the merits of pending case
- Rationale
 - based on “due process” principle that no party should have ability to have private contact with decision maker to influence how case should be decided
- Prohibition applies to:
 - all contested, on the record proceedings
 - each Commissioner, ALJ and their advisors
 - does not apply to policy or rulemaking proceedings
- Prohibition ends when case ends



Commingling of Functions

- Agency's employees and process may not:
 - Comingle prosecutory and advisory functions, unfair to parties where prosecutor advises decision maker on outcome of case
 - Comingle decision to initiate prosecution with decision on outcome of case, decision maker may not be or appear to be impartial if same person made decision to initiate prosecution



Effect of Appeals

- Court rules prohibit any further action by Commission regarding case
 - Commission “may no longer proceed further in the matter” to preserve status quo
- Exceptions to “no further action” rule
 - Take action to preserve status quo, correct errors, grant stays of agency’s order
 - Enforce agency’s order, unless stayed by court
 - Grant reconsideration (within 30 days)
 - Take action authorized by court



Effect of Reconsideration

- Commission may grant reconsideration of its order, upon petition or *sua sponte*
 - If granted within 30 days, renders appeal to Commonwealth Court “inoperative”
 - New 30 days time period to appeal runs anew from Commission’s order on reconsideration
 - Allows Commission another opportunity to consider and address issues raised in appeal and to either change its mind or further support its decision



Applications for Stay

- Aggrieved parties may seek to “stay” or stop effect of Commission’s order
- Preliminary Requirements
 - (1) must file appeal with Commonwealth Court
 - (2) must have first asked Commission for stay
- Necessary Elements – petition must show
 - petitioner is “likely to prevail on the merits”
 - Petitioner will suffer “irreparable harm”
 - No substantial harm to other parties
 - No adverse effect on public interest



Certification of Record and Statement of Issues

- Commission Obligations
 - after appeal is filed, Commission must file certified record with Commonwealth court within 40 days
- Three methods for certification of record:
 - Physical record (all documents, transcripts, briefs, orders, motions, etc.) – not preferred
 - Certified list of documents – clerk produces list
 - Stipulation of record – parties agree
- Petitioner Obligations
 - after appeal is filed, petitioner must file, within 30 days, “docketing statement” with detailed statement of case and issues



Some Points re Brief Writing

- Follow court's rules for elements and format
- Scope of review – type of issues reviewed
- Standard of review - how its reviewed
- Statement of questions – be specific
- Statement of facts – explain/make the case here
- Summary of Argument – 1 or 2 pages max
- Argument – add law to facts, provide roadmap
- Conclusion – ask for specific relief



Some Points re Oral Argument

- Know the record below from A to Z
- Narrow issues to be presented, identify critical issues and address only those issue
- Speaking style – be yourself
- Approach – be less the “single-minded” advocate, use more the “let us reason together” approach
- Anticipate and welcome questions – questions are window to judge’s thinking and concerns that you can address directly
- Prepare, in advance, your opening and closing remarks, be substantive and persuasive



Disposition of Appeals

- Appellate Court's Options
 - court may affirm, modify or reverse any order on review, or court may remand case to agency and direct further proceedings
- Affirm on Different Grounds
 - court may affirm agency decision where result is **correct**, even if reasons are different from those advocated by agency or parties
- Remand
 - court may remand case back to agency if additional fact-finding or decision-making is required



Further Appellate Options

- Commonwealth Court decision can be appealed to Pennsylvania Supreme Court
 - Petition for allowance of appeal (most Commission decisions in this category, few are accepted)
 - Direct appeal for original jurisdiction cases (challenge to assessment determinations)
- Pennsylvania Supreme Court decision can be appealed to United States Supreme Court
 - Must have issue re federal statute or U.S. Constitution
 - Must file *petition for certiorari* (few are accepted)
 - If accepted, file briefs and oral argument in Washington, D.C. (TMI nuclear accident case and *Duquesne* case)



Commission Enforcement Options

- Informal Investigation and Prosecution before Commission
 - Separate investigatory staff and attorneys investigate allegations
 - No commingling of functions
- Original Jurisdiction or Mandamus Action before Commonwealth Court
 - File directly with Commonwealth Court if no additional facts needed and violations of law or failure to obey are clear



Informal Investigations

- Use separate investigation staff and attorneys to investigate potential violations of law
 1. If facts indicate violations of law or Commission regulations, staff seeks voluntary remedy via settlement or files complaint (gas explosions, MC violations, etc.)
 2. Staff's complaint treated like any other party's complaint, complaint is assigned to Administrative Law Judge (ALJ) for hearing and decision
 3. Staff and utility present witnesses, cross-examine witnesses, file briefs and reply briefs
 4. ALJ reviews record and briefs, drafts "initial decision"
 5. Staff and utility may file exceptions to initial decision
 6. ALJ "initial decision", record below and exceptions are reviewed by Commission
 7. Commission makes final decision



Settlements of Informal Investigations

- Informal investigations by staff may result in settlements with utility
- Settlements are subject to Commission review and approval, must be in the “public interest”
- Staff and utility file proposed settlement, documentation and statements in support
- Commission options:
 1. Give tentative approval (allow public comments)
 2. Reject proposed settlement (force litigation)
 3. Amend settlement and require parties to accept modification or go to litigation



Complaint in Mandamus

- Where no further facts are needed, Commission's attorney may file original jurisdiction complaint in Commonwealth Court to enforce Commission's order
- Complaint in Mandamus
 - State key facts and attach order
 - State utility's non-compliance with order
 - Request Commonwealth Court to enforce Commission's order
- Utility has 20 days to respond



Appeal Conclusions

- **Agency's Strategic Advantage** - on appeal, Commission has substantial advantage due to “deference” afforded to an expert tribunal and use of “substantial evidence” standard
- **Provide Due Process** - Providing full “due process” to all parties (notice and opportunity to be heard) and an “impartial decision maker” (no conflict of interest) are most important factors for success on appeal
 - Long-run appellate costs (and loss of credibility) almost always out-weigh short-term time savings



Enforcement Conclusions

Two Enforcement Options:

- 1. Informal Investigations** – where facts are needed to determine if any violations have occurred, prosecute matter before agency, agency decision is subject to appeal
- 2. Complaint to Commonwealth Court** – where facts and violation of Commission order, law or regulation are clear on their face, Commission's attorney files directly with court to secure enforcement



Questions ?

