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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

December 23, 1999

Honorable Bradley L. Mallory, Secretary
Department of Transportation
Ninth Floor, Forum Place
555 Walnut Street
Harrisburg, PA 17101

Re: IRRC Regulation #18-349 (#2070)
Department of Transportation
Administrative Practice and Procedure; Outdoor Advertising

Dear Secretary Mallory:

Enclosed are our Comments on the subject regulation. They are also available on our website at <http://www.irrc.state.pa.us>.

Our Comments list objections and suggestions for consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you would like to discuss these Comments, please contact Mary Lou Harris at 772-1284.

Sincerely,

Robert E. Nyce
Executive Director

REN:kcg

Enclosure

cc: Robert H. Raymond, Jr.
Jerry McCoy
Office of General Counsel
Office of Attorney General
Lee Ann Labecki

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF TRANSPORTATION REGULATION NO. 18-349

ADMINISTRATIVE PRACTICE AND PROCEDURE; OUTDOOR ADVERTISING

DECEMBER 23, 1999

We have reviewed this proposed regulation from the Department of Transportation (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ in determining whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to reasonableness, need and clarity. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. General. – Clarity.

Interested parties and other participants and party[ies]

In several sections, the phrase “interested parties and other participants” has been replaced with the term “parties.” Other sections retain this phrase. With respect to notice requirements, why has the scope of the regulation been reduced to “parties”? How will this change affect the Department’s current practices? Also, will this change result in a person with an interest in a proceeding not receiving notice of that proceeding?

Unless the Department has a valid reason for retaining the phrase “interested party[ies] and other participants,” this phrase should be deleted, and the term “part[ies]” should be used consistently throughout the regulation. Finally, the term “party” should be defined in Section 491.2.

2. Section 491.2. Definitions. – Clarity.

Office of the agency

The phrase “upon which commencement of process is made upon the Secretary” is unclear. The Department should incorporate the first sentence of Section 491.4(c) in this definition.

3. Section 491.2a. Separation of adjudicatory function from representation of the Department. – Need; Clarity.

Subsection (b) Ex Parte discussions

Subsection (c) Prohibited discussions with employees

Both of these subsections convey prohibitions, but do so with inconsistent verbs. Subsection (b) uses “no” in conjunction with “may,” and Subsection (c) uses “will not.” For conformity with the Legislative Reference Bureau’s Style Manual, both sections should use “may not.”

The word “likewise,” which begins Subsection (c), should be deleted because it is not clear what that term relates to.

Subsection (d) Designation by Chief Counsel and Secretary

For the same reason discussed above, “prohibited from participating” should be replaced with “may not participate.” Similarly, “should designate” should be replaced with “shall designate.”

4. Section 491.3. Request for hearing. – Reasonableness; Clarity.

Subsection (a) Content

We have two concerns with this subsection. First, it does not require that the party requesting the hearing provide an address at which documents may be served. This requirement should be added to the final-form regulation.

Second, Paragraph (3) uses the phrase “gives rise for the occasion of the appeal.” For clarity, the Department should consider more direct language, such as “is the subject of the appeal.”

Subsection (b) Timeliness of petition for hearing

We have two concerns with this subsection. First, the beginning point of the 30-day period referenced in Paragraph (b)(1) is unclear. That period begins with the Department’s “determination.” However, the period referenced in Subparagraph (2)(i) begins on the mailing date of the Department’s letter. The beginning of the time period referenced in these paragraphs should be consistent and should begin on the date of mailing (which is the date of service under the General Rules, 1 Pa, Code § 33.34) of the Department’s determination.

Second, Subparagraph 2(ii) should only become operative in instances where the Department’s notice was either not mailed or misdirected, so that the party did not receive it. Only in that case, should the date of actual or constructive notice begin the 30-day period.

Subsection (c) Determination of insufficiency

Subsection (c) does not explain what kind of deficiency will lead to a matter being closed, thereby depriving the filing party of any opportunity for relief. Also, it does not provide any opportunity for a party to correct a deficiency. We recommend that the Department clarify what type of deficiencies are correctable and consider allowing a filing party a period of time to correct a deficiency.

Subsection (d) Department’s request for clarification of the issues

Subsection (d) allows the Department to request clarification of the issue giving rise to the appeal, but does not specify the time period within which clarification must be provided. The final-form regulation should provide how long a party has to respond to a request for clarification of the issues.

5. Section 491.4. Institution of proceedings. – Clarity.

Subsection (c) Docket clerks designated office of the agency/timely filings

The last sentence of this subsection provides that the date of receipt at the office of the agency - not the date of deposit in the mails - is determinative for timely filing purposes. This sentence should be relocated to the preceding section as a new Paragraph (c). Alternatively, “date of filing” could be defined as the date of receipt at the office of the agency in Section 491.2 (relating to definitions).

6. Section 491.6. Notice and conduct of hearing. – Clarity.

Subsection (a) Written notification to parties

The Department should explain how the interest of a person entitled to notice under 67 Pa. Code Chapter 441 will be protected if notice is not given. In the final-form regulation, the Department should clarify whether notice to a party in interest will be effective from the time the party receives actual notice of the matter, or from the time the party should have known of the matter.

Subsection (d) Intervention

The underlying premise of the Subsection (d)(1) rule is that a person knows or should have known about the hearing matter, but unduly delayed beyond the deadline in filing their petition to intervene. However, the regulation does not indicate what the time frame for intervention is, or when the deadline for intervention occurs. Under 1 Pa. Code Section 35.30, the deadline for intervention is published in the *Pennsylvania Bulletin*. The Rules of Civil Procedure provide that intervention is allowed during the pendency of a matter (Pa. R.C.P., Rule 2327). The Department should examine both approaches and establish an allotment of time or deadline. Without any indication of the allowable window for intervention, it is not possible to determine if a petition to intervene has been unduly delayed.

Is Subparagraph (2)(ii) properly titled “Supersedeas,” or should it be titled “Supplementation”? It appears that “Supplementation” is the appropriate heading.

Subsection (g) Request for a stay or supersedeas

The caption of this subsection implies that there is a difference between the terms “stay” and “supersedeas.” Black’s Law Dictionary indicates that these terms are used synonymously. If there is a difference between these two terms within the context of the Department’s procedures, the Department should indicate what that difference is. Otherwise, the Department should use one term consistently and define that term in Section 491.2 (relating to definitions).

7. Section 491.7. Filing requirements. – Reasonableness; Clarity.

Subsection (b) Telefacsimile and electronic transmission not accepted

This subsection adds a prohibition on electronic filing of documents to the existing prohibition on telefacsimile filings. Why does the Department prohibit the telefacsimile and electronic transmission of documents?

8. Section 491.9. Order to show cause. – Clarity.

Subsection (b) Notification to respondent

Subsection (b) states in part: “the docket clerk will forward a copy of the order to the respondent.” The term “forward” is vague and potentially confusing. For greater clarity, the Department should replace “forward” with the term “serve.”

Subsection (e) Notification to parties

Subsection (f) Scheduling of hearing

Subsection (g) Waiver

These subsections refer to “parties.” In a proceeding on an order to show cause, what other parties are involved besides the respondent? If there are none, the term “parties” should be replaced with “respondent.”