



**COMMENTS ON PROPOSED REGULATION 54-103
HEARINGS BY TELECONFERENCE - IRRC 3375**

SUBMITTED BY:

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INTRODUCTION

The Pennsylvania Liquor Control Board (LCB) proposes a regulation to codify the practice of holding virtual hearings. LCB lacks the statutory authority to make this unilateral change thorough the regulatory process, and as a result, the proposal should be rejected.

VIRTUAL HEARINGS ARE A PRODUCT OF THE COVID-19 ERA WHICH HAS COME TO AN END

LCB states that virtual hearings commenced in November 2020 as a result of the "unprecedented challenge...of the COVID-19 public health emergency." These hearings resulted from temporary procedures adopted in September 2020. On page 1 of the proposed rulemaking, LCB outlines the genesis of these temporary procedures and the authority under which it promulgated these procedures:

The executive orders and mandates of the Governor necessitated that many agencies transition to a telework environment in order to continue day-to-day operations and ensure continued service to the citizens of the Commonwealth.¹

LCB notes that the executive orders and mandates of then-Governor Wolf created an atmosphere (and the necessary authority) for specific temporary procedures in response to the COVID-19 pandemic.

However, LCB fails to note that the executive orders and mandates that created this atmosphere (and the necessary authority) no longer exist. Governor Wolf's years-long COVID-19 emergency declaration came to an abrupt end after the voters of the Commonwealth rebuked such endless emergency declarations at the ballot box, passing a constitutional amendment that curtails the use of such declarations.

¹ <http://www.irrc.state.pa.us/docs/3375/AGENCY/3375PRO.pdf>

LCB bases the entirety of the proposed regulation upon a foundation (temporary executive order and mandates) that no longer exists. LCB seeks to establish COVID-era emergency practices as the “new normal” without the necessary legislative authority to do so.

LCB REMOTE HEARING ORDER ACKNOWLEDGES THE AUTHORITY TO HOLD VIRTUAL HEARINGS WAS TEMPORARY

LCB maintains the undated Remote Hearing Order that currently governs the LCB remote hearing policy on its website.² The Preamble to the Order states in part:

On July 10, 2020, Governor Wolf issued an executive order authorizing Commonwealth Agencies to conduct administrative hearings online by video or telephonic means, without the consent of the parties. The Governor’s order temporarily suspends any regulatory statute, order, rule or regulation of any Commonwealth agency that would prevent the agency from holding administrative proceedings via video, telephonic or other online conferencing means.

The Remote Hearing Order, authored by LCB, acknowledges the authority granted by Governor Wolf’s executive order was temporary in nature. This temporary authority has ceased.

LCB’s virtual hearing policy outlined in the Remote Hearing Order was acknowledged by LCB itself as temporary in nature. If LCB believed that it had the authority to, in 2020, promulgate regulations to establish virtual hearings on its own accord, there would have been no need to cite Governor Wolf’s COVID-era executive order as the basis for justifying virtual hearings.

Three years later, LCB now incorrectly claims that it somehow has the ability to continue the offering of virtual hearings despite the fact that the relevant section of the Liquor Code has not changed in the intervening years.

PURPORTED BENEFITS OF THE PROPOSED REGULATION ARE MEANINGLESS IF THE BOARD DOES NOT HAVE STATUTORY AUTHORITY TO ENACT THE PROPOSAL

LCB argues that “making such [virtual] hearing procedures permanent is in the public interest.”³ LCB buttresses this argument with ten purported benefits as outlined on pages 2-4 of the proposed rulemaking.

There can be little doubt that some, and perhaps all, of the purported benefits are in the public interest. However, the LCB does not have the ability to exceed the statutory authority granted by the General Assembly, regardless of the merits or benefits of the proposal.

Section 745.5b of the Regulatory Review Act provides IRRC clear guidance on this matter.

² <https://www.lcb.pa.gov/Legal/Documents/Remote%20Hearing%20Order.pdf>

³ <http://www.irrc.state.pa.us/docs/3375/AGENCY/3375PRO.pdf>

§ 745.5b. Criteria for review of regulations.

(a) In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, *the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.* In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General.⁴ (emphasis added)

As further developed elsewhere in this comment, LCB does not have the statutory authority to unilaterally promulgate this regulation. As a result, IRRC should discount the purported benefits as any justification to approve the proposed rulemaking.

SECTION 464 OF THE LIQUOR CODE DOES NOT CONTEMPLATE VIRTUAL HEARINGS

LCB repeatedly cites section 464 of the Liquor Code as the supposed authority for the contemplated regulation. Section 464 states (in part):

Section 464. Hearings Upon Refusal of Licenses, Renewals or Transfers; Appeals.--The board may of its own motion, and shall upon the written request of any applicant for club, hotel or restaurant liquor license, or any applicant for any malt or brewed beverage license other than a public service license, or for renewal or transfer thereof, or for the renewal of an amusement permit, whose application for such license, renewal or transfer, or the renewal of an amusement permit, has been refused, fix a time and place for hearing of such application for license or for renewal or transfer thereof, or the renewal of an amusement permit, notice of which hearing shall be mailed to the applicant at the address given in his application. Such hearing shall be before a hearing examiner designated by the board. At such hearing, the board shall present its reasons for its refusal or withholding of license, renewal or transfer thereof, or its refusal for renewal of an amusement permit. The applicant may appear in person or by counsel, may cross-examine the witnesses for the board and may present evidence which shall likewise be subject to cross-examination by the board.⁵ (emphasis added)

LCB cites the seemingly broad language “fix a time and place for hearing” as foundational justification for the proposed regulatory change. There can be no doubt that the framers of the law desired to give the LCB maximum flexibility on:

- 1) The time the hearing begins, and

⁴ <https://www.legis.state.pa.us/WU01/LI/LI/US/HTM/1982/0/0181..HTM>

⁵ <https://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1951/0/0021..PDF>

- 2) The physical location for such a hearing at locations throughout the Commonwealth.

However, the law specifies LCB must fix a place for the hearing. LCB seems to argue that the term “place” may include a virtual hearing, but provides little justification for this assumption.

Section 464 goes on to state that the “applicant may appear in person.” There can be no doubt that the term “in person,” particularly when used in a law dating to 1951, means physically (not virtually) present at a hearing occurring in a physical location.

Even in 2023, the Commonwealth commonly recognizes the plain reading of the term “in person” to mean physically present.

PENNSYLVANIA GOVERNMENT AGENCIES USE THE TERM “IN PERSON” TO MEAN PHYSICALLY PRESENT

- 1) The Pennsylvania Office of Open Records maintains a FAQ website which states, “Can a requester ask for records in person or by telephone?”⁶
- 2) Title 18, Chapter 57, Section 5704 of the Pennsylvania Wiretap act contemplates a situation where a member of law enforcement meets in person with a suspected felon and wears a concealed electronic or mechanical device capable of intercepting or recording oral communications.⁷
- 3) The Pennsylvania Department of State maintains a website listing methods to register to vote, including options to register in person.⁸
- 4) The Pennsylvania State Police stipulate that an individual may file a complaint for a suspected violation of the Pennsylvania Liquor Code “over the phone, or in person at any Bureau of Liquor Control Enforcement District Office.”⁹
- 5) The Liquor Control Board policy on RAMP certification lists three distinct methods for certain training opportunities; 1) classroom (in-person, instructor led), 2) virtual (instructor led) or 3) online (no instructor).¹⁰

In all of these examples, state agencies (even the LCB itself) clearly find the meaning of the term “in person” to mean physically present. Note that in many of the cited examples, the state agency juxtaposes the “in person” offering with an offering of an option that does not require the physical presence of the individual (telephone, internet, etc.)

TITLE 1 DOES NOT SUPPORT THE LCB’S EXPANSIVE READING OF THE TERM “IN PERSON”

⁶ <https://www.openrecords.pa.gov/RTKL/About.cfm>

⁷ <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&chpt=57>

⁸ <https://www.vote.pa.gov/Register-to-Vote/pages/how-to-register-to-vote.aspx>

⁹ <https://www.psp.pa.gov/LCE/Pages/report-a-violation.aspx>

¹⁰ <https://www.lcb.pa.gov/Education/RAMP/pages/ramp-certification.aspx>

Title 1 of the Pennsylvania Consolidated Statutes contains Statutory Rules of Construction which lay out clear standards for undefined terms in the law. Where a term is not defined, “words and phrases shall be construed according to rules of grammar and according to their common and approved usage.” 1 Pa.C.S. § 1903(a).¹¹ In ascertaining the common and approved usage or meaning, courts routinely resort to the dictionary definitions of the terms left undefined by the legislature.¹²

Merriam-Webster defines “in person” as “in one’s bodily presence.”¹³

The Cambridge Dictionary defines “in person” as “involving someone’s physical presence rather than communication by phone, email, etc.”¹⁴

These definitions comport with the previous cited examples commonly used across state agencies.

THE TERM “MAY” IN SECTION 464 DOES NOT CONTEMPLATE VIRTUAL MEETINGS, IT REFERS TO THE INDIVIDUAL APPEARING AT THE HEARING

One could perhaps argue that the word “may” allows for enough wiggle room to support the LCB’s virtual hearing regulatory scheme.

*The applicant **may** appear in person or by counsel...*

Such an argument might provide that the applicant could choose their own adventure – they *may* appear in person, or they *may* appear virtually. Put another way, if the applicant desired to be physically present at the hearing, they could request such a meeting; and if they desired for the sake of convenience to appear virtually, then so be it.

The problems with this argument are:

- 1) The later virtual option is nowhere to be found in the statute, in fact it is not even contemplated. The framers of Pennsylvania’s arcane liquor laws, and any General Assembly since they were enacted, could well have included virtual meeting options. They did not.
- 2) The law does give an option, but it has nothing to do with the method/mode of the meeting. The option is whether the applicant appears “in person” or “by counsel.”

Clearly, the intent of the law as passed, especially in light of the common use of the term “in person” both in 1951 and in 2023 by state agencies including the LCB, is these meetings are

¹¹ <https://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/01/01.HTM>

¹² See, e.g., *Hoffman v. Kline*, 300 Pa. 485, 494, 150 A. 889, 891–92 (1930); *Contas v. City of Bradford*, 206 Pa. 291, 55 A. 989 (1903) and *Department of Labor and Industry v. Unemployment Compensation Board of Review*, 203 Pa.Super. 183, 199 A.2d 474, 478 (1964).

¹³ <https://www.merriam-webster.com/dictionary/in%20person>

¹⁴ <https://dictionary.cambridge.org/dictionary/english/in-person>

important enough to be held at a physical location with individuals physically present. Additionally, LCB construes the requirement to fix a “place” for the hearing to include a non-physical virtual option without providing statutory basis for such a conclusion.

LCB CITATIONS REGARDING STATUTORY AUTHORITY IN RESPONSE TO RAF SECTION 8 ARE INSUFFICIENT

LCB cites sections 207(i), 212(a), and 464 of the Liquor Code as the basis for the proposed regulation.

SECTION 207(i) OBJECTION

Section 207(i) deals with LCB’s general authority to promulgate regulations “not inconsistent with this act as it may deem necessary for the efficient administration of this act.” This broad language gives LCB significant authority with two caveats:

- 1) Regulations must not be inconsistent with the Liquor Code, and
- 2) Regulations must relate to the efficient administration of the Liquor Code.

As outlined elsewhere in these comments, there are significant grounds to argue that the proposed regulation is inconsistent with the Liquor Code, specifically concerning the General Assembly’s clear guidance in section 464 using the term “in person” as it is commonly understood.

SECTION 212(a) OBJECTION

Section 212(a) deals with the Office of Administrative Law Judge. This brief section states in its entirety:

Section 212. Office of Administrative Law Judge.--(a) There is hereby created within the board an autonomous office to be known as the Office of Administrative Law Judge.

This section creates the Office of Administrative Law Judge, but does not provide a basis for the proposed regulatory scheme contemplating virtual meetings.

SECTION 464 OBJECTION

Section 464 deals with “Hearings Upon Refusal of Licenses, Renewals or Transfers; Appeals.”

As outlined elsewhere in these comments, there are significant grounds to argue that the language in Section 464 providing the LCB with authority to “fix a time and place for hearing...” does not contemplate the virtual hearings in the proposed regulation.

Respectfully, none of the statutory sections cited in RAF Section 8 provide the LCB with the authority to proceed with this proposed regulation.

COMMENTS ON PROPOSED SECTION 15.46(c)

With regard to hearings, Section 464 of the Liquor Code provides:

The applicant may appear in person or by counsel...

Section 15.46(c) proposes:

(c) Hearings before the OALJ shall be conducted by video conference. Hearings may be conducted in-person at the discretion of the ALJ.

IRRC should reject this proposed change out-of-hand for at least two reasons:

- 1) As outlined elsewhere in this comment, LCB lacks the statutory authority to order such a change.
- 2) Even if one discovers authority in the Liquor Code to allow for the proposed purely virtual hearings, the law could not be more clear that the applicant is the one in the driver's seat as it relates to appearing "in person," not the ALJ. LCB's proposal appears to place a burden of proof on the applicant to prove the need for an in person hearing – which is completely contrary to the clear intent of the law. If the applicant desires to appear in person, the law clearly allows for it regardless of the opinion of the ALJ.

OVERALL COMMENTS ON SECTION 17.16

For at least the reasons listed elsewhere in these comments, IRRC should reject the addition of Section 17.16 on the basis that the LCB does not enjoy the statutory authority to implement the proposed regulation.

COMMENTS ON PROPOSED SECTION 17.16(a)(2)

LCB proposes prescriptive regulations surrounding the precise manner and timing an applicant must adhere to regarding hearings. Section 17.16(a)(2)(i) and (ii) go so far as to prescribe the manner in which certain PDF files must be named.

Even if the law allowed for the LCB to formulate such a regulation, it is debatable whether placing such language into the regulatory framework is advisable. Changing technologies, for example the increased use of Microsoft programs that supplant or mimic Adobe PDF files, lead one to believe such requirements should not be enshrined in regulations that are time consuming to change.

COMMENTS ON PROPOSED SECTION 17.16(c)(3)

Section 17.16(c)(3) proposes:

(3) The Office of Chief Counsel of the Board will electronically send notice to the parties and the hearing examiner of the date and time set for the hearing. Such notice will include the hyperlink

needed to access the hearing. Any hearing participant who has not received the required hyperlink shall request access by sending an e-mail to ra-lbhearings@pa.gov no later than three business days prior to the scheduled hearing.

IRRC should reject this proposed addition to the regulation for at least the following reason:

Section 464 of the Liquor Code provides that communications relating to hearings “shall be **mailed** to the applicant at the address given in his application.” It is difficult to imagine more clarity in the statutory intent of this provision. The General Assembly clearly desires for communications regarding hearings to be remitted to the applicant via US Mail.

Certainly nothing prevents the LCB from using email in addition to the US Mail. The proposed 17.16(c)(3) could be improved by noting that the LCB will communicate via US Mail as required by the law, and via email as a convenience.

THE GENERAL ASSEMBLY HAS SHOWN AN APPETITE TO CONSIDER VIRTUAL OPTIONS IN THE POST-COVID ERA

It is worth noting that the General Assembly has wrestled with the after-effects of temporary COVID-era regulations with mixed results. A number of laws and regulations were suspended or abrogated during the emergency, and there has been honest debate over whether these changes should continue into the future. Some of the temporary changes proved to be more efficient and popular with the general public. To cite but two examples directly related to the LCB, COVID-era policies on outdoor dining and alcoholic drinks-to-go have been the subject of legislative proposals.

The policy surrounding virtual hearings should be no different. The fact that the General Assembly has shown a keen and active interest in this arena gives additional reason to reject the LCB’s end run around the legislature. A permanent change away from in person hearings to virtual hearings requires legislative authorization.

CONTINUATION OF VIRTUAL HEARINGS IN ABSENCE OF CLEAR LEGISLATIVE GUIDANCE IS PROBLEMATIC

LCB hearings range from vanilla transfers to more controversial matters that end up in litigation. Section 464 of the Liquor Code contemplates more fraught scenarios, specifically noting which court would have jurisdiction if an appeal is contemplated.

There can be no doubt as to the legitimacy of virtual hearings held during the COVID-19 pandemic under the auspices of then-Governor Wolf’s emergency declarations.

However, the shaky legal authority for ongoing use of such virtual hearings is deeply problematic. It is not difficult to imagine legal counsel for an aggrieved party bringing into question the procedural basis for a virtual hearing held post-COVID without specific authority granted by

statute. In such an instance, the aggrieved party may argue the entire hearing process is flawed and void as it was not carried out in compliance with the clear language of the law.

At a minimum, LCB should give careful consideration to the continued use of virtual hearings absent specific authorization from the General Assembly.

RECOMMENDATIONS FOR LCB CONSIDERATION

As outlined elsewhere in this comment, the purported benefits of the virtual hearing framework merit consideration. The LCB should outline these benefits to the General Assembly and seek a sponsor for a bill to accomplish this goal. One might imagine broad bipartisan support for such a proposal.

It may well be that the proper venue to hash out the details of implementing a new virtual hearing program is within the regulatory framework overseen by IRRC, but that exercise must follow, not precede, legislative authorization of the virtual hearing framework.

CONCLUSION

The LCB is a creature of the law, created by the General Assembly decades ago to oversee the sale and regulation of liquor in the Commonwealth. It acts at the behest of the legislature and the often-obtuse Liquor Code.

In this instance, the LCB has reached beyond the authority granted by the General Assembly. Despite the apparently good intentions of the proposal identified in IRRC 3375, the lack of specific, or frankly even general, authority to establish the proposed regulation must lead IRRC to reject the proposed regulation.

For at least the reasons outlined, IRRC should reject the proposed addition of Section 15.46(c) to Chapter 15 Subchapter D, the proposed addition of Section 17.16 to Chapter 17 Subchapter B, and changes to Section 17.32 of Chapter 17 Subchapter D of Title 40 as stated on pages 7-9 of Annex A attached to the Regulatory Analysis Form IRRC #3375.

I appreciate the opportunity to comment on this matter before the Commission.