

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review)
of the Rules Concerning Forfeitures and) Case No. 11-809-TR-ORD
Compliance Orders Contained in Chapter)
4901:2-7, Ohio Administrative Code.)

ENTRY

The Commission finds:

- (1) Section 119.032, Revised Code, requires all state agencies, every five years, to conduct a review of each of its rules and to determine whether to continue its rules without change, amend its rules, or rescind its rules. The current review date for the rules contained in Chapter 4901:2-7, Ohio Administrative Code (O.A.C.), is May 31, 2011. The rules govern all proceedings of the Commission to assess forfeitures and make compliance orders as authorized by Sections 4905.83, 4919.99, 4921.99, and 4923.99, Revised Code.
- (2) Section 119.032(C), Revised Code, requires that the Commission determine:
 - (a) Whether the rule should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted;
 - (b) Whether the rule needs amendment or rescission to give more flexibility at the local level;
 - (c) Whether the rule needs amendment to eliminate unnecessary paperwork; and
 - (d) Whether the rule duplicates, overlaps with, or conflicts with other rules.

- (3) In addition, on January 10, 2011, the governor of the state of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative," which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among other things, the Commission must review its rules to determine the impact that a rule has on small businesses; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative unintended consequences, or unnecessarily impede business growth.
- (4) Following its review, Staff recommends that a number of the rules contained in Chapter 4901:2-7, O.A.C., should be amended in ways intended to reduce mailing and associated costs, as well as to clarify and correct other issues. Among other proposed changes, Staff recommends that Rule 4901:2-7-03(B), O.A.C., be amended to allow service to be made upon a respondent by electronic mail, if the respondent has consented to receive service by electronic mail. Staff recommends that the rule be further amended to eliminate the requirement that service upon a domestic respondent of a notice of intent to assess forfeiture or a notice of intent to make compliance order be made by certified United States mail. The proposed rule provides that service upon a respondent, whether domestic or foreign, shall be made by ordinary or certified United States mail, courier, facsimile, electronic mail, or personal service. A copy of Staff's proposed rules is attached to this entry.
- (5) In making the determinations required by Section 119.032(C), Revised Code, Staff has considered those matters set forth in Section 119.032(C), Revised Code, as well as the continued need for the rules, the nature of any complaints or comments received concerning these rules, and any relevant factors that have changed in the subject matter area affected by the rules.
- (6) The Commission requests comments from interested persons to assist in the review required by Section 119.032(C), Revised Code. Comments should be filed in this

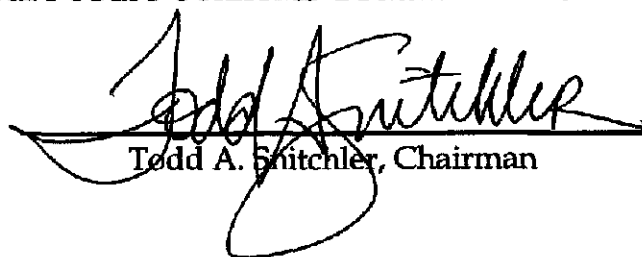
docket, in writing, with the Commission's Docketing Division by April 1, 2011. All comments must be sent to: The Public Utilities Commission of Ohio, Docketing Division, 11th floor, 180 East Broad Street, Columbus, Ohio 43215.

It is, therefore,

ORDERED, That comments on the attached rules be filed in accordance with finding (6). It is, further,

ORDERED, That a copy of this entry and the attached rules be served upon the Ohio State Highway Patrol, Ohio Trucking Association, Ohio Association of Movers, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Todd A. Snitchler, Chairman

Paul A. Centolella



Steven D. Lesser

Valerie A. Lemmie

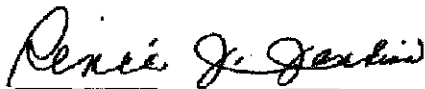


Cheryl L. Roberto

SJP/sc

Entered in the Journal

MAR 02 2011



Renee J. Jenkins
Secretary

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4901:2-7-01 **Definitions.**

As used in this chapter:

(A) "Commission" means the public utilities commission of Ohio.

~~(A)~~(B) "Days," when used to compute any period of time prescribed or allowed by these rules, shall not include the date of the act or event from which the designated period of time begins to run. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event ~~even~~ the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.

~~(B)~~(C) "Director" means the director of the commission's transportation department or the director's ~~his~~ designee.

~~(C)~~(D) "Filing" means delivery to the commission's docketing division in accordance with rule 4901-1-02 of the Administrative Code.

~~(D)~~(E) "Hearing" means all proceedings before the commission involving a violation, commencing with the filing of a request for administrative hearing and concluding with the issuance of a final order of the commission.

~~(E)~~(F) "Notice" means a notice of apparent violation as defined in rule 4901:2-7-05 of the Administrative Code; a notice of intent to assess forfeiture as defined in rule 4901:2-7-07 of the Administrative Code; a notice of intent to make compliance order as defined in rule 4901:2-7-08 of the Administrative Code; a combined notice as described in rule 4901:2-7-09 of the Administrative Code; or a notice of preliminary determination as defined in rule 4901:2-7-12 of the Administrative Code.

~~(F)~~(G) "Parties" means staff and a respondent, and any persons permitted to intervene after commencement of a proceeding.

~~(G)~~ "Remedy" means ~~any monetary civil forfeiture or compliance order set forth in a~~ notice.

(H) "Report of violation" means the information provided to staff in accordance with rule 4901:2-7-04 of the Administrative Code.

(I) "Respondent" means the shipper, carrier, individual, or several such persons, which the staff has determined may be responsible for a violation.

(J) "Staff" means those employees of the commission's transportation department to whom responsibility has been delegated for administering the provisions of sections 4905.83, 4919.99, 4921.99, and 4923.99 of the Revised Code, as applicable.

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- (K) "Violation" means any conduct, act, or failure to act, prohibited by statute or commission rule or order, ~~for which a forfeiture may be assessed pursuant to sections 4905.83, 4919.99, 4921.99 and 4923.99 of the Revised Code.~~

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4901:2-7-02 **Purpose and scope.**

~~This chapter governs all proceedings of the commission to assess forfeitures and make compliance orders as authorized by sections 4905.83, 4919.99, 4921.99 and 4923.99 of the Revised Code.~~

(A) This chapter governs all proceedings of the commission to assess forfeitures and make compliance orders as authorized by sections 4905.83, 4919.99, 4921.99, and 4923.99 of the Revised Code.

(B) The commission may, upon application or upon a motion filed by a party, waive any requirement of this chapter, for good cause shown, other than a requirement mandated by statute from which no waiver is permitted.

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4901:2-7-03 **Service.**

In proceedings governed by this chapter:

- (A) Unless provided otherwise by this chapter, service upon staff may be made by ordinary or certified United States mail, by courier service, by facsimile transmission, or by personal service ~~in the offices designated as the hazardous materials division~~. Service upon staff shall be made to:

"Compliance Division

Transportation Department

Public Utilities Commission of Ohio

180 East Broad Street, ~~Fourteenth Floor~~

Columbus, Ohio 43215-3793"

Service is effective upon receipt except that service by United States mail is complete upon mailing and service by facsimile transmission is complete upon transmission.

- (B) Service upon a respondent shall be made by ordinary or certified United States mail, by courier service, by facsimile transmission, by electronic mail, or by personal service ~~except that service upon a domestic respondent of a notice of intent to assess forfeiture or a notice of intent to make compliance order shall be made by certified United States mail. Service upon a foreign respondent of a notice of intent to assess forfeiture or a notice of intent to make compliance order shall be by ordinary United States mail.~~ Service is effective upon receipt by any person, except that service by ordinary or certified United States mail is effective upon mailing and service by facsimile transmission or electronic mail is complete upon transmission. Service by electronic mail may be made only if the person to be served has consented to receive service by electronic mail. Service upon a respondent by ordinary or certified United States mail shall be made at any of the following, ~~in order of priority~~:

- (1) If the respondent is a natural person:

(a) The address listed on the report of ~~the~~ violation.

(b) The address listed on the respondent's operator's license.

- (2) If the respondent is other than a natural person:

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- (a) If the respondent has filed a request for conference or otherwise appeared, itself or through an authorized representative, at the address indicated in the appearance or other communication.
 - (b) If the respondent is a carrier, at the address designated by the respondent, in writing, with the staff.
 - (c) If the respondent is a carrier, shipper or other business entity, at the address disclosed on the shipping papers or other shipping documents, if any.
 - (d) If the respondent is a carrier, shipper or other business entity, and whose address is not disclosed by the shipping papers, at any business address of the respondent.
- ~~(C) Failure to observe the prescribed priority of service will not constitute a failure of service.~~
- ~~(D) If the service envelope is returned with an endorsement showing failure of delivery or if no receipt of delivery is returned, then service may be made by ordinary United States mail and is effective upon mailing.~~
- ~~(E)~~(C) Once a respondent has served a request for administrative hearing in accordance with rule 4901:2-7-13 of the Administrative Code, any further service shall be made in accordance with Chapter 4901-1 of the Administrative Code.

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4901:2-7-04 **Investigation and reports of violations.**

- (A) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon the request of the staff, when the staff has cause to believe that a violation for which a forfeiture may be assessed has been committed. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such person to produce the papers, documents, or other tangible things described therein. A subpoena issued under this rule shall be served ~~upon the respondent~~ by personal service or by certified United States mail and is effective upon receipt.
- (B) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of the person to whom the subpoena is directed, quash a subpoena if it is unlawful, unreasonable, or oppressive.
- (C) Any person having statutory authority to take enforcement action regarding a violation may transmit a report of the violation to staff. The report shall be made on forms prescribed by the director ~~of the transportation department~~, or shall contain substantially the same information called for on such forms. ~~The report shall include the name, address, and telephone number of the person making the report.~~ Whenever practicable, the report should include any documentary, photographic, or other evidence which has been collected regarding the violation.

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4901:2-7-05 Notice of apparent violation.

When the staff receives a report of a violation, it shall identify the respondent or respondents and serve a "notice of apparent violation" upon any such respondents. The notice of apparent violation shall contain:

- (A) An identification of the date of the violation and person, vehicle, or facility concerning which the violation occurred.
- (B) Reference to the statute, rule or regulation, or order of the commission that was violated.
- (C) A brief description of the manner in which the violation is alleged to have occurred.
- (D) Instructions regarding the manner in which the respondent may serve a timely request for conference to contest the violation.
- (E) A notice that failure to contest the violation will conclusively establish the occurrence of the violation.

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TO BE RESCINDED

4901:2-7-06

Amount of forfeiture.

- (A) When staff has reason to believe that a person has committed a violation, it may serve a notice of intent to assess forfeiture under this chapter. In determining the amount of any forfeiture to be assessed, staff and the commission shall consider:
- (1) The nature and circumstances of the violation.
 - (2) The extent and gravity of the violation.
 - (3) The degree of the respondent's culpability.
 - (4) The respondent's history of violations, including but not limited to prior "violations" as defined under this chapter and any other available information concerning the respondent's safety of operations.
 - (5) The respondent's ability to pay.
 - (6) The effect on the respondent's ability to continue in business.
 - (7) Such other matters as justice may require.
- (B) When staff has reason to believe that a person is engaging in a pattern of violations, it may serve a notice of intent to make compliance order under this chapter. Any such order shall be reasonably calculated to prevent future violations.

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4901:2-7-07 Notice of intent to assess forfeiture.

(A) Within ninety days of discovery of a violation, but no later than one year following the violation, the staff may serve a "notice of intent to assess forfeiture" for that violation upon one or more respondents. The notice of intent to assess forfeiture shall contain:

- (1) An identification of the date of the violation and person, vehicle, or facility concerning which the violation occurred.
- (2) Reference to the statute, rule or regulation, or order of the commission that was violated.
- (3) A brief description of the manner in which the violation is alleged to have occurred.
- (4) The amount of the forfeiture intended to be assessed.
- (5) A statement that respondent's failure to serve timely a request for conference shall constitute a waiver of respondent's right to further contest liability to the state for the forfeiture described in the notice.
- (6) A description of the manner in which the respondent may make payment of the forfeiture.
- (7) Instructions regarding the manner in which the respondent may serve a timely request for conference to contest the occurrence of the violation or the amount of the forfeiture.

(B) In determining the amount of any forfeiture to be assessed, staff shall consider:

- (1) The nature and circumstances of the violation.
- (2) The extent and gravity of the violation.
- (3) The degree of the respondent's culpability.
- (4) The respondent's history of violations, including, but not limited to, prior "violations" as defined under this chapter and any other available information concerning the respondent's safety of operations.

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4901:2-7-08 **Notice of intent to make compliance order.**

When The staff has reason to believe that a person or entity has committed one or more violations, staff may serve a "notice of intent to make compliance order" for that violation upon one or more respondents. Any such order shall be reasonably calculated to prevent future violations. The notice of intent to make compliance order shall contain:

- (A) An identification of the date of each ~~the~~ violation and person, vehicle, or facility concerning which the violation occurred.
- (B) Reference to the statute, rule or regulation, or order of the commission that was violated.
- (C) A brief description of the manner in which each ~~the~~ violation is alleged to have occurred.
- (D) The language of the compliance order intended to be made.
- (E) A statement that respondent's failure to serve timely a request for conference shall constitute a waiver of respondent's right to further contest the making of the order described in the notice.
- (F) Instructions regarding the manner in which the respondent may serve a timely request for conference to contest the ~~occurrence of the violation or the making of the~~ compliance order.

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4901:2-7-09 **Combined notices.**

One or more timely notices directed to a single respondent may be combined or merged in any combination.

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4901:2-7-10

Request for conference.

- (A) A respondent upon ~~to~~-whom a notice of apparent violation, a notice of intent to assess forfeiture, ~~or a notice of intent to make compliance order, or a combined notice~~ has been served ~~directed~~-may, within thirty days of ~~service upon him~~, serve upon staff a "request for conference." The request for conference shall be in writing, and may be in any legible form which identifies the matter to be discussed and communicates respondent's desire to have a conference concerning the matter. The request for conference shall contain the name, address, and telephone number of the respondent or the respondent's ~~his~~-authorized representative. The request may be submitted via ordinary United States ~~U.S.~~-mail, facsimile transmission, or electronic mail.
- (B) The conference may occur in person, by telephone, or through written communications, and may be held with the respondent or the respondent's ~~his~~-authorized representative. The respondent shall have the opportunity to present reasons why the violation did not occur as alleged, mitigating circumstances regarding the amount of the forfeiture, reasons why the compliance order may be unjustified, or any other information relevant to the action proposed to be taken.
- (C) The staff shall notify the respondent of the date and time of the settlement conference by service of a scheduling notice by ordinary United States ~~U.S.~~-mail, facsimile transmission, or electronic mail, at least fourteen days prior to the date and time established for the conference.
- (D) Unless contained in or otherwise provided in a settlement agreement, no statement or conduct occurring in a settlement conference is admissible in any evidentiary ~~hearing~~ ~~proceeding~~ regarding the violation.

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4901:2-7-11

Settlement agreements.

- (A) Should the parties reach agreement regarding the occurrence of a violation, the amount of a forfeiture to be assessed, or the nature of a compliance order to be made, the agreement may be reduced to writing in a "settlement agreement." Such an agreement shall be signed by the director and by the respondent, and shall be fully binding upon the commission and the respondent upon execution, except as otherwise provided in this rule.
- (B) A settlement agreement may contain an agreed forfeiture, an agreed compliance order, another agreed remedy, or withdrawal of the violation, regardless of the remedy specified in the notice.
- (C) Settlement agreements providing for the payment of forfeitures of five thousand dollars or more for any violation shall not be effective until approved by and made the order of the commission.
- (D) In negotiating a settlement agreement, staff may consider any matters as justice may require, including, but not limited to:
 - (1) Mitigating circumstances relevant to the occurrence of the violation.
 - (2) The respondent's ability to pay.
 - (3) The effect on the respondent's ability to continue in business.
 - (4) Imposition of remedies to assure future compliance other than those specified in the notice.

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4901:2-7-12 **Notice of preliminary determination.**

Following service of a notice of apparent violation, a notice of intent to assess forfeiture, ~~or a notice of intent to make compliance order, or a combined notice,~~ the staff may serve a "notice of preliminary determination" upon the respondent. The notice of preliminary determination shall be signed by the ~~transportation department~~ director and shall contain:

- (A) An identification of the date of the violation and person, vehicle, or facility concerning which the violation occurred.
- (B) Reference to the statute, rule or regulation, or order of the commission which was violated.
- (C) A brief description of the violation, the amount of the ~~civil~~ forfeiture intended to be assessed, or the language of the compliance order intended to be made.
- (D) Instructions regarding the manner in which the respondent may serve a timely request for administrative hearing to contest the alleged violation, the proposed forfeiture, or the making of the compliance order.
- (E) A notice that failure to file a request for administrative hearing will conclusively establish the occurrence of the violation described in the notice of preliminary determination and will constitute a waiver of the right of the respondent to contest liability to the state commission ~~for the forfeiture proposed in the notice of preliminary determination~~ or ~~and~~ the right of the respondent to contest the making of the compliance order proposed in the notice of preliminary determination.

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4901:2-7-13

Request for administrative hearing.

Within thirty days following the service by the staff of a notice of preliminary determination in accordance with rule 4901:2-7-12 of the Administrative Code, the respondent ~~either party~~ may file a "request for administrative hearing" with the ~~commission's~~ ~~commission~~ docketing division. The request for administrative hearing shall be in writing and ~~,~~ shall contain the name, address, and telephone number of the respondent and the case number assigned to the matter by the staff. The request for administrative hearing shall be signed by the respondent or its authorized representative; ~~if the request for administrative hearing is filed by the respondent; and the request for administrative hearing shall be signed by the transportation department director, if the request for administrative hearing is filed by the staff.~~ A copy of the notice of preliminary determination served by the staff upon the respondent shall be attached to the request for administrative hearing.

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4901:2-7-14 **Default.**

- (A) A respondent upon whom a notice of intent to assess forfeiture has been served who fails within thirty days to pay the amount of the forfeiture stated in the notice or to serve upon staff a request for conference shall be in default. ~~A respondent who has requested an administrative hearing and fails to participate in the hearing proceeding shall be in default.~~ A respondent in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest liability to the state for the forfeiture described in the notice.
- (B) A respondent upon whom a notice of intent to make a compliance order has been served who fails to serve upon staff within thirty days a request for conference shall be in default. A respondent in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest the making of the order described in the notice.
- (C) A respondent upon whom a notice of preliminary determination has been served who fails within thirty days to pay the amount of the civil forfeiture proposed in the notice of preliminary determination or to file with the commission's ~~commission~~ docketing division a request for administrative hearing shall be in default. A respondent in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest liability for the forfeiture proposed in the notice or to contest the making of the compliance order described in the notice.
- (D) A respondent who has failed to comply with the provisions of a settlement agreement for a period exceeding thirty days shall be in default. A respondent in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest liability for the forfeiture proposed in the notice or to contest the making of the compliance order described in the notice.
- (E) A respondent who has requested an administrative hearing and fails to appear for the evidentiary hearing shall be in default. A respondent in default shall be deemed to have admitted the occurrence of the violation and waived all further right to contest liability for the forfeiture proposed in the notice of preliminary determination or to contest the making of the compliance order described in the notice of preliminary determination.
- (F) If a respondent is in default, the commission may, on its own motion and without prior notification to respondent, make an order adopting the remedy set out in the notice with respect to which a default has occurred pursuant to this rule. A copy of the order shall be served upon any affected respondent.

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4901:2-7-15 Extensions and relief from default or other order.

- (A) Any time within which a respondent is required to act under this chapter may be extended by the ~~transportation department director,~~ in writing, for good cause shown.
- (B) Any time within which the staff is required to act under this chapter may be extended by the written agreement of all parties.
- (C) Extensions of time sought after the commencement of a hearing shall be governed by Chapter 4901-1 of the Administrative Code.
- (D) A party which is in default ~~or has failed to comply with a settlement agreement,~~ and has been subjected to an ~~ex parte~~ order of the commission, may file an application for rehearing in accordance with rule 4901-1-35 of the Administrative Code.

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4901:2-7-16 Conduct of hearing.

- (A) Unless otherwise provided in this chapter, all hearings shall be conducted in accordance with Chapter 4901-1 of the Administrative Code.
- (B) Subsequent to a respondent filing a request for administrative hearing pursuant to rule 4901:2-7-13 of the Administrative Code~~Unless otherwise ordered by the commission or agreed by the parties,~~ a prehearing conference shall be scheduled in accordance with rule 4901-1-26 of the Administrative Code, unless otherwise ordered by the commission or agreed by the parties, within thirty days of filing of a request for administrative hearing pursuant to Chapter 4901:2-13 of the Administrative Code.
- (C) The commission, the legal director, the deputy legal director, or an attorney examiner shall assign the time and place for an evidentiary hearing. The evidentiary hearing may consist of written stipulations, oral testimony, or such other evidence that is admitted.

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4901:2-7-17 Parties.

Parties to any hearing shall consist of respondent, the staff, and any parties permitted to intervene in accordance with rule 4901-1-11 of the Administrative Code.

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4901:2-7-18 **Discovery.**

- (A) Depositions will be permitted only upon agreement of all parties or motion granted by the commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case, which leave shall not be unreasonably withheld.
- (B) Any additional discovery shall be conducted in accordance with rules 4901-1-16 to 4901-1-24 of the Administrative Code.

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4901:2-7-19 **Evidentiary hearing.**

Unless otherwise ordered by the commission or agreed by the parties, an evidentiary hearing shall be scheduled within sixty days after the prehearing conference. The evidentiary hearing may consist of written stipulations, oral testimony, or such other evidence which is admitted. A final commission order shall be issued within ninety days of the conclusion of the evidentiary hearing unless otherwise ordered by the commission or agreed by the parties.

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4901:2-7-20 Evidence and burden of proof.

- (A) During the evidentiary hearing, the staff must prove the occurrence of a violation by a preponderance of the evidence. Reports of violation ~~A summary identifying violations~~ upon which staff relies to establish a respondent's history of violations shall constitute prima facie evidence of the occurrence of those violations.
- (B) Any final order rendered as the result of an evidentiary hearing ~~or in accordance with paragraph (E) of rule 4901:2-7-11 of the Administrative Code, which finds the occurrence of a violation,~~ or any final order concerning a violation rendered in accordance with paragraph ~~(E)~~ of rule 4901:2-7-14 of the Administrative Code shall conclusively establish the occurrence of that violation in any future commission hearing involving the same respondent.
- (C) *If a notice of apparent violation has been served by staff concerning a violation, and no request for conference has been served by respondent within the time provided in this chapter, or, if a notice of preliminary determination has been served by the staff and no request for administrative hearing has been filed by respondent within the time provided in this chapter, and the violation has not otherwise been disposed of, the occurrence of the violation shall be conclusively established in any future commission hearing involving the same respondent.*

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4901:2-7-21 Remedy ordered.

If justified by the evidence in any hearing, the commission may order payment of a forfeiture greater than, less than, or equal to the forfeiture requested in the notices. The commission is not restricted in the making of any compliance order by the order proposed in the notices, if another order is justified by the evidence.

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4901:2-7-22 **Payment of forfeitures.**

- (A) Any ~~forfeiture~~ forfeitures shall be paid by company check, certified check, or money order made payable to "Treasurer, State of Ohio," and shall be mailed or delivered to:

"Fiscal Division

Public Utilities Commission of Ohio

180 East Broad Street, ~~Thirteenth Floor~~

Columbus, Ohio 43215-3793"

Any instrument of payment shall contain the identifying case number of the violation for which payment is tendered. Payment is complete upon receipt by staff.

- (B) If the only remedy requested with respect to a violation is the payment of a forfeiture, and full payment of the forfeiture demanded in the notice is made prior to the execution of a settlement agreement or any final commission order ~~following service of a complaint~~, full payment shall terminate all further proceedings under this chapter regarding that violation. Full payment under these circumstances constitutes an admission of the occurrence of the violation for purposes of consideration of a respondent's history of violations in determining the appropriate remedy for any future violation.