

EX PARTE COMMUNICATIONS

§ 2.2-4024.2. Ex Parte Communications (Option 2)

A. Except as otherwise provided in this section, while a ~~contested case~~ formal case conducted in accordance with § 2.2-4020 is pending, the hearing officer may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication.

B. A hearing officer may communicate about a pending ~~formal case conducted in accordance with § 2.2-4020~~ ~~contested case~~ with any person if the communication is required for the disposition of *ex parte* matters authorized by statute or concerns an uncontested procedural issue.

~~C. A hearing officer may communicate about a pending contested case with an individual authorized by law to provide legal advice to the hearing officer or presiding officer and may communicate on ministerial matters with an individual who serves on the administrative staff of the hearing officer if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.~~

A hearing officer may communicate on ministerial matters about a pending ~~formal case conducted in accordance with § 2.2-4020~~ ~~contested case~~ with any person, ~~who has not served as investigator, prosecutor, or advocate at any stage of the case, and~~ if the communication does not augment, diminish, or modify the evidence in the record.

D. If a hearing officer makes or receives a communication in violation of this section, the hearing officer:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the hearing officer or presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the hearing officer or presiding officer or final decision maker to the communication, and the identity of the person that communicated, ~~and that memorandum shall be made a part of the hearing record.~~

E. If a communication prohibited by this section is made, the hearing officer shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the hearing officer may permit additional testimony in response to the prohibited communication.

F. If necessary to eliminate the effect of a communication received in violation of this section, a hearing officer may be disqualified under § 2.2-4024.1, the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case.

Suggested Virginia Code § 2.2-4020.01 Reconsideration

(a) A party having standing under the Rules of the Supreme Court of Virginia to seek judicial review of a case decision made by an agency pursuant to § 2.2-4020 may file a request with the agency for reconsideration of that case decision. Such request shall state in writing the supporting basis which shall be consistent with this section.

(b) A request for reconsideration may be granted only upon a showing either (i) that there has been a change in controlling law or (ii) that material facts previously unavailable to the requesting party have been discovered.

Alternative: A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The petition shall contain a full and clear statement of the facts pertaining to the reasons for reconsideration, the grounds in support thereof, and a statement of the relief desired. The board may grant such at any time on its own initiative for good cause shown.

(c) A request for reconsideration must be filed within the time for filing a notice of appeal under Rule 2A:2 of the Rules of the Supreme Court of Virginia. A timely request for reconsideration shall toll the time for filing such notice of appeal from the time the request is received by the agency until the agency issues a decision disposing of such request.

(d) The agency within thirty (30) days from receipt of a request for reconsideration shall issue a written decision either (i) denying the request, (ii) modifying the case decision, or (iii) vacating the case decision and setting a new hearing for further proceedings. The agency shall state the reasons for its action.

(e) Denial of a request for reconsideration shall not constitute a separate case decision and shall not on its own merits be subject to judicial review. It may, however, be considered by a reviewing court as part of any judicial review of the case decision itself.

Model APA Definition of Standing

§ 505 STANDING.

The following persons have standing to obtain judicial review of a final agency action:

- (1) a person aggrieved or adversely affected by the agency action; and
- (2) a person that has standing under law of this state other than this [act].

Rules of VA Supreme Court Definition of Party

Rule 2A:1. Authorization; Definitions; Application.

(c) The term "party" means any person affected by and claiming the unlawfulness of a regulation, or a party aggrieved who asserts a case decision is unlawful or any other affected person or aggrieved person who appeared in person or by counsel at a hearing, as defined in § 2.2-4001, with respect to the regulation or case decision as well as the agency itself. Whenever a case decision disposes of an application for a license, permit or other benefit, the applicant, licensee or permittee shall be a necessary party to any proceeding under this part.

Virginia State Corporation Commission Rules of Practice and Procedure

5 VAC 5-20-220. Petition for rehearing or reconsideration.

Final judgments, orders, and decrees of the commission, except judgments prescribed by § [12.1-36](#) of the Code of Virginia, and except as provided in §§ [13.1-614](#) and [13.1-813](#) of the Code of Virginia, shall remain under the control of the commission and subject to modification or vacation for 21 days after the date of entry. Except for good cause shown, a petition for rehearing or reconsideration must be filed not later than 20 days after the date of entry of the judgment, order, or decree. The filing of a petition will not suspend the execution of the judgment, order, or decree, nor extend the time for taking an appeal, unless the commission, within the 21-day period following entry of the final judgment, order or decree, shall provide for a suspension in an order or decree granting the petition. A petition for rehearing or reconsideration must be served on all parties and delivered to commission staff counsel on or before the day on which it is filed. The commission will not entertain responses to, or requests for oral argument on, a petition. An order granting a rehearing or reconsideration will be served on all parties and commission staff counsel by the Clerk of the Commission.

PROCEDURAL RULES FOR THE CONDUCT OF HEARINGS BEFORE THE ABC BOARD AND ITS HEARING OFFICERS

3 VAC 5-10-340. Rehearings and reconsideration.

The board may, in its discretion for good cause shown, grant a rehearing or reconsideration on written petition of an interested party addressed to the Secretary to the Board and received within 30 days after the date of the final decision of the board. The petition shall contain a full and clear statement of the facts pertaining to the grievance, the grounds in support thereof, and a statement of the relief desired. The board may grant such at any time on its own initiative for good cause shown.

Model APA Suggestion

§ 416 RECONSIDERATION.

(a) A party, not later than [15] days after notice to the parties that a final order has been issued, may file a petition for reconsideration that states the specific grounds on which relief is requested. The place of filing and other procedures, if any, must be specified by agency rule and must be stated in the final order.

(b) If a petition for reconsideration is timely filed, and if the petitioner has complied with the agency's procedural rules for reconsideration, if any, the time for filing a petition for judicial review does not begin until the agency disposes of the petition for reconsideration as provided in Section 503(d).

(c) Not later than [20] days after a petition is filed under subsection (a), the decision maker shall issue a written order denying the petition, granting the petition and dissolving or modifying the final order, or granting the petition and setting the matter for further proceedings. If the decision maker fails to respond to the petition not later than [30] days after filing, or a longer period agreed to by the parties, the petition is deemed denied. The petition may be granted only if the decision maker states findings of facts, conclusions of law, and the reasons for granting the petition.

Model APA Intervention

409	<p>INTERVENTION.</p> <p>(a) A presiding officer shall grant a timely petition for intervention in a contested case, with notice to all parties, if:</p> <p>(1) the petitioner has a statutory right under law of this state other than this [act] to initiate or to intervene in the case; or</p> <p>(2) the petitioner has an interest that may be adversely affected by the outcome of the case and that interest is not adequately represented by existing parties.</p> <p>(b) A presiding officer may grant a timely petition for intervention in a contested case, with notice to all parties, if the petitioner has a permissive statutory right to intervene under law of this state other than this [act] or if the petitioner's claim or defense is based on the same transaction or occurrence as the case.</p> <p>(c) A presiding officer may impose conditions at any time on an intervener's participation in the contested case.</p> <p>(d) A presiding officer may permit intervention provisionally and, at any time later in the contested case or at the end of the case, may revoke the provisional intervention.</p> <p>(e) On request by the petitioners or a party or by action of the presiding officer, the presiding officer may hold a hearing on the intervention petition.</p> <p>(f) A presiding officer shall promptly give notice of an order granting, denying, or revoking intervention to the petitioner for intervention and to the parties. The notice must allow parties a reasonable time to prepare for the hearing on the merits.</p>
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Virginia Supreme Court Rules

Rule 3:14. Intervention.

A new party may by leave of court file a pleading to intervene as a plaintiff or defendant to assert any claim or defense germane to the subject matter of the proceeding.

All provisions of these Rules applicable to civil cases, except those provisions requiring payment of writ tax and clerk's fees, shall apply to such pleadings. The parties on whom such pleadings are served shall respond thereto as provided in these Rules.

Virginia State Corporation Commission Rules of Practice and Procedure

5 VAC 5-20-80. Regulatory Proceedings

B. Participation as a respondent. A notice of participation as a respondent is the proper initial response to an application. A notice of participation shall be filed within the time prescribed by the commission and shall contain (i) a precise statement of the interest of the respondent; (ii) a statement of the specific action sought to the extent then known; and (iii) the factual and legal basis for the action. Any person or entity filing a notice of participation as a respondent shall be a party to that proceeding.