



VIEW*S* & VISIONS

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James Kelsh is an attorney in the Charleston, West Virginia office of Bowles Rice. He joined the firm in January 2012, bringing a wealth of experience in legal matters dealing with public utilities, public finance, local governments, motor carriers and government relations.

Prior to his work in private practice, Mr. Kelsh served as a staff attorney with the West Virginia Public Service Commission, from 1996 to 2000. He obtained the first capacity improvement fee for a public service district in West Virginia and successfully obtained 19 certificates of convenience and necessity for utilities throughout the state.

Mr. Kelsh is certified by the West Virginia Infrastructure and Jobs Council. He is a member of several organizations, including the National Association of Clean Water Agencies, the American Water Works Association, the Small Public Utilities Association and the Municipal Attorneys Association.

He is a 1994 graduate of the University of Virginia School of Law and received his undergraduate degree from St. Joseph's University in Philadelphia, Pennsylvania.

As a West Virginia motor carrier attorney, I hate to report that commercial motor transportation in the Mountain State is not nearly as easy as John Denver's famous song suggests.

The type of regulation which applies to commercial motor transportation over West Virginia's roads and highways varies, depending upon who is doing the transporting, what is being transported and where it is being transported. This article will provide a brief overview of the general regulatory features applicable to private carriers, coal transportation, hazardous material transportation, intrastate common and contract carriers, and interstate common and contract carriers.

The type of regulation which applies to commercial motor transportation over West Virginia roads and highways varies, depending upon who is doing the transporting, what is being transported and where it is being transported.

West Virginia has a distinct and extensive regulatory system over intrastate common and contract carriers. Like most West Virginia transportation attorneys, this is the regulatory arena which occupies far more of my time than the others.

Safety Regulation. All motor carriers are subject to safety enforcement by the Transportation Enforcement Division of the Public Service Commission of West Virginia (PSC) regarding size, weight and load limitations. The PSC issues wide load and similar special permits.

Private Carriers. Private carriers are those who are transporting goods for their own use, such as a drug store chain which has trucks transporting goods from its warehouses to its retail stores. Private carriers are only subject to safety regulations.

Coal Transportation. The PSC issues permits, for a fee, for the transportation of coal on select coal resource transportation roads in 15 counties. Properly permitted vehicles can carry up to 120,000 pounds, depending on the truck configuration. The PSC enforces its permitting program with administrative fines and suspension of driver's licenses. Shippers and receivers of coal are required to report usage data, including tonnages, to the PSC.

Hazardous Materials. The PSC registers, permits and collects assessments from HazMat carriers, in addition to its safety jurisdiction consistent with federal HazMat transportation rules.

Intrastate Transportation. West Virginia is one of only two states, the other being my home state of Washington, that maintain a presumptive regulated monopoly system of regulation for intrastate common carriers.





Most people have some familiarity with the medallion system of regulating cabs in New York City, where the city issues only so many medallions, but it does so to many competing cab companies. In contrast, in West Virginia the first common carrier in West Virginia authorized to provide service on identified roads will be the ONLY intrastate common carrier allowed to provide service on those identified roads, unless that carrier effectively consents to allowing another common or contract carrier to provide that service. This system applies to intrastate taxi cabs, limousines, moving companies and waste haulers. It does not apply to transportation for senior citizens, governmental carriers, transportation of coal, agricultural products, petroleum and recycled goods. Based upon several federal court decisions, interstate carriers are exempt from the PSC's certification regulation.

Prior to transporting goods or people within the state, a prospective common carrier must apply for a certificate of convenience and necessity from the PSC. Public notice of such an application is required within the proposed service area, and such notices typically draw the attention of any existing certificated

intrastate common carrier. If an existing intrastate common carrier protests the application, the application will be denied. Even if the applicant demonstrates that the existing service is inadequate, the existing carrier is given one or more opportunities to correct deficient service before a prospective competitor is permitted to provide the service.

If a certificate application is granted, the PSC will define the scope of authority and set rates. Intrastate common carriers are required to charge their exact tariff rates, neither higher nor lower. This is often a source of complaint by intrastate carriers which are, de facto, often in competition with interstate carriers that are not subject to rate regulation. The PSC hears complaints regarding any alleged illegal service within a certificated intrastate common carrier's territory by another intrastate carrier.

Interstate Transportation. Several recent federal court decisions have clarified that interstate carriers are not subject to the PSC's certification requirements. A carrier whose trucks are garaged in another state, who comes into this state to pick up a product, and who disposes or transports it

out of state is clearly an interstate carrier. A carrier whose trucks are garaged in West Virginia and who moves products from one place in West Virginia to another is clearly an intrastate carrier. It is unclear at the moment where, exactly, the bright line is between interstate and intrastate transportation for more muddled situations, such as where a carrier whose vehicles are garaged out of state transports goods from one point in West Virginia to another, but then returns to his out-of-state base. A federal court imposed a monetary penalty on the PSC for overexpansively interpreting its jurisdiction over interstate carriers in violation of the interstate commerce clause. Consequently, the PSC is disinclined to test where exactly the edge of its jurisdiction ends. ▽