

oral argument will proceed in accordance with the provisions of §10.103 (b) and (d) of this chapter.

§9.33 Final decision by the Commission.

(a) *Opinion and order.* Upon review, the Commission may affirm, modify, set aside, or remand for further proceedings, in whole or in part, the decision of the exchange. The Commission's decision will be contained in its opinion and order which will be based upon the record before it, including the record of the exchange proceeding, and any oral argument made in accordance with §9.32. Except as provided in paragraph (b) of this section, the opinion and order will constitute the final decision of the Commission, effective upon service on the parties. In the event the Commission is equally divided as to its decision, the Commission will affirm without opinion the decision of the exchange, which will constitute the Commission's final decision.

(b) *Order of summary affirmance.* If the Commission finds that the result reached in the decision of the exchange is substantially correct and that none of the arguments on appeal made by the appellant raise important questions of law or policy, the Commission may, by appropriate order, summarily affirm the decision of the exchange without opinion, which will constitute the Commission's final decision. Unless the Commission expressly indicates otherwise in its order, an order of summary affirmance does not reflect a Commission determination to adopt the exchange final decision, including any rationale contained therein, as its opinion and order, and neither the exchange's final decision nor the Commission's order of summary affirmance will serve as a Commission precedent in other proceedings.

(c) *Standards of review.* In reviewing an exchange disciplinary, access denial or other adverse action, the Commission will consider whether:

(1) The exchange disciplinary, access denial or other adverse action was taken in accordance with the rules of the exchange;

(2) Fundamental fairness was observed in the conduct of the proceeding

resulting in the disciplinary, access denial or other adverse action;

(3)(i) In the case of a disciplinary action, the record contains substantial evidence of a violation of the rules of the exchange, or (ii) in the case of an access denial or other adverse action, the record contains substantial evidence supporting the exchange action; and

(4) The disciplinary, access denial or other adverse action otherwise accords with the Act and the rules, regulations and orders of the Commission thereunder.

PART 10—RULES OF PRACTICE

Subpart A—General Provisions

- Sec.
- 10.1 Scope and applicability of rules of practice.
 - 10.2 Definitions.
 - 10.3 Suspension, amendment, revocation and waiver of rules.
 - 10.4 Business address; hours.
 - 10.5 Computation of time.
 - 10.6 Changes in time permitted for filing.
 - 10.7 Date of entry of orders.
 - 10.8 Presiding officers.
 - 10.9 Separation of functions.
 - 10.10 Ex parte communications.
 - 10.11 Appearance in adjudicatory proceedings.
 - 10.12 Service and filing of documents; form and execution.

Subpart B—Institution of Adjudicatory Proceedings; Pleadings; Motions

- 10.21 Commencement of the proceeding.
- 10.22 Complaint and notice of hearing.
- 10.23 Answer.
- 10.24 Amendments and supplemental pleadings.
- 10.25 Form of pleadings.
- 10.26 Motions and other papers.

Subpart C—Parties and Limited Participation

- 10.31 Parties.
- 10.32 Substitution of parties.
- 10.33 Intervention as a party.
- 10.34 Limited participation.
- 10.35 Permission to state views.
- 10.36 Commission review of rulings.

Subpart D—Prehearing Procedures; Prehearing Conferences; Discovery Depositions

- 10.41 Prehearing conferences; procedural matters.

§ 10.1

17 CFR Ch. I (4–1–98 Edition)

- 10.42 Discovery.
- 10.43 Stipulations.
- 10.44 Depositions and interrogatories.

Subpart E—Hearings

- 10.61 Time and place of hearing.
- 10.62 Appearances.
- 10.63 Consolidation; separate hearings.
- 10.64 Public hearings.
- 10.65 Record of hearing.
- 10.66 Conduct of the hearing.
- 10.67 Evidence.
- 10.68 Subpoenas.
- 10.69 Reopening hearings.

Subpart F—Post Hearing Procedures; Initial Decisions

- 10.81 Filing the transcript of evidence.
- 10.82 Proposed findings and conclusions; briefs.
- 10.83 Oral arguments.
- 10.84 Initial decision.

Subpart G—Disposition Without Full Hearing

- 10.91 Summary disposition.
- 10.92 Shortened procedure.
- 10.93 Obtaining default order.
- 10.94 Setting aside of default.

Subpart H—Appeals to the Commission; Settlements

- 10.101 Interlocutory appeals.
- 10.102 Review of initial decisions.
- 10.103 Oral argument before the Commission.
- 10.104 Scope of review; Commission decision.
- 10.105 Review by Commission on its own initiative.
- 10.106 Reconsideration.
- 10.107 Leave to adduce additional evidence.
- 10.108 Settlements.
- 10.109 Delegation of authority to Chief of the Opinions Section.

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Subpart A—General Provisions

§ 10.1 Scope and applicability of rules of practice.

These rules of practice are generally applicable to adjudicatory proceedings before the Commodity Futures Trading Commission under the Commodity Exchange Act. These include proceedings for:

(a) Denial, suspension, revocation, conditioning, restricting or modifying of registration as a futures commission merchant, introducing broker, or associated person, floor broker, floor trader, commodity pool operator, commodity trading advisor or leverage transaction merchant pursuant to sections 6(c), 8a(2), 8a(3), 8a(4) and 8a(11) of the Act, 7 U.S.C. 9 and 15, 12a(2), 12a(3), 12a(4) and 12(a)(11), or denial, suspension, or revocation of designation as a contract market pursuant to sections 6(a) and 6(b) of the Act, 7 U.S.C. 8;

(b) The issuance of cease and desist orders pursuant to sections 6b and 6(d) of the Act, 7 U.S.C. 13a and 13b;

(c) Denial of trading privileges pursuant to section 6(c) of the Act, 7 U.S.C. 9 and 15;

(d) The assessment of civil penalties pursuant to sections 6(c) and 6b of the Act, 7 U.S.C. 9 and 15 and 13a; and

(e) Any other proceedings where the Commission declares them to be applicable.

These rules do not apply to:

(f) Investigations conducted pursuant to sections 8 and 16(a) of the Act, 7 U.S.C. 12 and 20(a), except as specifically made applicable by the Rules Relating to Investigations set forth in part 11 of this chapter;

(g) Reparation proceedings under section 14 of the Act, 7 U.S.C. 18, except as specifically made applicable by the Rules Relating to Reparation Proceedings set forth in part 12 of this chapter;

(h) Public rulemaking, except as specifically made applicable by the Rules Relating to Public Rulemaking Procedures sets forth in part 13 of this title.

The rules shall be construed to secure the just, speedy and inexpensive determination of every proceeding with full protection for the rights of all parties therein.

[41 FR 2511, Jan. 16, 1976, as amended at 49 FR 8225, Mar. 5, 1984; 57 FR 19597, Apr. 15, 1993; 59 FR 5701, Feb. 8, 1994]

§ 10.2 Definitions.

For purposes of this part:

(a) *Act* means the Commodity Exchange Act, as amended, 7 U.S.C. 1, *et seq.*;

(b) *Adjudicatory proceeding* means a judicial-type proceeding leading to the formulation of a final order;

(c) *Administrative Law Judge* means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105 (provisions of the rules in this part which refer to Administrative Law Judges may be applicable to other Presiding Officers as well, as set forth in § 10.8);

(d) *Administrative Procedure Act* means those provisions of the Administrative Procedure Act, as codified, which are contained in 5 U.S.C. 551 through 559;

(e) *Commission* means the Commodity Futures Trading Commission;

(f) *Complaint* means any document initiating an adjudicatory proceeding, whether designated a complaint or an order for proceeding or otherwise;

(g) *Division of Enforcement* means that office in the Commission that prosecutes a complaint issued by the Commission;

(h) *Hearing* means that part of a proceeding which involves the submission of evidence, either by oral presentation or written submission;

(i) *Proceedings Clerk* means that member of the Commission's staff designated as such in the Commission's Office of Proceedings.

(j) *Order* means the whole or any part of a final procedural or substantive disposition of a matter by the Commission or by the Presiding Officer in a matter other than rulemaking;

(k) *Party* includes a person or agency named or admitted as a party to a proceeding;

(l) *Person* includes an individual, partnership, corporation, association, exchange or other entity or organization;

(m) *Pleading* means the complaint, the answer to the complaint, any supplement or amendment thereto, and any reply that may be permitted to any answer, supplement or amendment;

(n) *Presiding Officer* means a member of the Commission, and Administrative Law Judge, or a hearing officer designated by the Commission to conduct a hearing on a specific matter, or the Commission itself, if it is to preside at or accept the introduction of evidence in a particular proceeding (provisions of the rules in this part which refer to Administrative Law Judges may be ap-

plicable to other Presiding Officers as well, as set forth in § 10.8);

(o) *Respondent* means a party to an adjudicatory proceeding against whom findings may be made or relief or remedial action may be taken.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54801, Oct. 26, 1995]

§ 10.3 Suspension, amendment, revocation and waiver of rules.

(a) These rules may, from time to time, be suspended, amended or revoked in whole or in part. Notice of such action will be published in the FEDERAL REGISTER.

(b) In the interest of expediting decision or to prevent undue hardship on any party or for other good cause the Commission may order the adoption of expedited procedures and may waive any rule in subparts A through H of this part in a particular case and may order proceedings in accordance with its direction upon a determination that no party will be prejudiced and that the ends of justice will be served. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(c) The Presiding Officer, to expedite decision or to prevent undue hardship on any party, may waive any rule in subparts A through G of this part when neither party is prejudiced thereby. Reasonable notice shall be given to all parties of any action taken pursuant to this provision.

(d) Notwithstanding any provision of this part, the Commission may in any proceeding commenced pursuant to section 6(c) of the Act require a respondent to show cause why an order should not be entered against the respondent and may specify a day and place for the hearing not less than three days after service upon the respondent of the Commission's complaint and notice of hearing in such proceeding.

(Secs. 2(a), 6(b) and 8a, 42 Stat. 1001, as amended, 49 Stat. 1498, 1499, as amended 88 Stat.; 49 Stat. 1500, as amended, 88 Stat. 1392; 88 Stat. 1389, 1391; 7 U.S.C. 4a, 9 and 12a)

[41 FR 2511, Jan. 16, 1976, as amended at 44 FR 61327, Oct. 25, 1979; 59 FR 5701, Feb. 8, 1994]

§ 10.4 Business address; hours.

The Office of Proceedings is located at Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581. It is open each day, except Saturdays, Sundays and legal public holidays from 8:15 a.m. to 4:45 p.m., eastern standard time or eastern daylight savings time, whichever is currently in effect in Washington, DC. If Commission personnel are present in the offices after 4:45 p.m., they may, at their discretion, accept documents for filing and serve the public in other matters within the scope of this part. Legal holidays include New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other legal holidays recognized by the Federal Government.

[41 FR 2511, Jan. 16, 1976, as amended at 41 FR 28260, July 9, 1976; 60 FR 54801, Oct. 26, 1995]

§ 10.5 Computation of time.

In computing any period of time prescribed by these rules or allowed by the Commission or the Presiding Officer, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included unless it is a Saturday, a Sunday, or a legal holiday; in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Intermediate Saturdays, Sundays, and legal holidays shall be excluded from the computation only when the period of time prescribed or allowed is less than seven days.

§ 10.6 Changes in time permitted for filing.

Except as otherwise provided by law or by these rules, for good cause shown the Commission or the Presiding Officer before whom a matter is then pending, on their own motion or the motion of a party, at any time may extend or shorten the time limit prescribed by the rules for filing any document. In any instance in which a time limit is not prescribed for an action to be taken in a proceeding, the Commission

or the Presiding Officer may set a time limit for that action.

§ 10.7 Date of entry of orders.

In computing any period of time involving the date of the entry of an order the date of entry shall be the date the order is served by the Proceedings Clerk.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54801, Oct. 26, 1995]

§ 10.8 Presiding officers.

Unless otherwise determined by the Commission, all proceedings within the scope of this part shall be assigned to an Administrative Law Judge for hearing. If the Commission determines that a proceeding within the scope of this subpart shall be conducted before a Presiding Officer who is not an Administrative Law Judge, all provisions of this part that refer to and grant authority to or impose obligations upon an Administrative Law Judge shall be read as referring to and granting authority to and imposing obligations upon the designated Presiding Officer.

(a) *Functions and responsibilities of Administrative Law Judge.* The Administrative Law Judge shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority to:

- (1) Administer oaths and affirmations;
- (2) Issue subpoenas;
- (3) Rule on offers of proof;
- (4) Receive relevant evidence;
- (5) Examine witnesses;
- (6) Regulate the course of the hearing;
- (7) Hold prehearing conferences;
- (8) Consider and rule upon all motions;
- (9) Make decisions in accordance with § 10.84 of these rules;
- (10) Certify interlocutory matters to the Commission for its determination in accordance with § 10.101 of these rules;
- (11) Take such action as is just or appropriate, if a party or agent of a party fails to comply with an order issued by the Administrative Law Judge;
- (12) Take any other action required to give effect to these Rules of Practice, including but not limited to requesting the parties to file briefs and

statements of position with respect to any issue in the proceeding.

(b) *Disqualification of Administrative Law Judge*—(1) *At his own request.* An Administrative Law Judge may withdraw from any proceeding when he considers himself to be disqualified. In such event he immediately shall notify the Commission and each of the parties of his withdrawal and of his reason for such action.

(2) *Upon the request of a party.* Any party or person who has been granted leave to be heard pursuant to these rules may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict or similar bases. Interlocutory review of an adverse ruling by the Administrative Law Judge may be sought without certification of the matter by the Administrative Law Judge, in accordance with the procedures set forth in § 10.101.

§ 10.9 Separation of functions.

(a) An Administrative Law Judge will not be responsible to or subject to the supervision or direction of any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecutorial functions for the Commission.

(b) No officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel in the proceedings, without the express written consent of the respondents in the proceeding. This provision shall not apply to the Commission or a member or members of the Commission.

§ 10.10 Ex parte communications.

(a) *Definitions.* For purposes of this section:

(1) *Commission decisional employee* means employees of the Commission who are or may reasonably be expected to be involved in the decisionmaking process in any proceeding, including, but not limited to:

(i) Members of the personal staffs of the Commissioners;

(ii) Members of the staffs of the Administrative Law Judges;

(iii) The Deputy General Counsel for Opinions and Review and staff of the Office of General Counsel.

(iv) Members of the staff of the Office of Proceedings; and

(v) Other Commission employees who may be assigned to hear or to participate in the decision of a particular matter;

(2) *Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part;

(3) *Interested person* includes parties and other persons who might be adversely affected or aggrieved by the outcome of a proceeding; their officers, agents, employees, associates, affiliates, attorneys, accountants or other representatives; and any other person having a direct or indirect pecuniary or other interest in the outcome of a proceeding;

(4) *Party* includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to a proceeding, and a person or agency permitted limited participation or to state views in a proceeding by the Commission.

(b) *Prohibitions against ex parte communications.* (1) No interested person outside the Commission shall make or knowingly cause to be made to any Commissioner, Administrative Law Judge or Commission decisional employee an ex parte communication relevant to the merits of a proceeding.

(2) No Commissioner, Administrative Law Judge or Commission decisional employee shall make or knowingly cause to be made to any interested person outside the Commission an ex parte communication relevant to the merits of a proceeding.

(c) *Procedures for handling ex parte communications.* A Commissioner, Administrative Law Judge or Commission decisional employee who receives, or who makes or knowingly causes to be made, an ex parte communication prohibited by paragraph (b) of this section shall:

§ 10.11

17 CFR Ch. I (4–1–98 Edition)

(1) Place on the public record of the proceeding:

- (i) All such written communications;
- (ii) Memoranda stating the substance of all such oral communications; and
- (iii) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c) (1)(i) and (1)(ii) of this section; and

(2) Promptly give written notice of such communication and responses thereto to all parties to the proceedings to which the communication or responses relate.

(d) *Sanctions.* (1) Upon receipt of an ex parte communication knowingly made or knowingly caused to be made by a party in violation of the prohibition contained in paragraph (b)(1) of this section, the Commission, Administrative Law Judge or other Commission employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the Act, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(2) Any attorney or accountant who knowingly makes or knowingly causes to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in unprofessional conduct of the type proscribed by 17 CFR 14.8(c).

(3) Any Commissioner, Administrative Law Judge or Commission decisional employee who knowingly makes or knowingly cause to be made, or who knowingly solicits or knowingly causes the solicitation of, an ex parte communication which violates the prohibitions contained in paragraph (b) of this section may, on that basis alone, be deemed to have engaged in conduct of the type proscribed by 17 CFR 140.735-3(b)(3).

(e) *Applicability of prohibitions and sanctions against ex parte communications.* (1) The prohibitions of this section against ex parte communications shall apply:

(i) To any person who has actual knowledge that a proceeding has been or will be commenced by order of the Commission; and

(ii) To all persons after public notice has been given that a proceeding has been or will be commenced by order of the Commission.

(2) The prohibitions of this section shall remain in effect until a final order has been entered in the proceeding which is no longer subject to review or reconsideration by the Commission or to review by any court.

(3) Nothing in this section shall constitute authority to withhold information from Congress.

(Sec. 4, Pub. L. 94-409, 90 Stat. 1246, 1247 (5 U.S.C. 551(14), 556(d) and 557(d)); sec. 101(a)(11), Pub. L. 93-463, 88 Stat. 1391 (7 U.S.C. 4a(j) (Supp. V, 1975))

[42 FR 13700, Mar. 11, 1977, as amended at 60 FR 54801, Oct. 26, 1995]

§ 10.11 Appearance in adjudicatory proceedings.

(a) *Appearance—(1) By non-attorneys.* An individual may appear pro se (in his own behalf), a member of a partnership may represent the partnership, a bona fide officer of a corporation, trust or association may represent the corporation, trust or association, an officer or employee of a State Commission or of a department or political subdivision of a State may represent the State Commission or the department or political subdivision of the State in any proceeding.

(2) *By attorneys.* An attorney-at-law who is admitted to practice before the highest Court in any State or territory, or of the District of Columbia, who has not been suspended or disbarred from appearance and practice before the Commission in accordance with the provisions of part 14 of this title, may represent parties in proceedings before the Commission.

(b) *Debarment of counsel or representative by administrative law judge during the course of a proceeding.* (1) Whenever, while a proceeding is pending before him, the Administrative Law Judge finds that a person acting as counsel or representative for any party to the proceeding is guilty of contemptuous conduct, the Administrative Law Judge

may order that such person be precluded from further acting as counsel or representative in such proceeding. An immediate appeal to the Commission may be sought from any such order, pursuant to the terms of § 10.101, but the proceeding shall not be delayed or suspended pending disposition of the appeal: *Provided*, That the Administrative Law Judge may suspend the proceedings for a reasonable time for the purpose of enabling the party to obtain other counsel or representative.

(2) Whenever the Administrative Law Judge has issued an order precluding a person from further acting as counsel for representative in the proceeding, the Administrative Law Judge within a reasonable time thereafter, shall submit to the Commission a report of the facts and circumstances surrounding the issuance of the order and shall recommend what action the Commission should take respecting the appearance of such person as counsel or representative in other proceedings before the Commission.

§ 10.12 Service and filing of documents; form and execution.

(a) *Service by a party or other participant in a proceeding*—(1) *Number of copies; when required.* Two copies of all pleadings subsequent to the complaint, all motions, petitions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be served by the party or other participant upon all parties to the proceeding.

(2) *How service is made.* Service shall be made either by personal service or by first-class mail. Service shall be complete at the time of personal service or upon deposit in the mails of a properly addressed and post-paid document. Where a party effects service by mail, the time within which the person served may respond thereto shall be increased by three days.

(3) *Proof of Service.* Proof of service of a document shall be made by filing with the Proceedings Clerk, simultaneously with the filing of the required number of copies of the document, an affidavit of service executed by any person 18 years of age or older or a cer-

tificate of service executed by an attorney-at-law qualified to practice before the Commission. The proof of service shall identify the persons served, state that service has been made, set forth the date of service, and recite the manner of service.

(b) *Service of decisions and orders.* A copy of all rulings, opinions and orders of the Administrative Law Judge and the Commissions shall be served by the Proceedings Clerk on each of the parties.

(c) *Designation of person to receive service.* The first document filed in a proceeding by or on behalf of any party or participant (including the complaint and notice of hearing, the answer, and an application for intervention) shall state on the first page thereof the name and post office address of the person who is authorized to receive service for him of all documents filed in the proceeding. Thereafter service of documents shall be made upon the person authorized unless service on the party himself is ordered by the Administrative Law Judge or the Commission, or unless no person authorized to receive service can be found, or unless the person authorized is changed by the party upon due notice to all other parties.

(d) *Filing of documents with the Proceedings Clerk.* (1) All documents which are required to be served upon a party shall be filed concurrently with the Proceedings Clerk. A document shall be filed by delivering it in person or by certified or registered mail with return receipt requested to:

Proceedings Clerk, Office of Proceedings, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

(2) To be timely filed, a document must be received by the Proceedings Clerk within the time prescribed for filing.

(e) *Formalities of filing*—(1) *Number of copies.* Unless otherwise specifically provided, an original and five conformed copies of all documents shall be filed with the Proceedings Clerk.

(2) *Title page.* All documents filed with the Proceedings Clerk must include at the head thereof, or on a title page, the name of the Commission, the docket number and title of the proceeding, the subject of the particular document and the name of the person

in whose behalf the document is being filed. In the complaint the title of the action shall include the names of all the respondents, but in documents subsequently filed it is sufficient to state the name of the first respondent named in the complaint with an appropriate indication of other parties.

(3) *Paper, spacing, type.* All documents filed under this part shall be typewritten, mimeographed, printed, or otherwise reproduced by a process that produces permanent and plainly legible copies, shall be on one grade of good unglazed white paper no less than 8 or more than 8½ inches wide and no less than 10½ or more than 14 inches long, with a left-hand margin 1½ inches wide, and shall be bound on the top only. They shall be double spaced, except for long quotations (3 or more lines) and footnotes, which should be single-spaced. If printed, the documents shall be in either 10- or 12-point type with double-leaded text and single-leaded quotations and footnotes.

(4) *Signatures.* The original copy of all papers must be signed in ink by the person filing the same or by his duly authorized agent or attorney.

(5) *Length and form of briefs.* All briefs filed with the Proceedings Clerk containing more than ten pages shall include an index and a table of cases and other authorities cited. The date of each brief must appear on its front cover or title page and on its signature page. No brief shall exceed 60 pages in length, except with the permission of the Administrative Law Judge or, by the Commission, to whomever the brief is directed.

(6) *Documents improperly tendered for filing.* No document will be accepted unless it complies with the requirements of this paragraph concerning form, filing, subscription, service and other similar matters. A document tendered but not accepted for filing shall not be entered on the Proceedings Clerk's docket, but a motion may be made to the Administrative Law Judge for leave to file an otherwise unauthorized document.

(f) *Subscriptions—(1) By whom.* Pleadings, petitions, motions and answers thereto, briefs and other documents filed with the Commission shall be subscribed:

(i) By the person or persons on whose behalf they are tendered for filing;

(ii) By a partner, officer or director of a partnership, corporation, association, or other legal entity; or

(iii) By an attorney-at-law having authority with respect thereto.

The Proceedings Clerk may require appropriate evidence of the authority of a person subscribing a document on behalf of another person.

(2) *Effect.* The signature on a document of any person acting either for himself or as attorney or agent for another constitutes a certification by him that:

(i) He has read the document subscribed and knows the contents thereof;

(ii) If executed in any representative capacity, it was done with full power and authority to do so;

(iii) To the best of his knowledge, information and belief, every statement contained in the document is true and not misleading; and

(iv) The document is not being interposed for delay.

(3) *Sham documents.* If a document is not signed or is signed with an intent to defeat the purpose of this rule, it may be stricken as sham and false. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action pursuant to § 10.11(b). Similar action may be taken if scandalous matter is inserted.

(g) *Official docket.* The Proceedings Clerk will maintain the official docket for each proceeding. The official docket is available for public inspection in the Commission's Office of Proceedings.

[41 FR 2511, Jan. 16, 1976, as amended at 41 FR 28260, July 9, 1976; 60 FR 54802, Oct. 26, 1995]

Subpart B—Institution of Adjudicatory Proceedings; Pleadings; Motions

§ 10.21 Commencement of the proceeding.

An adjudicatory proceeding is commenced when the Commission authorizes service of a complaint and notice of hearing upon one or more respondents.

§ 10.22 Complaint and notice of hearing.

(a) *Content.* The complaint and notice of hearing shall include:

(1) The legal authority and jurisdiction under which the hearing is held;

(2) The matters of fact and law to be considered and determined.

The complaint shall set forth the matters of fact alleged therein in such manner as will permit a specific response to each allegation. The notice shall notify the respondent of his right to a hearing and shall specify the time required by § 10.23 of these rules for the filing of an answer and the consequence of failure to file an answer.

(b) *Service.* The Proceedings Clerk shall give appropriate notice to each respondent by serving them with a copy of the complaint and notice of hearing. Service may be made in person, by confirmed telegraphic notice, or by registered mail or certified mail, addressed to the last known business or residence address of the person to be served or the address of his duly authorized agent for service.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.23 Answer.

(a) *When required.* Following service of a complaint and notice of hearing as set forth in § 10.22 of these rules, unless otherwise specified in the notice of hearing, each respondent shall file an answer with the Proceedings Clerk within 20 days.

(b) *Content of answer.* The answer shall include:

(1) A statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; a statement of a lack of information shall have the effect of a denial; any allegation not expressly denied shall be deemed to be admitted;

(2) A statement of the facts supporting each affirmative defense.

(c) *Effect of failure to file answer.* A party who fails to file an answer within 20 days shall be in default and, pursuant to procedures set forth in § 10.93 of these rules, the proceeding may be determined against him by the Administrative Law Judge upon his consider-

ation of the complaint, the allegations of which shall then be deemed to be true.

(d) *Admission of all allegations of fact.*

If a respondent's answer admits the truth of all the material allegations of fact contained in the complaint, it shall constitute a waiver of hearing on those allegations. However, the Administrative Law Judge may conduct a hearing, if so requested, by any of the parties. Following waiver, the parties may submit proposed findings and conclusions and briefs, as provided in § 10.82 and may appeal any initial decision to the Commission as provided in § 10.102 of these rules.

(e) *Motion for more definite statement.*

Where a reasonable showing is made by a respondent that he cannot frame a responsive answer based on the allegations in the complaint, he may move for a more definite statement of the charges against him before filing an answer. A motion for a more definite statement shall be filed within ten days after service of the complaint and shall specify the defects complained of and the particular allegation as to which a more definite statement is sought.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.24 Amendments and supplemental pleadings.

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, he may amend it within 20 days after it is served. Otherwise a party may amend his pleading only by leave of the Administrative Law Judge which shall be freely given when justice so requires.

(b) *Supplemental pleadings.* Upon reasonable notice, and upon such terms as are just, the Administrative Law Judge may, upon the motion of a party, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to any of the issues involved.

(c) *Response to amendments and supplements.* Any party may file a response to any amendment or supplement to a pleading within ten days after date of service upon him of the amendment or supplement.

(d) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a proceeding initiated by the complaint are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

§ 10.25 Form of pleadings.

All averments of claim and defense shall be made in consecutively numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a single set of circumstances.

§ 10.26 Motions and other papers.

(a) *Presentation.* An application for a form of relief not otherwise specifically provided for in these rules shall be made by motion, filed with the Proceedings Clerk, which shall be in writing unless made on the record during a hearing. The motion shall state: (1) The relief sought; (2) the basis for relief; and (3) the authority relied upon. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. All motions and applications, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge prior to the filing of an initial decision in a proceeding, and to the Commission after the initial decision has been filed.

(b) *Answers to motions.* Any party may serve and file a written response to a motion within ten days after service of the motion upon him or within such longer or shorter period as established by these rules or as the Administrative Law Judge or the Commission may direct. Any party who does not file a response to a motion shall be deemed to have consented to the relief sought by the motion.

(c) *Motions for procedural orders.* Motions for procedural orders, including motions for extension of time, may be acted on at any time, without awaiting a response thereto. Any party ad-

versely affected by such order may request reconsideration, vacation or modification of the order.

(d) *Dilatory motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

(e) *Review by the Commission.* Interloctory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought in accordance with the procedures and under the circumstances set forth in § 10.101 of these rules.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

Subpart C—Parties and Limited Participation

§ 10.31 Parties.

The parties to an adjudicatory proceeding shall include the Division of Enforcement, each respondent named in the complaint and each person permitted to intervene pursuant to § 10.33 of these rules. A respondent shall cease to be a party or purposes of a pending proceeding when (a) a default order is entered against him pursuant to § 10.93; or (b) the Commission accepts an offer of settlement pursuant to § 10.108 of these rules.

§ 10.32 Substitution of parties.

Upon motion and for good cause shown the Administrative Law Judge may order a substitution of parties.

§ 10.33 Intervention as a party.

(a) *Petition for Leave to Intervene.* Any person whose interests may be affected substantially by the matters to be considered in a proceeding may petition the Administrative Law Judge for leave to intervene as a party in the proceeding any time after the institution of a proceeding and before such proceeding has been submitted for final consideration. Petitions for leave to intervene shall be in writing and shall set forth with specificity the nature of the petitioner's interest in the proceeding and the manner in which his interests may be affected substantially. The Administrative Law Judge may direct a petitioner requesting intervention to submit himself for examination as to his interest in the proceeding.

(b) *Response to petition.* A petition for leave to intervene shall be served by the petitioner upon all parties to the proceeding, who may support or oppose the petition in a document filed within ten days after service of the petition upon them or within such other period as the Administrative Law Judge may direct in a particular case.

(c) *Leave to intervene—when granted.* No person shall be admitted as a party to a proceeding by intervention unless the Administrative Law Judge is satisfied that (1) a substantial interest of the person seeking to intervene may be adversely affected by the matter to be considered in the proceeding; (2) that his intervention will not materially prejudice the rights of any party, through delay or otherwise; (3) that his participation as a party will otherwise be consistent with the public interest; and (4) that leave to be heard pursuant to §10.34 would be inadequate for the protection of his interests. The burden shall be upon the petitioner to satisfy the Administrative Law Judge on these issues.

(d) *Rights of intervenor.* A person who has been granted leave to intervene shall from that time forward have all the rights and responsibilities of a party to the proceeding.

§ 10.34 Limited participation.

(a) *Petitions for leave to be heard.* Any person may, in the discretion of the Administrative Law Judge, be given leave to be heard in any proceeding as to any matter affecting his interests. Petitions for leave to be heard shall be in writing, shall set forth (1) the nature and extent of the applicant's interest in the proceeding; (2) the issues on which he wishes to participate; and (3) in what manner he wishes to participate. The Administrative Law Judge may direct any person requesting leave to be heard to submit himself to examination as to his interest in the proceeding.

(b) *Rights of a participant.* Leave to be heard pursuant to §10.34(a) may include such rights of a party as the Administrative Law Judge may deem appropriate, except that oral argument before the Commission may be permitted only by the Commission.

§ 10.35 Permission to state views.

Any person may, in the discretion of the Administrative Law Judge be permitted to file a memorandum or make an oral statement of his views, and the Administrative Law Judge may, in his discretion, accept for the record written communications received from any person.

§ 10.36 Commission review of rulings.

Interlocutory review by the Commission of a ruling as to matters within the scope of §10.33, §10.34 or §10.35 may be sought in accordance with the procedures set forth in §10.101 of these rules without certification by the Administrative Law Judge.

Subpart D—Prehearing Procedures; Prehearing Conferences; Discovery; Depositions

§ 10.41 Prehearing conferences; procedural matters.

In any proceeding the Administrative Law Judge may direct that one or more conferences be held for the purpose of:

- (a) Clarifying issues;
- (b) Examining the possibility of obtaining stipulations, admissions of fact and of authenticity or contents of documents;
- (c) Determining matters of which official notice may be taken;
- (d) Discussing amendments to pleadings;
- (e) Limiting the number of witnesses;
- (f) Discussing adoption of shortened procedures pursuant to §10.92;
- (g) Promoting a fair and expeditious hearing.

At or following the conclusion of a prehearing conference, the Administrative Law Judge shall serve a prehearing memorandum containing agreements reached and any procedural determinations made by him, unless the conference shall have been recorded and transcribed in written form and a copy of the transcript has been made available to each party.

§ 10.42 Discovery.

(a) *Pretrial materials.* An Administrative Law Judge may, at the request of

any party or upon his own motion, in his discretion and with due regard for the convenience and necessity of the parties or their attorneys, order a party to furnish where practicable, in the form of a prehearing memorandum or otherwise, any or all of the following:

- (1) An outline of its case or defense;
- (2) The legal theories upon which it will rely;
- (3) The identity of the witness who will testify on its behalf;
- (4) Copies of or a list of documents which it intends to introduce at the hearing. The Administrative Law Judge shall not order any of the foregoing procedures that any party can show is inappropriate under all the circumstances.

(b) *Investigatory materials.* Unless otherwise ordered by the Commission or the Administrative Law Judge, the Division of Enforcement shall make available to respondents prior to the scheduled hearing date copies of the following documents obtained during the investigation preceding the initiation of the complaint all transcripts of testimony, signed statements and substantially verbatim reports of interviews which were obtained during the investigation which preceded institution of the proceeding from or concerning witnesses to be called at the hearing and all exhibits to those transcripts, statements and reports. Provided that, if a person has requested confidential treatment of information submitted by him, either pursuant to rules adopted by the Commission under the Freedom of Information Act (part 145) or under the Commission's Rules Relating to Investigations (part 11), the Division of Enforcement shall notify him, if possible, that the information is to be disclosed to parties to the proceeding and he may apply to the Administrative Law Judge for an order protecting the information from disclosure; but no protective order shall be granted which will tend to prevent the introduction of material evidence of violation by the Division or tend to impair a respondent's ability adequately to defend.

(c) *Admissions—(1) Request for admissions.* Any party may serve upon any other party, with a copy to the Pro-

ceedings Clerk, a written request for admission of the truth of any facts relevant to the pending proceeding set forth in the request, including the genuineness of any documents described therein. Each matter of which an admission is requested shall be separately set forth. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying.

(2) *Response.* A matter shall be considered to be admitted unless, within 15 days after service of the request, or within such other time as the Administrative Law Judge may allow, the party upon whom the request is directed serves upon the requesting party a sworn written answer or objection to the matter. If objection is made, the reasons therefor shall be stated. The response shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission and when good faith requires that a party qualify his answer and deny only a part of the matter, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give a lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or reasonably available to him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may deny the matter or set forth reasons why he cannot admit or deny it.

(3) *Determining sufficiency of answers or objections.* The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the objecting party sustains his burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served. If the Administrative Law Judge determines that an answer does not comply with the requirements of this rule, he may order

either that the matter is admitted or that an amended answer be served.

(4) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used at a hearing as against the party who made the admission. However, the Administrative Law Judge may permit withdrawal or amendment when the presentation on the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy the Administrative Law Judge that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.43 Stipulations.

The parties may by stipulation in writing at any stage of the proceeding, or orally made at hearing, agree upon any pertinent facts in the proceeding. It is desirable that the facts be thus agreed upon so far as and whenever practicable. Stipulations may be received in evidence at a hearing and when received in evidence shall be binding on the parties thereto.

§ 10.44 Depositions and interrogatories.

(a) *When permitted.* If it appears that:

(1) A prospective witness will be unable to attend or testify at a hearing on the basis of age, illness, infirmity, imprisonment or on the basis that he is or will be outside of the United States at the time of the hearing (unless it appears that the absence of the witness was procured by the party seeking to take the deposition),

(2) His testimony is material,

(3) It is necessary to take his deposition in the interest of Justice, the Administrative Law Judge may by order direct that his deposition be taken either orally or in the form of written interrogatories, and may issue a subpoena to compel the attendance of the witness for deposition.

(b) *Application for deposition.* Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in § 10.44(a), the application shall include:

(1) The name and post office address of the witness;

(2) The specific matters concerning which the witness is expected to testify and their relevance;

(3) The reasons why the deposition should be taken, supported by affidavits and a physician's certificate, where appropriate;

(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;

(5) A specification of the documents and materials which the deponent is requested to produce;

(6) Application for any subpoenas.

(c) *Service and reply.* A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) *Time when, place where, and officer before whom deposition is taken—(1) Where the deposition is taken.* Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in the city or municipality where the deponent is located.

(2) *Officer before whom taken.* (i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by a stipulation in writing to be filed with the Proceedings Clerk.

(e) *Procedures for taking oral depositions.* (1) Oral examination and cross-examination of witnesses shall be conducted in a manner similar to that permitted at a formal hearing. All questions and testimony shall be recorded verbatim, except to the extent that all parties present or represented may agree that a matter shall be off the record.

(2) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the

evidence presented, or to the conduct of any party, or any other objection to the proceeding shall be noted by the officer upon the deposition, and shall subsequently be determined by the Administrative Law Judge. Evidence objected to shall be taken subject to the objections. However, the parties may stipulate that, except as to objections to the form of questions, all objections to the matters testified to in a deposition are preserved for the hearing, whether or not raised at the time of deposition.

(3) During the taking of a deposition a party or deponent may request and obtain an adjournment to permit an application to be made to the Administrative Law Judge for an order suspending the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of a deponent or party, or improper questions. An attorney who requests and obtains an adjournment for this purpose but fails, without good cause, promptly to apply for relief to the Administrative Law Judge may be found guilty of contemptuous conduct in accordance with §10.11(b) of these rules.

(f) *Procedures for use of interrogatories.*

(1) If depositions are to be taken and submitted on written interrogatories, the interrogatories shall be filed in triplicate with the application for deposition and served on the parties. Within ten days after service, any party may file, in triplicate, with the Proceedings Clerk, his objections, if any, to such interrogatories and may file such cross-interrogatories as he desires to submit. Other parties shall have ten days to file their objections to cross-interrogatories. Objections shall be settled by the Administrative Law Judge.

(2) When a deposition is taken upon written interrogatories and cross-interrogatories, no party shall be present or represented and no person other than the witness, a stenographic reporter, and the officer shall be present. The officer shall propound the interrogatories and cross-interrogatories to the witness, and the interrogatories and responses thereto shall be transcribed and reduced to writing.

(g) *Use of depositions at hearing.* (1) Any part or all of a deposition, to the

extent admissible under rules of evidence applied as though the witness were then present and testifying at the hearing, may be used against any party who had reasonable notice of the taking of the deposition, if the Administrative Law Judge finds that:

(i) The witness is dead;

(ii) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(iii) The witness is out of the United States at the time of the hearing, unless it appears that the absence of the witness was procured by the party offering the deposition.

(2) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(3) Objection may be made at a hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

Subpart E—Hearings

§ 10.61 Time and place of hearing.

(a) *Notice.* All parties shall be notified of the time and place of hearing, which shall be fixed with due regard for the public interest and the convenience and necessity of the parties and their representatives.

(b) *Requests for change.* A request for postponement of a hearing or for a change in the place assigned for hearing will be granted by the Administrative Law Judge only for good cause shown.

§ 10.62 Appearances.

(a) *Who may appear.* The parties may appear in person, by counsel or by other representatives of their choosing, subject to the provisions of §10.11 of these rules and part 14 of this chapter, dealing with appearance and practice before the Commission.

(b) *Effect of failure to appear.* (1) If any party to the proceeding, after filing an

answer fails to appear at the hearing or any part thereof, he shall to that extent be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(2) A failure to appear at a hearing shall not constitute a waiver of a party's right to propose findings of fact based on the record in the proceeding, to propose conclusions of law or to submit briefs, in the manner provided in §10.82, if the non-appearing party submits prior to the scheduled hearing or within three days thereafter, a notice of appearance indicating his intent to continue to participate in the proceeding. Otherwise, his failure to appear will constitute a default, and a default order may be sought in accordance with procedures set forth in §10.93 of these rules.

§10.63 Consolidation; separate hearings.

(a) *Consolidation.* Two or more proceedings involving a common question of law or fact may be joined for hearing of any or all the matters in issue or may be consolidated by order of the Administrative Law Judge. The Administrative Law Judge may make such rulings concerning the conduct of such proceedings as may tend to avoid unnecessary costs or delay.

(b) *Separate Hearings.* The Administrative Law Judge, for the convenience of the parties, to avoid prejudice, or to expedite final resolution of the issues, may order a separate hearing of any claim or issue, or grant a separate hearing to any respondent.

§10.64 Public hearings.

All hearings shall be public, except that upon application of a respondent or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

§10.65 Record of hearing.

(a) *Reporting and transcription.* Hearings for the purpose of taking evidence shall be recorded and transcribed in written form under the supervision of the Administrative Law Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of the record and shall be the sole official transcript. Copies of transcripts, except those portions granted non-public treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter.

(b) *Corrections.* Any party may submit a timely request to the Administrative Law Judge to correct the transcript. Corrections may be submitted to the Administrative Law Judge by stipulation of the parties, or by motion by any party, and upon notice to all parties to the proceeding, the Administrative Law Judge may specify corrections of the transcript. A copy of such specification shall be furnished to all parties and made a part of the record. Corrections shall be made by the official reporter, who shall furnish substitute pages of the transcript, under the usual certificate of the reporter, for insertion in the official record. The original uncorrected pages shall be retained in the files of the Proceedings Clerk.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§10.66 Conduct of the hearing.

(a) *Expedition.* Hearings shall proceed expeditiously and insofar as practicable hearings shall be held at one place and shall continue, without suspension, until concluded.

(b) *Rights of parties.* Every party shall be entitled to due notice of hearings, the right to be represented by counsel, the right to cross-examine witnesses, present oral and documentary evidence, raise objections, make arguments and move for appropriate relief.

(c) *Examination of witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law

Judge. A witness may be cross-examined by each adverse party and, in the discretion of the Administrative Law Judge, may be cross-examined, without regard to the scope of direct examination, as to any matter which is relevant to the issues in the proceeding.

(d) *Expert witnesses.* The Administrative Law Judge, at his discretion, may order that direct testimony of expert witnesses be made by verified written statement rather than presented orally at the hearing. Any expert witness whose testimony is presented in this manner shall be available for oral cross-examination, and may be examined orally upon re-direct following cross-examination.

(e) *Exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed and retained in the docket of the proceeding, unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding.

§ 10.67 Evidence.

(a) *Admissibility.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(b) *Official notice.* (1) Official notice may be taken of

(i) Any material fact which might be judicially noticed by a district court of the United States; or

(ii) Any matter in the public official records of the Commission.

(2) If official notice is requested or taken of a material fact, any party, upon timely request, shall be afforded an opportunity to establish the contrary.

(c) *Objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. If a party has had no opportunity to object to a ruling at the time it is made, he shall not thereafter be prejudiced by the absence of an objection.

(d) *Exceptions.* Formal exception to an adverse ruling is not required. It

shall be sufficient that a party, at the time the ruling is sought or entered, makes known to the Administrative Law Judge the action he wishes the Administrative Law Judge to take or his objection to the action being taken and his grounds therefor.

(e) *Excluded evidence.* When an objection to a question propounded to a witness is sustained, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness, or the Administrative Law Judge may, in his discretion, receive the evidence in full. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(f) *Affidavits.* Affidavits may be admitted by the Administrative Law Judge only if the evidence is otherwise admissible and the parties agree that affidavits may be used.

(g) *Official government records.* An official government record or any entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having legal custody of the record or by his deputy, accompanied by a certificate that such officer has custody. If the office in which the record is kept is within the United States the certificate may be made by a judge of a court of record in the district or political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by any officer in the Foreign Service of the United States stationed in the foreign state or country in which the record is kept and authenticated by the seal of his office. A written statement signed by an officer having custody of an official record or by his deputy, that after diligent search, no record or entry dealing with a specific matter is found to exist, accompanied by a certificate as provided above, is admissible as evidence that the records of his office contain no such record or entry.

(h) *Entries in the regular course of business.* Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or

record of any act, transaction, occurrence, or event, will be admissible as evidence thereof if it shall appear that it was made in the regular course of business by a person who had a duty to report or record it.

§ 10.68 Subpoenas.

(a) *Application for and issuance of subpoenas—(1) Application for and Issuance of Subpoena Ad Testificandum.* An application for a subpoena requiring a person to appear and testify (subpoena ad *testificandum*) may be made, either orally or in writing by any party without notice to other parties. The application shall be made to the Administrative Law Judge or in the event that the Administrative Law Judge is not available, to the Director of the Office of Proceedings. A subpoena shall be issued upon the request of any interested party upon tender of an original and two copies of such subpoena, except in those situations described in § 10.68(b) where additional requirements are set forth.

(2) *Application for subpoena duces tecum.* An application for a subpoena requiring a person to appear and testify and to produce specified documentary or tangible evidence (subpoena *duces tecum*) shall be submitted in duplicate and in writing, but need not be served upon all other parties. All such applications shall contain a statement or showing of general relevance and reasonable scope of the evidence sought and shall be accompanied by an original and two copies of the subpoena sought which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible. Notwithstanding the foregoing, for good cause shown application for a subpoena *duces tecum* may be made orally during the course of a hearing on the record to the Administrative Law Judge. In those situations described in § 10.68(b) additional requirements are set forth.

(3) *Standards for issuance of subpoena duces tecum.* The Administrative Law Judge considering any application for a subpoena *duces tecum* shall issue the subpoena requested if he is satisfied the application complies with this section and the request is not unreasonable, oppressive, excessive in scope or

unduly burdensome. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena *duces tecum* and no detailed or burdensome showing shall be required as a condition to the issuance of any subpoena.

(4) *Denial of application.* In the event the Administrative Law Judge determines that a requested subpoena or any of its terms are unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) *Special requirements relating to application for and issuance of subpoenas for commission records and for the appearance of commission employees or employees of other agencies—(1) Form.* An application for the issuance of subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require

(i) The production of documents, papers, books, physical exhibits, or other material in the records of the Commission;

(ii) The appearance of a Commissioner or an official or employee of the Commission;

(iii) The appearance of a Commissioner or an official or employee of any other state or federal agency in his official capacity.

(2) *Content.* The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show

(i) The relevance of the material, information, or testimony to the matters at issue in the proceeding;

(ii) The reasonableness of the scope of the proposed subpoena; and

(iii) That such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge or in the event the Administrative Law Judge is not available, by the Director of the Office of Proceedings, and shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witness as may appear

necessary and appropriate for the protection of the public interest.

(4) *Commission review of rulings.* Interlocutory review by the Commission of a ruling made under this section may be sought in accordance with the procedures set forth in §10.101 without certification by the Administrative Law Judge.

(c) *Motions to quash subpoenas*—(1) *Application.* Any person upon to whom a subpoena has been served may within seven days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the Administrative Law Judge who issued the subpoena, and serve a copy of such motion upon the party requesting the subpoena. The application shall be accompanied by a brief statement of the reasons therefor. If the Administrative Law Judge to whom the motion has been directed has not acted upon the motion by the return date, the subpoena shall be stayed pending his final action.

(2) *Disposition.* After due notice to the person upon whose request the subpoena was issued, and after opportunity for response by that person, the Administrative Law Judge may (i) quash or modify the subpoena, or (ii) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, in the case of a subpoena duces tecum, a requirement that the person in whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

(d) *Attendance and mileage fees.* Persons summoned to testify either by deposition or at a hearing under requirement of subpoena are entitled to the same fees and mileage as are paid to witnesses in the courts of the United States. Fees and mileage are paid by the party at whose instance the persons are called.

(e) *Service of subpoenas*—(1) *How effected.* Service of a subpoena upon a party shall be made in accordance with §10.12(a) of these rules except that only one copy of a subpoena need be served. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as pro-

vided in paragraph (b) or (c) of this section and by tendering to him the fees for one day's attendance and fees and mileage as specified in §10.64(d). When the subpoena is issued at the instance of the Commission, fees and mileage need not be tendered at the time of service.

(2) *Service upon a natural person.* Delivery of a copy of a subpoena and tender of the fees to a natural person may be effected by

- (i) Handing them to the person;
- (ii) Leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving them in a conspicuous place therein;
- (iii) Leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein;
- (iv) Mailing them by registered or certified mail to him at his last known address; or

(v) Any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by

(i) Handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person;

(ii) Mailing them by registered or certified mail to any such representative at his last known address; or

(iii) Any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

(f) *Enforcement of subpoenas.* Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission in its discretion to institute an action in an appropriate U.S. District Court for enforcement of that subpoena.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.69 Reopening hearings.

Any party may petition the Administrative Law Judge to reopen a hearing to adduce additional evidence at any

time prior to issuance of the initial decision. The petition shall show that the evidence sought to be adduced is relevant and material and that there were reasonable grounds for failure to adduce such evidence at the time of the original hearing.

Subpart F—Post Hearing Procedures; Initial Decisions

§10.81 Filing the transcript of evidence.

As soon as practicable after the close of the hearing, the reporter shall transmit to the Proceedings Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have been delivered to the Administrative Law Judge.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§10.82 Proposed findings and conclusions; briefs.

In any proceeding involving a hearing or an opportunity for hearing, the parties may file written proposed findings of fact and conclusions of law. Briefs may be filed in support of proposed findings and conclusions either as part of the same document or in a separate document. Any proposed finding or conclusion not briefed may be regarded as waived.

(a) *Proposed findings and briefs; time for filing.* Where the parties file proposed findings and briefs, the following schedule shall apply, unless otherwise determined by the Administrative Law Judge:

(1) *Initial submission.* Proposed findings, conclusions and an initial brief shall be served and filed by the Division of Enforcement and intervenors on the side of the Division of Enforcement within 45 days of the close of the hearing;

(2) *Answering submission.* Proposed findings, conclusions, and an answering brief shall be served and filed by the respondents and intervenors on the side of the respondents within 30 days after service of the initial findings, conclusions and briefs upon the respondents;

(3) *Reply.* A reply brief may be filed by the Division of Enforcement and in-

tervenors on the side of the Division of Enforcement within 15 days after filing of the answering submission;

(4) *Submissions by limited participants.* Submissions by a person admitted as a limited participant pursuant to §10.34 of these rules, are permitted under such terms as determined by the Administrative Law Judge.

(b) *Alternative procedures for submissions.* In his discretion the Administrative Law Judge may lengthen or shorten the periods for the filing of submissions, may direct simultaneous filings, may direct that respondents make the first filing, or may otherwise modify the procedures set forth in paragraph (a) of this section for purposes of a particular proceeding.

(c) *Briefs.* (1) The initial brief should include:

(i) A short, clear and concise statement of the case;

(ii) Specification of the questions to be resolved; and

(iii) The argument, presenting clearly the points of fact and law relied upon in support of the position taken on each question.

(2) The answering brief shall generally follow the same style as prescribed for the initial brief but may omit a statement of the case if the party does not dispute the statement of the case contained in the initial brief;

(3) Reply briefs should be limited to rebuttal of matters in the prior briefs.

(d) *Content and form of proposed findings and conclusions.* (1) The findings of fact shall be confined to the material issues of fact presented on the record, with exact citations to the transcripts of record and exhibits in support of each proposed finding.

(2) The proposed findings and conclusions of the party filing initially shall be set forth in consecutively numbered paragraphs and all counter-statement of proposed findings and conclusions shall, in addition to any other matter, indicate which paragraphs of initial proposals are not disputed.

§10.83 Oral arguments.

In his discretion the Administrative Law Judge may hear oral arguments by the parties any time before he files

§ 10.84

his initial decision with the Proceedings Clerk. The argument shall be recorded and transcribed in written form.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.84 Initial decision.

(a) *When initial decision is required.* The Administrative Law Judge shall make an initial decision in any proceeding in which a hearing is required to be conducted in conformity with the requirements of the Administrative Procedure Act, as codified, 5 U.S.C. 557. He shall make an initial decision in other proceedings in which the Commission directs him to make such a decision.

(b) *Filing of initial decision.* The Administrative Law Judge, within 30 days after the final date allowed for filing proposed findings of fact and briefs, or such other time as may be allowed by the Director of the Office of Proceedings, shall prepare upon the basis of the record in the proceeding and shall file with the Proceedings Clerk his decision, a copy of which shall be served by the Proceedings Clerk upon each of the parties.

(c) *Effect of initial decision.* The initial decision shall become the decision of the Commission 30 days after service thereof, except:

(1) The decision shall not become final as to any party who shall have filed a notice of appeal pursuant to § 10.102 of these rules; and

(2) The decision shall not become final as to any party to the proceeding if, within 30 days after the initial decision and order, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the decision.

In the event that the initial decision becomes the final decision of the Commission with respect to a party, that party shall be duly notified thereof by the Proceedings Clerk. The notice shall state that the time for filing a notice of appeal by the party has expired, that the Commission has determined not to review the initial decision on its own initiative and shall specify the date on which a final order in the proceeding

17 CFR Ch. I (4–1–98 Edition)

shall become effective as against that party.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995; 61 FR 21954, May 13, 1996]

Subpart G—Disposition Without Full Hearing

§ 10.91 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding. Such motion shall be filed at or before the first prehearing conference or at such later time as may be allowed by the Administrative Law Judge. Any adverse party within 20 days after service of the motion, may serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary judgment shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, including investigative transcripts, admissions, stipulations, and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits or otherwise. He may also submit a brief of points and authorities.

(c) *Form of affidavits.* Supporting and opposing affidavits shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify on the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(d) *Oral argument.* Oral argument may be granted at the discretion of the Administrative Law Judge.

(e) *Ruling on motion.* The Administrative Law Judge shall grant a motion for summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An order denying a motion for summary disposition is subject to interlocutory review under the provisions of § 10.101 on the same terms as a ruling on any other motion. An order granting a motion for summary disposition is reviewable by the Commission in accordance with the provisions of § 10.102 relating to appeals of initial decisions.

§ 10.92 Shortened procedure.

(a) *How initiated.* With the consent of the parties, in lieu of a full oral hearing, the Administrative Law Judge may order a shortened procedure as to the submission of direct evidence may be ordered in a proceeding. An order for shortened procedure shall list the names and addresses of all persons who are parties to the proceeding and shall direct compliance with the procedures established in this section. The order shall be served by the Proceedings Clerk upon all parties.

(b) *Filing of statements*—(1) *Opening statement.* Within 20 days after receipt of notice that the shortened procedure will be used, the Division of Enforcement shall serve upon all other parties and file with the Hearing Clerk, in triplicate, an opening statement, in support of the complaint;

(2) *Answering statement.* Within 20 days after receipt of the opening statement of the Division, each respondent may serve upon all other parties and file with the Proceedings Clerk, in triplicate, in support of his answer, an answering statement.

(3) *Statement in reply.* Within ten days after receipt of all answering statements, or within ten days after the expiration of the period within which an-

swering statements may be served, the Division of Enforcement may serve upon all other parties and file with the Proceedings Clerk, in triplicate, a statement in reply, which shall be confined strictly to replying to the facts and arguments set forth in the answering statements.

(c) *Joint statements.* Parties having a common interest may serve and file joint statements.

(d) *Failure to file statement.* Any party who, without the express permission of the Administrative Law Judge, should fail to file a statement within the time prescribed by this section after service upon him of an order for shortened procedures shall be in default and shall be deemed to have waived any further hearing.

(e) *Content of statements.* As used in this section, the term "statement" includes

(1) Statements of fact signed and sworn to by persons having knowledge of those facts;

(2) Documents filed as part of the proof of the alleged facts (which shall be duly authenticated under oath or otherwise in a manner that would render them admissible in evidence at an oral hearing under the rules in this part); and

(3) Briefs containing argument to sustain the contentions of the party submitting the statement.

(f) *Verification.* The facts asserted in any statement filed under shortened procedure must be sworn to by persons having knowledge thereof and, except under unusual circumstances, the persons should be those who would appear as witnesses to substantiate the facts asserted should a full oral hearing become necessary.

(g) *Hearings*—(1) *Request for cross-examination or other hearings.* If cross-examination is desired of any witness whose affidavit or other verified statement has been submitted, the name of the witness and the subject matter of the desired cross-examination shall be stated at the end of the answering statement or statement in reply as the case may be. Oral hearings under other circumstances may also be requested but will be granted only under exceptional circumstances. Any request filed under this subparagraph shall include a

justification of the need for oral hearing.

(2) *Hearings issues limited.* The order setting the proceeding for oral hearing, if hearing is found necessary, will specify the matters upon which the parties are not in agreement and concerning which oral evidence is to be introduced. Unless material facts are in dispute, oral hearing will not be held.

(h) *Subsequent procedure.* Post-hearing procedures shall be the same as those in proceedings in which the shortened procedures have not been followed.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.93 Obtaining default order.

When a respondent has failed to (a) file an answer as provided in § 10.23 of these rules or (b) failed to appear or file a notice of appearance as provided in § 10.62 of these rules or (c) failed to file a statement under the shortened procedures as provided in § 10.92 of these rules, the Division of Enforcement may move the Administrative Law Judge to enter findings and conclusions and a default order against that respondent based upon the matters set forth in the complaint, which shall be deemed to be true for purposes of this determination.

§ 10.94 Setting aside of default.

In order to prevent injustice and on such conditions as may be appropriate, (a) the Commission may at any time set aside a default order obtained under § 10.93; and (b) the Administrative Law Judge may set aside a default order obtained under § 10.93 at any time prior to filing of his initial decision in a proceeding in which there are remaining respondents. Any motion to set aside a default shall be made within a reasonable time, and shall state the reasons for the failure to file or appear and specify the nature of the proposed defense in the proceeding.

Subpart H—Appeals to the Commission; Settlements

§ 10.101 Interlocutory appeals.

Interlocutory review by the Commission of a ruling on a motion by an Ad-

ministrative Law Judge may be sought in accordance with the following procedures:

(a) *Scope of review.* The Commission will not review a ruling of the Administrative Law Judge prior to the Commission's consideration of the entire proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from an adverse ruling pursuant to § 10.8(b) on a motion to disqualify an Administrative Law Judge;

(2) Appeal from a ruling pursuant to § 10.11(b) suspending an attorney from participation in a particular proceeding.

(3) Appeal from a ruling pursuant to §§ 10.33 and 10.34 denying intervention or limited participation;

(4) Appeal from a ruling pursuant to § 10.68(b) requiring the appearance of an officer or employee of the Commission or another government agency or the production of Commission records;

(5) Upon a determination by the Administrative Law Judge, certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay for expense to the parties.

(b) *Procedure to obtain interlocutory review.* (1) An Application for interlocutory review may be filed within five days after notice of the Administrative Law Judge's ruling on a matter described in paragraph (a)(1), (a)(2), (a)(3) or (a)(4) of this section or within five days after certification in the manner described in paragraph (a)(5) of this section.

(2) An application for review shall:

(i) Designate the ruling or part thereof from which appeal is being taken;

(ii) Present the points of fact and law relied upon in support of the position taken; and

(iii) Not exceed 15 pages.

(3) Any party that opposes the application may file a response, not to exceed 15 pages, within five days after service of the application.

(4) The Commission will determine whether to grant a review based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(c) *Proceedings not stayed.* The filing of an application for review and the grant of review shall not stay proceedings before an Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge and denied.

§ 10.102 Review of initial decisions.

(a) *Notice of appeal.* Any party to a proceeding may appeal to the Commission an initial decision or a dismissal or other final disposition of the proceeding by the Administrative Law Judge as to any party. The appeal shall be initiated by filing a notice of appeal with the Proceedings Clerk within 15 days after service of the initial decision or other order terminating the proceeding. The Proceedings Clerk shall serve notice of the filing of a notice of appeal by mailing a copy thereof to each other party.

(b) *Briefs: Time for filing.* The appeal shall be perfected through the filing of an appeal brief.

(1) *Appeal brief.* The appeal brief shall be filed within 30 days after filing of the notice of appeal.

(2) *Answering brief.* Within 30 days after service of the appeal brief upon any other party that party may file an answering brief.

(3) No further briefs shall be permitted.

If the appeal brief is not filed within the time specified the opposing party may move for dismissal of the appeal.

(c) *Briefs: Number of copies.* An original and 10 copies of all briefs submitted under this section shall be filed with the Proceedings Clerk.

(d) *Briefs: Content and form.* (1) The appeal brief should include, in the order indicated:

(i) A statement of the issues presented for review.

(ii) A statement of the case. The statement shall first indicate briefly the nature of the case. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(iii) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the party to the appeal with respect to the issues presented, and the reasons therefor, and citations to supporting authorities, statutes and parts of the record.

(iv) A conclusion stating the precise relief sought.

(2) The answering brief generally shall follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the party does not dispute the issues and statement of the case contained in the appeal brief.

(3) Any matter not briefed shall be deemed waived, and may not be argued before the Commission.

(e) *Appendix to briefs—(1) Designation of contents of appendix.* At the time an appellant serves and files its appeal brief, it shall also serve and file a designation of those specific parts of the record to which it wishes to direct the particular attention of the Commission and that it wishes to have included in the appendix, including, but not necessarily limited to, particular pages of the transcript and portions of exhibits filed in the proceeding. The designation shall be set forth in a document wholly separate and apart from the brief, shall enumerate those specific parts of the record that the appellant wishes to have included in the appendix and shall not incorporate by reference citations to the record contained in its brief or in any other document. If an appellee deems it necessary to direct the particular attention of the Commission to specific parts of the record not designated by any appellant, it shall serve and file with its answering brief a designation of additional portions of the record for inclusion in the appendix. In designating parts of the record for inclusion in the appendix, the principal parts of the record relied

upon should be designated, but the parties shall have regard to the fact that the entire record is always available to the Commission or reference and examination, and shall not engage in unnecessary designation. The fact that a part of the record is not included in an appendix shall not prevent any party or the Commission from relying thereon.

(2) *Preparation of the appendix.* Within 15 days after the last answering brief of a party was due to be filed the Office of Proceedings shall prepare an appendix to the briefs which will contain a list of the relevant docket entries filed in the proceedings before the Administrative Law Judge, the initial decision and order of the Administrative Law Judge, the pleadings filed on behalf of the parties who are participating in the appeal and such other parts of the record designated by the parties to the appeal in accordance with the procedures set forth in paragraph (e)(2) of this section in accordance with the procedures set forth in paragraph (e)(1) of this section. The Proceedings Clerk shall cause one copy of the appendix to be served on each of the parties to the appeal and shall cause ten copies of the appendix to be placed in the docket of the proceeding for the use of the Commission.

(3) *Objections to appendix.* Any party who believes that an error or omission has been made in the preparation of the appendix or that the appendix is misleading, prejudicial or otherwise inadequate may on that basis file a motion with the Commission to amend or supplement the appendix within 30 days of the date of the mailing of the appendix.

The Commission has determined that once an appeal goes to the Commission, it is in a better position than the Chief Administrative Law Judge to review motions objecting to the appendix or seeking to supplement the appendix. Consequently, upon the adoption of this amendment, the Commission and not the Chief Administrative Law Judge will consider any objection to the appendix pursuant to paragraph (e)(3) of this section. As provided by the amendment, a motion raising objections to the appendix must be filed

within 30 days after the date of the mailing of the appendix.

(f) *Effect of failure to file an appeal.* Timely appeal to the Commission for review of an initial decision is mandatory as a prerequisite to seeking judicial review of a final decision entered pursuant to these Rules of Practice.

(7 U.S.C. Secs. 4a, 12a; 5 U.S.C. Sec. 10)

[41 FR 2511, Jan. 16, 1976, as amended at 41 FR 18071, Apr. 30, 1976; 41 FR 19932, May 14, 1976; 47 FR 5999, Feb. 10, 1982; 60 FR 54802, Oct. 26, 1995; 61 FR 21954, May 13, 1996]

§ 10.103 Oral argument before the Commission.

(a) *Request.* Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may in its discretion grant or deny. A request for oral argument must be made within the time provided for filing the initial briefs.

(b) *Time allowed.* Unless otherwise directed by the Commission, not more than one-half hour will be allowed for oral argument by any participant. Where the same or similar interests are represented by more than one participant, an aggregate of not more than one-half hour will be allowed the interests so represented irrespective of the number of participants, the time to be divided equally among such participants or as they may agree among themselves. In appropriate cases the Commission may, in its discretion, extend, shorten or reallocate the time prescribed herein.

(c) *Reporting and transcription.* Oral arguments before the Commission shall be reported and transcribed in written form unless the Commission shall direct otherwise.

(d) *Commissioners not present at oral argument.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding. Any Commissioner participating in the decision who was not present at the argument will review the transcript of argument.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§10.104 Scope of review; Commission decision.

(a) *Scope of review.* The Commission will ordinarily consider the whole record on review, and base its determination thereon. However, it may limit the issues to those presented in the statement of issues in the brief.

(b) *Decision on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the Administrative Law Judge and make any findings or conclusions which in its judgment are proper based on the record in the proceeding. The Commission's decision shall be contained in its opinion and order. In the event the Commission is equally divided as to its decision the initial decision will be affirmed, without opinion.

(c) *Contents of Record.* The record of the proceeding before the Commission for final decision shall include:

- (1) The complaint, notice of hearing, answers and any amendments thereto;
- (2) Any application, motion or objection made during the course of the proceeding, briefs in support thereof, rulings thereon and exceptions thereto;
- (3) Any admission or stipulations between the parties, and documents or papers filed in connection with prehearing conferences; and the record of prehearing conferences, if recorded;
- (4) The transcript of testimony taken at the hearing, together with exhibits received at the hearing;
- (5) Any statements filed under the shortened procedure;
- (6) Portions of the official public records of the Commission specified in any of the above;
- (7) Any proposed findings of fact, conclusions of law and briefs in support thereof, which were filed in connection with the hearing;
- (8) Any written communication accepted by the Administrative Law Judge pursuant to §§10.34 and 10.35 relating to limited participation;
- (9) The initial decision and the petition for review;
- (10) Any other documents which appear on the docket of the proceeding.

§10.105 Review by Commission on its own initiative.

The Commission may on its own initiative, within 30 days after the initial decision has been served on all parties, direct review of any initial decision of an Administrative Law Judge. The Commission shall determine the scope of the review and the issues which will be considered and make provisions for the filing of briefs and oral argument, if deemed appropriate by the Commission. Notice that the Commission has directed review on its own initiative shall be served on all parties by the Proceedings Clerk.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§10.106 Reconsideration.

Within 15 days after service of a Commission opinion and order any party may file with the Commission a petition for reconsideration of the opinion and order, setting forth the relief desired and the grounds in support thereof. Any petition filed under this section must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission. The filing of a petition for reconsideration shall not operate to stay the effective date of the Commission's order.

§10.107 Leave to adduce additional evidence.

Any time prior to issuance of the final decision the Commission may, upon its own motion or upon application in writing by any party, after notice to the parties and an opportunity for them to be heard, reopen the hearing for the reception of further evidence. The application shall show to the satisfaction of the Commission that the additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence at the hearing. The Commission may hear the additional evidence or may refer the proceeding to the Administrative Law Judge for the taking of the additional evidence.

§ 10.108 Settlements.

(a) *When offers may be made.* Parties may at any time during the course of the proceeding propose offers of settlement. All offers of settlement shall be in writing.

(b) *Content of offer of settlement.* Each offer of settlement made by a respondent shall:

(1) Acknowledge service of the Complaint;

(2) Admit the jurisdiction of the Commission with respect to the matters set forth in the Complaint;

(3) Include a waiver of:

(i) A hearing,

(ii) All post-hearing procedures,

(iii) Judicial review, and

(iv) Any objection to the staff's participation in the Commission's consideration of the offer;

(4) Stipulate the record basis on which an order may be entered, which may consist solely of the complaint and the findings contained in the offer of settlement; and

(5) Consent to the entry of an order reflecting the terms of settlement agreed upon, including, where appropriate:

(i) Findings by the Commission that the respondent has violated specified provisions of the Act, and

(ii) The imposition of sanctions.

(c) *Submission of offer of settlement.* Offers of settlement made by a respondent shall be submitted in writing to the Division of Enforcement, which shall present them to the Commission with the Division's recommendation. The respondent will be informed if the recommendation will be unfavorable, in which event the offer shall not be presented to the Commission unless the respondent so requests. Any offer of settlement not presented to the Commission shall be null and void with respect to any acknowledgement, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

(d) *Acceptance of offer by the Commission.* The Commission will accept an offer of settlement only by issuing its opinion and order based on the offer. Upon issuance of the opinion and order, the proceeding shall be terminated as to the respondent involved and so

noted on the docket by the Proceedings Clerk.

(e) *Rejection of offer of settlement; effect of rejection.* When the Commission rejects an offer of settlement, the party making the offer shall be notified of the Commission's action and the offer of settlement shall be deemed withdrawn. A rejected offer of settlement and any documents relating thereto shall not constitute a part of the record in the proceeding; and the offer will be null and void with respect to any acknowledgment, admission, waiver, stipulation or consent contained in the offer and shall not be used in any manner in the proceeding by any party thereto.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.109 Delegation of authority to Chief of the Opinions Section.

The Commodity Futures Trading Commission hereby delegates, until such time as it orders otherwise, the following functions to the Deputy General Counsel for Opinions and Review, to be performed by him or by such person or persons under his direction as he may designate from time to time:

(a) With respect to proceedings conducted pursuant to the Commodity Exchange Act, as amended, 7 U.S.C. 1 *et seq.*, and subject to the Commission's Rules of Practice as set forth in part 10 of this chapter, to:

(1) Consider and decide miscellaneous motions for procedural orders that may be directed to the Commission pursuant to part 10 of these rules after the initial decision or other order disposing of the entire proceeding has been filed; such motions may be acted upon at anytime, without awaiting a response;

(2) Remand, with or without specific instructions, initial decisions or other orders disposing of the entire proceeding to the appropriate officer in the following situations:

(i) Where a default order has been made pursuant to § 10.93 of these rules and a motion to vacate the default or equivalent request has been directed to the Commission under § 10.94 without the benefit of a prior ruling by the Administrative Law Judge;

(ii) Where, in his judgment, clarification or supplementation of the initial

decision or other order disposing of the entire proceeding prior to Commission review is appropriate; however, the Deputy General Counsel for Opinions and Review may not direct that the record be reopened;

(iii) Where, in his judgment, a ministerial act necessary to the proper conduct of the proceeding has not been performed;

(3) Deny applications for interlocutory Commission review of a ruling of the Administrative Law Judge in cases in which the Administrative Law Judge has not certified the ruling to the Commission in the manner prescribed by §10.101(a) of the rules; and the ruling does not concern the disqualification of, or a motion to disqualify, an Administrative Law Judge; and the ruling does not concern the suspension of, or failure to suspend, an attorney from participation in a particular proceeding, or the denial of intervention or limited participation;

(4) Deny any application for interlocutory review in a proceeding if it is not filed in accordance with §10.101(b) of these rules;

(5) Dismiss any appeal from an initial decision or other disposition of the entire proceeding by an Administrative Law Judge, where such appeal is not filed and perfected in accordance with §10.102 of these rules;

(6) Strike any filing that does not meet the requirements of, or is not perfected in accordance with, part 10 of these rules;

(7) Stay, for a limited period of time not to exceed ten working days, any order of the Commission entered in a proceeding subject to these rules;

(b) Notwithstanding the provisions of paragraph (a) of this section, in any case in which the Deputy General Counsel for Opinions and Review believes it appropriate, he may submit the matter to the Commission for its consideration;

(c) Within seven (7) days after service of a ruling issued pursuant to paragraph (a) of this section, a party may file with the Proceedings Clerk a petition for Commission reconsideration of the ruling. Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not operate to stay the effective date of such ruling;

(d) This rule is applicable to all proceedings pending as of August 20, 1985.

[50 FR 33515, Aug. 20, 1985, as amended at 60 FR 54802, Oct. 26, 1995]

PART 11—RULES RELATING TO INVESTIGATIONS

Sec.

- 11.1 Scope and applicability of rules.
- 11.2 Authority to conduct investigations.
- 11.3 Confidentiality of investigations.
- 11.4 Subpoenas.
- 11.5 Transcripts.
- 11.6 Oath; false statements.
- 11.7 Rights of witnesses.
- 11.8 Sequestration.

APPENDIX A TO PART 11—INFORMAL PROCEDURE RELATING TO THE RECOMMENDATIONS OF ENFORCEMENT PROCEEDINGS

AUTHORITY: 7 U.S.C. 4a(j), 9 and 15, 12, 12a(5), 12(f).

SOURCE: 41 FR 29799, July 19, 1976, unless otherwise noted.

§ 11.1 Scope and applicability of rules.

The rules of this part apply to investigatory proceedings conducted by the Commission or its staff pursuant to sections 6(c) and 8 and 12(f) of the Commodity Exchange Act, as amended, 7 U.S.C. 9 and 15 and 12 and 16(f) (Supp. IV, 1974), to determine whether there have been violations of that Act, or the rules, regulations or orders adopted thereunder, or, in accordance with the provisions of section 12(f) of the Act, whether there have been violations of the laws, rules or regulations relating to futures or options matters administered or enforced by a foreign futures authority, or whether an application for designation or registration under the Act should be denied. Except as otherwise specified herein, the rules will apply to the conduct of investigation whether or not the Commission has authorized the use of subpoenas in the particular matter to compel the production of evidence.

[63 FR 5233, Feb. 2, 1998]

§ 11.2 Authority to conduct investigations.

(a) The Director of the Division of Enforcement and members of the Commission staff acting pursuant to his authority and under his direction may conduct such investigations as he