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SUBCHAPTER X—PROCEDURAL RULES

PART 385—RULES OF PRACTICE AND PROCEDURE

Subpart A—Applicability and Definitions

Sec.
385.101 Applicability (Rule 101).
385.102 Definitions (Rule 102).
385.103 References to rules (Rule 103).
385.104 Rule of construction (Rule 104).

Subpart B—Pleadings, Tariff and Rate Filings, Notices of Tariff or Rate Examination, Orders To Show Cause, Intervention, and Summary Dispositon

385.201 Applicability (Rule 201).
385.202 Types of pleadings (Rule 202).
385.203 Content of pleadings and tariff or rate filings (Rule 203).
385.204 Applications (Rule 204).
385.205 Tariff or rate filings (Rule 205).
385.206 Complaints (Rule 206).
385.207 Petitions (Rule 207).
385.208 Notices of protest to tentative oil pipeline valuations (Rule 208).
385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).
385.210 Method of notice; dates established in notice (Rule 210).
385.211 Protests other than under Rule 208 (Rule 211).
385.212 Motions (Rule 212).
385.213 Answers (Rule 213).
385.214 Intervention (Rule 214).
385.215 Amendment of pleadings and tariff or rate filings (Rule 215).
385.216 Withdrawal of pleadings (Rule 216).
385.217 Summary disposition (Rule 217).

Subpart C [Reserved]

Subpart D—Discovery Procedures for Matters Set for Hearing Under Subpart E

385.401 Applicability (Rule 401).
385.402 Scope of discovery (Rule 402).
385.403 Methods of discovery; general provisions (Rule 403).
385.404 Depositions during proceedings (Rule 404).
385.405 Use of depositions (Rule 405).
385.406 Data requests, interrogatories, and requests for production of documents or things (Rule 406).
385.407 Inspection of documents and other property (Rule 407).
385.408 Admissions (Rule 408).
385.409 Subpoenas (Rule 409).
385.410 Objections to discovery, motions to quash or to compel, and protective orders (Rule 410).
385.411 Sanctions (Rule 411).

Subpart E—Hearings

385.501 Applicability (Rule 501).
385.502 Initiation of a hearing (Rule 502).
385.503 Consolidation, severance and extension of close-of-record date by Chief Administrative Law Judge (Rule 503).
385.504 Duties and powers of presiding officers (Rule 504).
385.505 Right of participants to present evidence (Rule 505).
385.506 Examination of witnesses during hearing (Rule 506).
385.507 Prepared written testimony (Rule 507).
385.508 Exhibits (Rule 508).
385.509 Admissibility of evidence (Rule 509).
385.510 Miscellaneous provisions (Rule 510).

Subpart F—Conferences, Settlements, and Stipulations

385.601 Conferences (Rule 601).
385.602 Submission of settlement offers (Rule 602).
385.603 Settlement of negotiations before a settlement judge (Rule 603).
385.604 Alternative means of dispute resolution (Rule 604).
385.605 Arbitration (Rule 605).
385.606 Confidentiality in dispute resolution proceedings (Rule 606).

Subpart G—Decisions

385.701 Applicability (Rule 701).
385.702 Definitions (Rule 702).
385.703 Contents of decisions (Rule 703).
385.704 Rights of participants before initial decision (Rule 704).
385.705 Additional powers of presiding officer with respect to briefs (Rule 705).
385.706 Initial and reply briefs before initial decision (Rule 706).
385.707 Oral argument before initial decision (Rule 707).
385.708 Initial decisions by presiding officer (Rule 708).
385.709 Other types of decisions (Rule 709).
385.710 Waiver of the initial decision (Rule 710).
385.711 Exceptions and briefs on and opposing exceptions after initial decision (Rule 711).
385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).
385.713 Request for rehearing (Rule 713).
385.714 Certified questions (Rule 714).
385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

385.716 Reopening (Rule 716).

Subpart H—Shortened Procedures

385.801 Waiver of hearing (Rule 801).
385.802 Noncontested proceedings (Rule 802).

Subpart I—Commission Review of Remedial Orders

385.901 Scope (Rule 901).
385.902 Definitions (Rule 902).
385.903 Request for nondisclosure of information (Rule 903).
385.904 Commencement of proceeding (Rule 904).
385.905 Stay of contested order (Rule 905).
385.906 Pleadings (Rule 906).
385.907 New facts and issues (Rule 907).
385.908 Discovery (Rule 908).
385.909 Hearing (Rule 909).
385.910 Conduct of the hearing (Rule 910).
385.911 Burden of proof (Rule 911).
385.912 Proposed findings of fact, conclusions of law, and comments (Rule 912).
385.913 Proposed order (Rule 913).
385.914 Commission action (Rule 914).
385.915 Ex parte communications (Rule 915).
385.916 Withdrawal of petition for review (Rule 916).
385.917 Sanctions (Rule 917).

Subpart J—Commission Review of Adjustment Request Denials

385.1001 Scope (Rule 1001).
385.1002 Definitions (Rule 1002).
385.1003 Request for nondisclosure of information (Rule 1003).
385.1004 Commencement of proceedings (Rule 1004).
385.1005 Replies (Rule 1005).
385.1006 Request for hearing (Rule 1006).
385.1007 Presiding officer (Rule 1007).
385.1008 Hearings (Rule 1008).
385.1009 Proof (Rule 1009).
385.1010 Certification of the record (Rule 1010).
385.1011 Final order (Rule 1011).
385.1012 Ex parte communications (Rule 1012).
385.1013 Attachments to pleadings (Rule 1013).

Subpart K—Petitions for Adjustments Under the NGPA

385.1101 Applicability (Rule 1101).
385.1102 Definitions (Rule 1102).
385.1103 Commencement of proceeding (Rule 1103).
385.1104 Initial petition (Rule 1104).
385.1105 Intervention (Rule 1105).
385.1106 Other filings (Rule 1106).
385.1107 Evaluations (Rule 1107).
385.1108 Criteria (Rule 1108).
385.1109 Orders (Rule 1109).
385.1110 Review of initial decision and order for adjustment (Rule 1110).
385.1111 Conferences (Rule 1111).
385.1112 Requests for confidential treatment (Rule 1112).
385.1113 Interim relief (Rule 1113).
385.1114 Motions (Rule 1114).
385.1115 Procedural rulings (Rule 1115).
385.1116 Appeals (Rule 1116).
385.1117 Petition for adjustment treated as request for interpretation (Rule 1117).

Subpart L [Reserved]

Subpart M—Cooperative Procedure with State Commissions

385.1301 Policy (Rule 1301).
385.1302 Notice (Rule 1302).
385.1303 Conferences (Rule 1303).
385.1304 Procedure governing matters referred to a board (Rule 1304).
385.1305 Joint and concurrent hearings (Rule 1305).
385.1306 Intervention by State commissions (Rule 1306).

Subpart N—Oil Pipeline Proceedings

385.1401 Applicability (Rule 1401).
385.1402 Subscriber lists (Rule 1402).
385.1403 Dates for filing protests and interventions (Rule 1403).
385.1404 Petitions seeking institution of rulemaking proceedings (Rule 1404).
385.1405 Modified procedure, how initiated (Rule 1405).
385.1406 Modified procedure; effect of order (Rule 1406).
385.1407 Modified procedure; intervention (Rule 1407).
385.1408 Modified procedure; joint pleadings (Rule 1408).
385.1409 Modified procedure; content of pleadings (Rule 1409).
385.1410 Modified procedure; verification (Rule 1410).
385.1411 Modified procedure; when pleadings filed and served (Rule 1411).
385.1412 Modified procedure; copies of pleadings (Rule 1412).
385.1413 Modified procedure; hearings (Rule 1413).
385.1414 Modified procedure; subsequent procedure (Rule 1414).
385.1415 Rule applicable to ex parte communications during oil pipeline proceedings (Rule 1415).

Subpart O—Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act

385.1501 Scope (Rule 1501).
385.1502 Persons subject to civil penalties (Rule 1502).

385.1503 Actions subjecting persons to civil penalties (Rule 1503).
385.1504 Maximum civil penalty (Rule 1504).
385.1505 Determination of proposed penalty amount (Rule 1505).
385.1506 Notice of proposed penalty (Rule 1506).
385.1507 Election of procedures and answer (Rule 1507).
385.1508 Commission administrative procedures (Rule 1508).
385.1509 District court procedures (Rule 1509).
385.1510 Modification of civil penalty (Rule 1510).
385.1511 Collection of civil penalties (Rule 1511).

Subparts P—R [Reserved]

Subpart S—Miscellaneous

385.1901 Interpretations and interpretive rules under the NGPA (Rule 1901).
385.1902 Appeals from action of staff (Rule 1902).
385.1903 Notice in rulemaking proceedings (Rule 1903).
385.1904 Copies of transcripts (Rule 1904).
385.1907 Reports of compliance (Rule 1907).

Subpart T—Formal Requirements for Filings in Proceedings Before the Commission

385.2001 Filings (Rule 2001).
385.2002 Caption of filings (Rule 2002).
385.2003 Specifications (Rule 2003).
385.2004 Original and copies of filings (Rule 2004).
385.2005 Subscription and verification (Rule 2005).
385.2006 Docket system (Rule 2006).
385.2007 Time (Rule 2007).
385.2008 Extensions of time (Rule 2008).
385.2009 Notice (Rule 2009).
385.2010 Service (Rule 2010).
385.2011 Procedures for filing on electronic media (Rule 2011).
385.2012 Petitions for review of Commission Orders (Rule 2012).
385.2013 Videotapes (Rule 2013).

Subpart U—Appearance and Practice Before the Commission

385.2101 Appearances (Rule 2101).
385.2102 Suspension (Rule 2102).
385.2103 Appearance of former employees (Rule 2103).

Subpart V—Ex Parte Communications: Separation of Functions

385.2201 Ex parte communications (Rule 2201).
385.2202 Separation of functions of staff (Rule 2202).

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SOURCE: Order 225, 47 FR 19022, May 3, 1982, unless otherwise noted.

Subpart A—Applicability and Definitions

§ 385.101 Applicability (Rule 101).

(a) *General rules.* Except as provided in paragraph (b) of this section, this part applies to:

(1) Any filing or proceeding under this chapter; and

(2) Any oil pipeline filing or proceeding under this chapter or 49 CFR Chapter X and replaces the Interstate Commerce Commission General Rules of Practice (49 CFR part 1100) with respect to any oil pipeline filing or proceeding.

(b) *Exceptions.* (1) This part does not apply to investigations under part 1b of this chapter.

(2) If any provision of this part is inconsistent with any provision of another part of this chapter, the provision of this part is inapplicable and the provision of the other part governs to the extent of the inconsistency.

(3) If any provision of this part is inconsistent with any provision of 49 CFR Chapter X that is not otherwise replaced by this part or Commission rule or order, the provision of this part is inapplicable and the provision of 49 CFR Chapter X governs to the extent of the inconsistency.

(4) With respect to any oil pipeline filing a proceeding:

(i) The modified procedures set forth in Rules 1404 through 1414 will apply; and

(ii) The ex parte rules set forth in Rule 1415 apply in lieu of rule 2201.

(c) *Transitional provisions.* (1) This part applies to any filing submitted on or after and to any proceeding pending on or initiated after, August 26, 1982.

(2) A decisional authority may, in the interest of justice:

(i) Apply the appropriate provisions of the prior Rules of Practice and Procedure (18 CFR part 1) to any filing submitted after, or to any proceeding or part of a proceeding pending on August 26, 1982;

(ii) Apply the provisions of this part to any filing submitted, or any proceeding or part of a proceeding initiated, after April 28, 1982 but before August 26, 1982.

(d) [Reserved]

(e) *Waiver.* To the extent permitted by law, the Commission may, for good cause, waive any provision of this part or prescribe any alternative procedures that it determines to be appropriate.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984]

§ 385.102 Definitions (Rule 102).

For purposes of this part—

(a) *Decisional authority* means the Commission or Commission employee, including the Oil Pipeline Board, that, at the time for decision on a question, has authority or responsibility under this chapter or 49 CFR Chapter X to decide that particular question.

(b) *Participant* means:

(1) Any party; or

(2) Any employee of the Commission assigned to present the position of the Commission staff in a proceeding before the Commission.

(c) *Party* means, with respect to a proceeding:

(1) A person filing any application, petition, tariff or rate filing, complaint, or any protest under section 19a(i) of the Interstate Commerce Act (49 U.S.C. 19a(i));

(2) Any respondent to a proceeding; or

(3) Any person whose intervention in a proceeding is effective under Rule 214.

(d) *Person* means an individual, partnership, corporation, association, joint stock company, public trust, an organized group of persons, whether incorporated or not, a receiver or trustee of the foregoing, a municipality, including a city, county, or any other political subdivision of a State, a State, the District of Columbia, any territory of the United States or any agency of any of the foregoing, any agency, authority, or instrumentality of the United States (other than the Commission), or any corporation which is owned directly or indirectly by the United States, or any officer, agent, or employee of any of the foregoing acting as such in the course of his or her official duty. The term also includes a foreign government or any agency, authority, or instrumentality thereof.

(e) *Presiding officer* means:

(1) With respect to any proceeding set for hearing under subpart E of this part, one or more Members of the Commission, or any administrative law judge, designated to preside at such hearing, or, if no Commissioner or administrative law judge is designated, the Chief Administrative Law Judge; or

(2) With respect to any proceeding not set for hearing under subpart E, any employee, including the Oil Pipeline Board, designated by rule or order to conduct the proceeding.

(f) *Respondent* means any person:

(1) To whom an order to show cause or notice of tariff or rate examination is issued by the Commission;

(2) Against whom a complaint is directed; or

(3) Designated as a respondent by the Commission or by the terms of this chapter.

§ 385.103 References to rules (Rule 103).

This part cross-references its sections according to rule number, as indicated by the section titles. Any filing with the Commission may refer to any section of this part by rule number; for example, ''Rule 103.''

§ 385.104 Rule of construction (Rule 104).

To the extent that the text of a rule is inconsistent with its caption, the text of the rule controls.

[Order 376, 49 FR 21705, May 23, 1984]

Subpart B—Pleadings, Tariff and Rate Filings, Notices of Tariff or Rate Examination, Orders To Show Cause, Intervention, and Summary Disposition

§ 385.201 Applicability (Rule 201).

This subpart applies to any pleading, tariff or rate filing, notice of tariff or rate examination, order to show cause, intervention, or summary disposition.

§ 385.202 Types of pleadings (Rule 202).

Pleadings include any application, complaint, petition, protest, notice of protest, answer, motion, and any amendment or withdrawal of a pleading. Pleadings do not include comments on rulemakings or comments on offers of settlement.

§ 385.203 Content of pleadings and tariff or rate filings (Rule 203).

(a) *Requirements for a pleading or a tariff or rate filing.* Each pleading and each tariff or rate filing must include, as appropriate:

(1) If known, the reference numbers, docket numbers, or other identifying symbols of any relevant tariff, rate, schedule, contract, application, rule, or similar matter or material;

(2) The name of each participant for whom the filing is made or, if the filing is made for a group of participants, the name of the group, provided that the name of each member of the group is set forth in a previously filed document which is identified in the filing being made;

(3) The specific authorization or relief sought;

(4) The tariff or rate sheets;

(5) The name and address of each person against whom the complaint is directed;

(6) The relevant facts, if not set forth in a previously filed document which is identified in the filing being made;

(7) The position taken by the participant filing any pleading, to the extent known when the pleading is filed, and the basis in fact and law for such position;

(8) Subscription or verification, if required;

(9) A certificate of service under Rule 2010(h), if service is required;

(10) The name, address, and telephone number of an individual who, with respect to any matter contained in the filing, represents the person for whom filing is made; and

(11) Any additional information required to be included by statute, rule, or order.

(b) *Requirement for any initial pleading or tariff or rate filing.* The initial pleading or tariff or rate filing submitted by a participant or a person seeking to become a party must conform to the requirements of paragraph (a) of this section and must include:

(1) The exact name of the person for whom the filing is made;

(2) The location of that person's principal place of business; and

(3) The name, address, and telephone number of at least one, but not more than two, persons upon whom service is to be made and to whom communications are to be addressed in the proceeding.

(c) *Combined filings.* If two or more pleadings, or one or more pleadings and a tariff or rate filing are included as items in a single filing each such item must be separately designated and must conform to the requirements which would be applicable to it if filed separately.

§ 385.204 Applications (Rule 204).

Any person seeking a license, permit, certification, or similar authorization or permission, must file an application to obtain that authorization or permission.

§ 385.205 Tariff or rate filings (Rule 205).

A person must make a tariff or rate filing in order to establish or change any specific rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant.

§ 385.206 Complaints (Rule 206).

(a) *General rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) *Answers.* Unless otherwise ordered by the Commission, any respondent to a complaint must file an answer with the Commission.

(c) *Satisfaction.* (1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied; and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

§ 385.207 Petitions (Rule 207).

(a) *General rule.* A person must file a petition when seeking:

(1) Relief under subpart I, J, or K of this part;

(2) A declaratory order or rule to terminate a controversy or remove uncertainty;

(3) Action on appeal from a staff action, other than a decision or ruling of a presiding officer, under Rule 1902;

(4) A rule of general applicability; or

(5) Any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.

(b) *Declarations of intent under the Federal Power Act.* For purposes of this part, a declaration of intent under section 23(b) of the Federal Power Act is treated as a petition for a declaratory order.

(c) Except as provided in § 381.302(b), each petition for issuance of a declaratory order must be accompanied by the fee prescribed in § 381.302(a).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§ 385.208 Notices of protest to tentative oil pipeline valuations (Rule 208).

(a) *General rule.* Any person objecting to a tentative valuation of any oil pipeline under section 19a of the Interstate Commerce Act (49 U.S.C. 19a(i)) must file a notice of protest, as prescribed under that section.

(b) *Effect.* A notice of protest has the effect prescribed in section 19a of the Interstate Commerce Act (49 U.S.C. 19a).

(c) *Service.* A notice of protest must be served by the protestant on the oil pipeline company whose tentative valuation is protested.

§ 385.209 Notices of tariff or rate examination and orders to show cause (Rule 209).

(a) *Issuance.* (1) If the Commission seeks to determine the validity of any rate, rate schedule, tariff, tariff schedule, fare, charge, or term or condition of service, or any classification, contract, practice, or any related regulation established by and for the applicant which is demanded, observed, charged, or collected, the Commission will initiate a proceeding by issuing a notice of tariff or rate examination.

(2) The Commission may initiate a proceeding against a person by issuing an order to show cause.

(b) *Contents.* A notice of examination or an order to show cause will contain a statement of the matters about which the Commission is inquiring, and a statement of the authority under which the Commission is acting. The statement is tentative and sets forth issues to be considered by the Commission.

(c) *Answers.* A person who is ordered to show cause must answer in accordance with Rule 213.

§ 385.210 Method of notice; dates established in notice (Rule 210).

(a) *Method.* When the Secretary gives notice of tariff or rate filings, applications, petitions, notices of tariff or rate examinations, and orders to show cause, the Secretary will give such notice in accordance with Rule 2009.

(b) *Dates for filing interventions and protests.* A notice given under this section will establish the dates for filing interventions and protests. Only those filings made within the time prescribed in the notice will be considered timely.

§ 385.211 Protests other than under Rule 208 (Rule 211).

(a) *General rule.* (1) Any person may file a protest to object to any application, complaint, petition, order to show cause, notice of tariff or rate examination, or tariff or rate filing.

(2) The filing of a protest does not make the protestant a party to the proceeding. The protestant must intervene under Rule 214 to become a party.

(3) Subject to paragraph (a)(4) of this section, the Commission will consider

protests in determining further appropriate action. Protests will be placed in the public file associated with the proceeding.

(4) If a proceeding is set for hearing under subpart E of this part, the protest is not part of the record upon which the decision is made.

(b) *Service.* (1) Any protest directed against a person in a proceeding must be served by the protestant on the person against whom the protest is directed.

(2) The Secretary may waive any procedural requirement of this subpart applicable to protests. If the requirement of service under this paragraph is waived, the Secretary will place the protest in the public file and may send a copy thereof to any person against whom the protest is directed.

§ 385.212 Motions (Rule 212).

(a) *General rule.* A motion may be filed:

(1) At any time, unless otherwise provided;

(2) By a participant or a person who has filed a timely motion to intervene which has not been denied;

(3) In any proceeding except an informal rulemaking proceeding.

(b) *Written and oral motions.* Any motion must be filed in writing, except that the presiding officer may permit an oral motion to be made on the record during a hearing or conference.

(c) *Contents.* A motion must contain a clear and concise statement of:

(1) The facts and law which support the motion; and

(2) The specific relief or ruling requested.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982; Order 376, 49 FR 21705, May 23, 1984]

§ 385.213 Answers (Rule 213).

(a) *Required or permitted.* (1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) *Written or oral answers.* Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) *Contents.* (1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(d) *Time limitations.* (1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, unless otherwise ordered.

(2) Any answer to a pleading or amendment to a pleading, other than an answer to a motion under paragraph (d)(1) of this section must be made:

(i) If notice of the pleading or amendment is published in the FEDERAL REGISTER, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the FEDERAL REGISTER, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) *Failure to answer.* (1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984]

§ 385.214 Intervention (Rule 214).

(a) *Filing.* (1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, a State Commission must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person, other than the Secretary of Energy or a State Commission, seeking to become a party must file a motion to intervene.

(b) *Contents of motion.* (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) *Grant of party status.* (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) *Grant of late intervention.* (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention,

the officer will promptly issue a written order confirming the oral order.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 376, 49 FR 21705, May 23, 1984]

§ 385.215 Amendment of pleadings and tariff or rate filings (Rule 215).

(a) *General rules.* (1) Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to modify its pleading by filing an amendment which conforms to the requirements applicable to the pleading to be amended.

(2) A tariff or rate filing may not be amended, except as allowed by statute. The procedures provided in this section do not apply to amendment of tariff or rate filings.

(3)(i) If a written amendment is filed in a proceeding, or part of a proceeding, that is not set for hearing under subpart E, the amendment becomes effective as an amendment on the date filed.

(ii) If a written amendment is filed in a proceeding, or part of a proceeding, which is set for hearing under subpart E, that amendment is effective on the date filed only if the amendment is filed more than five days before the earlier of either the first prehearing conference or the first day of evidentiary hearings.

(iii) If, in a proceeding, or part of a proceeding, that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section, or if an oral amendment is made to a presiding officer during a hearing or conference, the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.

(b) *Answers.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may answer a written or oral amendment in accordance with Rule 213.

(c) *Motion opposing an amendment.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may file a motion opposing the acceptance of any amendment, other than an amendment under paragraph (a)(3)(i) of this section, not later than 15 days after the filing of the amendment.

(d) *Acceptance of amendments.* (1) An amendment becomes effective as an amendment at the end of 15 days from the date of filing, if no motion in opposition to the acceptance of an amendment under paragraph (a)(3)(iii) of this section is filed within the 15 day period.

(2) If a motion in opposition to the acceptance of an amendment is filed within 15 days after the filing of the amendment, the amendment becomes effective as an amendment on the twentieth day after the filing of the amendment, except to the extent that the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.

(e) *Directed amendments.* A decisional authority, on motion or otherwise, may direct any participant, or any person seeking to be a party, to file a written amendment to amplify, clarify, or technically correct a pleading.

§ 385.216 Withdrawal of pleadings (Rule 216).

(a) *Filing.* Any participant, or any person who has filed a timely motion to intervene which has not been denied, may seek to withdraw a pleading by filing a notice of withdrawal.

(b) *Action on withdrawals.* (1) The withdrawal of any pleading is effective at the end of 15 days from the date of filing of a notice of withdrawal, if no motion in opposition to the notice of withdrawal is filed within that period and the decisional authority does not issue an order disallowing the withdrawal within that period. The decisional authority may disallow, for a good cause, all or part of a withdrawal.

(2) If a motion in opposition to a notice of withdrawal is filed within the 15 day period, the withdrawal is not effective until the decisional authority issues an order accepting the withdrawal.

(c) *Conditional withdrawal.* In order to prevent prejudice to other participants, a decisional authority may, on motion or otherwise, condition the withdrawal of any pleading upon a requirement

that the withdrawing party leave material in the record or otherwise make material available to other participants.

§ 385.217 Summary disposition (Rule 217).

(a) *Applicability*. This section applies to:

(1) Any proceeding, or any part of a proceeding, while the Commission is the decisional authority; and

(2) Any proceeding, or part of a proceeding, which is set for hearing under subpart E.

(b) *General rule*. If the decisional authority determines that there is no genuine issue of fact material to the decision of a proceeding or part of a proceeding, the decisional authority may summarily dispose of all or part of the proceeding.

(c) *Procedures*. (1) Any participant may make a motion for summary disposition of all or part of a proceeding.

(2) If a decisional authority, other than the Commission, is considering summary disposition of a proceeding, or part of a proceeding, in the absence of a motion for summary disposition by a participant, the decisional authority will grant the participants an opportunity to comment on the proposed disposition prior to any summary disposition, unless, for good cause shown, the decisional authority provides otherwise.

(3) If, prior to setting a matter for hearing, the Commission is considering summary disposition of a proceeding or part of a proceeding in the absence of a motion for summary disposition by any participant and the Commission determines that notice and comment on summary disposition are practicable and necessary, the Commission may notify the participants and afford them an opportunity to comment on any proposed summary disposition.

(d) *Disposition*. (1)(i) If a decisional authority, other than the Commission, summarily disposes of an entire proceeding, the decisional authority will issue an initial decision for the entire proceeding.

(ii) Except as provided under paragraph (d)(1)(iii) of this section, a decisional authority, other than the Commission, which summarily disposes of part of a proceeding may:

(A) Issue a partial initial decision; or

(B) Postpone issuing an initial decision on the summarily disposed part and combine it with the initial decision on the entire proceeding or other appropriate part of the proceeding.

(iii) If the decisional authority, other than the Commission, summarily disposes of part of a proceeding and such disposition requires the filing of new tariff or rate schedule sheets, the decisional authority will issue an initial decision on that part of the proceeding.

(2) Any initial decision issued under paragraph (d)(1) of this section is considered an initial decision issued under subpart G of this part, except that the following rules do not apply: Rule 704 (rights of participants before initial decision), Rule 705 (discretion of presiding officer before initial decision), Rule 706 (initial and reply briefs before initial decision), Rule 707 (oral argument before initial decision), and Rule 709 (other types of decisions).

[Order 225, 47 FR 19022, May 3, 1982; Order 225–A, 47 FR 35956, Aug. 18, 1982]

Subpart C [Reserved]

Subpart D—Discovery Procedures for Matters Set for Hearing Under Subpart E

SOURCE: 52 FR 6966, Mar. 6, 1987, unless otherwise noted.

§ 385.401 Applicability (Rule 401).

(a) *General rule*. Except as provided in paragraph (b) of this section, this subpart applies to discovery in proceedings set for hearing under subpart E of this part, and to such other proceedings as the Commission may order.

(b) *Exceptions*. Unless otherwise ordered by the Commission, this subpart does not apply to:

(1) Requests for information under the Freedom of Information Act, 5 U.S.C. 552, governed by Part 388 of this chapter; or,

(2) Requests by the Commission or its staff who are not participants in a proceeding set for hearing under subpart E

of this part to obtain information, reports, or data from persons subject to the Commission's regulatory jurisdiction; or

(3) Investigations conducted pursuant to Part 1b of this chapter.

§ 385.402 Scope of discovery (Rule 402).

(a) *General.* Unless otherwise provided under paragraphs (b) and (c) of this section or ordered by the presiding officer under Rule 410(c), participants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having any knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible in the Commission proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) *Material prepared for litigation.* A participant may not obtain discovery of material prepared in anticipation of litigation by another participant, unless that participant demonstrates a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship. In ordering any such discovery, the presiding officer will prevent disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(c) *Expert testimony.* Unless otherwise restricted by the presiding officer under Rule 410(c), a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at hearing, and the participant seeking discovery shows a compelling need for the information and it cannot practicably be obtained by other means.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 466–A, 52 FR 35909, Sept. 24, 1987]

§ 385.403 Methods of discovery; general provisions (Rule 403).

(a) *Discovery methods.* Participants may obtain discovery by data requests, written interrogatories, and requests for production of documents or things (Rule 406), depositions by oral examination (Rule 404), requests for inspection of documents and other property (Rule 407), and requests for admission (Rule 408).

(b) *Discovery conferences.* (1) The presiding officer may direct the participants in a proceeding or their representatives to appear for one or more conferences, either separately or as part of any other prehearing conference in the proceeding under Rule 601(a), for the purpose of scheduling discovery, identifying discovery issues, and resolving discovery disputes. Except as provided in paragraph (b)(2) of this section, the presiding officer, upon the conclusion of a conference, will issue an order stating any and all decisions made and agreements reached during the conference.

(2) The Chief Administrative Law Judge may, upon a showing of extraordinary circumstances, waive the requirement to issue an order under paragraph (b)(1) of this section.

(c) *Identification and certification of preparer.* Each response to discovery under this subpart must:

(1) Identify the preparer or person under whose direct supervision the response was prepared; and

(2) Be under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

(d) *Supplementation of responses.* (1) Except as otherwise provided by this paragraph, a participant that has responded to a request for discovery with a response that was complete when made is not under a continuing duty to supplement that response to include information later acquired.

(2) A participant must make timely amendment to any prior response if the

participant obtains information upon the basis of which the participant knows that the response was incorrect when made, or though correct when made is now incorrect in any material respect.

(3) A participant may be required to supplement a response by order of the presiding officer or by agreement of all participants.

(4) A participant may request supplementation of prior responses, if such request is permitted under the procedural schedule.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 466–A, 52 FR 35909, Sept. 24, 1987]

§ 385.404 Depositions during proceedings (Rule 404).

(a) *In general.* (1) A participant may obtain the attendance for a deposition by oral examination of any other participant, an employee or agent of that participant, or a person retained by that participant as a potential witness, by providing a notice of intent to depose.

(2) Any participant may obtain the attendance of a nonparticipant for a deposition by oral examination by obtaining a subpoena, in accordance with Rule 409. For purposes of this rule, a Commission decisional employee, as defined in Rule 2201(a), is a nonparticipant.

(b) *Notice.* (1) A participant seeking to take a deposition under this section must provide to all other participants written notice reasonably in advance of the deposition. The notice must be filed with the Commission and served on all participants. An original must be served on each person whose deposition is sought.

(2) A notice of intent under this section must:

(i) State the time and place at which the deposition will be taken, the name and address of each person to be examined, and the subject matter of the deposition; and

(ii) If known at the time that the deposition is noticed that its purpose is to preserve testimony, state that the deponent will be unable to testify at the hearing.

(3)(i) A notice of intent under this section or a subpoena under Rule 409 may name as the deponent a public or private corporation or a partnership or association or a governmental agency, and describe with reasonable particularity the matters on which examination is requested. Such organization must, in response, designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and set forth, for each person designated, the matters on which that person will testify.

(ii) A subpoena must advise any organization that is named as a deponent but is not a participant that it has a duty to designate a person to testify. Any person designated under this section must testify on matters known by, or reasonably available to, the organization.

(c) *Taking of deposition.* (1) Each deponent must swear to or affirm the truth of the testimony given before any testimony is taken.

(2) Any participant may examine and cross-examine a deponent.

(3) Any objection made during the examination must be noted by the officer taking the deposition. After the objection is noted, the deponent must answer the question, unless a claim of privilege is asserted or the presiding officer rules otherwise.

(4) The deposition must be transcribed verbatim.

(d) *Nonstenographic means of recording; telephonic depositions.* Testimony at a deposition may be recorded by means other than stenography if all participants so stipulate or if the presiding officer, upon motion, so orders. Such stipulation or order shall designate the person before whom the deposition. will be taken, and the manner in which the deposition will be preserved, filed, and certified. Depositions may also be taken by telephone, if all participants so stipulate or the presiding officer, upon motion, orders.

(e) *Officer taking deposition.* Depositions must be taken before an officer authorized to administer oaths or affirmations by the laws of the United States or of the place where the deposition is held. A deposition may not be taken before an officer who is a relative or employee or attorney of any of the participants, or is financially or in any other way interested in the action.

(f) *Submission to deponent.* (1) Unless examination is waived by the deponent, the transcription of the deposition must be submitted to the deponent for examination.

(2) If the deponent requests any changes in form or substance, the officer must enter the changes on the deposition transcript with a statement of the witness' reasons for the changes. The deponent must sign the deposition within 30 days after submittal to the deponent, unless the participants by stipulation waive the signing or the deponent cannot or will not sign. By signing the deposition the deponent certifies that the transcript is a true record of the testimony given.

(3) The officer who took the deposition must sign any deposition not signed by the deponent in accordance with this section and must state on the record that the signature is waived or that the deponent cannot or will not sign, accompanied by any reason given for a deponent's refusal to sign. If the officer complies with this paragraph, a deposition that is unsigned by the deponent may be used as though signed, unless the presiding officer rules otherwise.

(g) *Certification and copies.* (1) The officer must certify on the transcript of the deposition that the deponent swore to or affirmed the truth of the testimony given and the deposition transcript is a true record of the testimony given by the deponent. The officer must provide the participant conducting the deposition with a copy of the transcription.

(2) Documents and things produced for inspection during the examination of the witness will, upon the request of a participant, be marked for identification and annexed to the deposition and the officer will certify the document or thing as the original offered during the deposition, or as a true and correct copy of the original offered.

(3) Copies of the transcript of a deposition may be purchased from the reporting service that made the transcription, subject to protections established by the presiding officer.

§ 385.405 Use of depositions (Rule 405).

(a) *In general.* During a hearing, the hearing of a motion, or an interlocutory proceeding under Rule 715, any part or all of a deposition taken pursuant to Rule 404, so far as admissible as though the witness were then present and testifying, may be used against any participant who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the provisions of this section.

(1) If the deponent is a witness at a hearing, any participant may use the deposition of that witness at the time of the witness' examination to contradict, impeach, or complete the testimony of that witness.

(2) The deposition of a participant or of any person who, at the time of taking the deposition, was an officer, director, or managing agent of a participant, or a person designated under Rule 404(b)(3) to testify on behalf of a participant may be used by another participant for any purpose.

(3) The deposition of any witness, whether or not a participant, may be used by a participant for any purpose, if the presiding officer 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 participant offering the deposition is unable after the exercise of due diligence to procure the attendance of the witness by subpoena; or

(iv) Exceptional circumstances make it necessary in the interest of fairness with due regard to the importance of presenting the witness in open hearing, to allow use of the deposition.

(4) If only part of a deposition is offered in evidence by a participant, a participant may require the introduction of any other part which ought, in fairness, to be considered with the part introduced, and any adverse participant may introduce any other part.

(b) *Objections to admissibility.* No part of a deposition will constitute a part of the record in the proceeding, unless received in evidence by the Commission or presiding officer. Subject to paragraph (c) of this section, a participant may object to receiving into evidence all or part of any deposition for any reason that the evidence would be excluded if the deponent were present and testifying.

(c) *Effect of errors and irregularities in depositions.* (1) Any objection to the taking of a deposition based on errors or irregularities in notice of the deposition is waived, unless written objection is promptly served on the participant giving the notice.

(2) Any objection to the taking of a deposition based on the disqualification of the officer before whom it is to be taken is waived, unless the objection is made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) Any objection to the competency of the witness or the competency, relevancy, or materiality of testimony is not waived by failure to make the objection before or during the taking of the deposition, unless the basis for the objection might have been removed if the objection had been presented at the taking of the deposition.

(4) Any objection to errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions and answers, in the oath or affirmation, or in the conduct of participants, and errors of any kind that might be obviated, removed or cured if presented at the deposition, is waived unless objection is made at the taking of the deposition.

(5) Any objection based on errors or irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer is waived, unless the objection is made with reasonable promptness after the defect is, or with due diligence should have been, ascertained.

§ 385.406 Data requests, interrogatories, and requests for production of documents or things (Rule 406).

(a) *Availability.* Any participant may serve upon any other participant a written request to supply information, such as responses to data requests and interrogatories, or copies of documents.

(b) *Procedures.* (1) A request under this section must identify with specificity the information or material sought and will specify a reasonable time within which the matter sought must be furnished.

(2) Unless provided otherwise by the presiding officer, copies of any discovery request must be served upon the presiding officer and on all participants to the proceeding.

(3) Each discovery request must be answered separately and fully in writing.

(4) Responses to discovery requests are required to be served only on the participant requesting the information, Commission trial staff, and any other participant that specifically requests service. The presiding officer may direct that a copy of any responses be furnished to the presiding officer. Responses must be served within the time limit specified in the request or otherwise provided by the presiding officer.

(5) If the matter sought is not furnished, the responding participant must provide, in accordance with Rule 410, written explanation of the specific grounds for the failure to furnish it.

§ 385.407 Inspection of documents and other property (Rule 407).

(a) *Availability.* On request, the presiding officer may order any other participant to:

(1) Permit inspection and copying of any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, computer tapes or other compilations of data from which information can be obtained) that are not privileged and that are in the possession, custody, or control of the participant to whom the order is directed;

(2) Permit inspection, copying or photographing, testing, or sampling of any tangible thing that is not privileged and that is in the possession, custody, or control of the participant to whom the order is directed; and

(3) Permit entry upon or into designated land, buildings, or other property in the possession, custody, or control of the participant to whom the order is directed for the purpose of inspecting, measuring, surveying, or photographing the property or any activity or operation that is not privileged and that is conducted in or upon the property.

(b) *Procedures.* A request for inspection of documents or property under this section must describe with reasonable particularity the documents or other property to which access is sought. The request must also specify a reasonable time, place, and manner of making the inspection.

§ 385.408 Admissions (Rule 408).

(a) *General rule.* A participant may serve upon any other participant a written request for admission of the genuineness of any document or the truth of any matter of fact. The request must be served upon all participants.

(b) *Procedures.* (1) Any request for admission of the genuineness of a document must be accompanied by a legible copy of the document, unless it was previously furnished, is in the possession of the recipient of the request, or is readily available for inspection and copying.

(2) The truth of specified matters of fact or the genuineness of the documents described in a request are deemed admitted unless, within 20 days after service of the request or any longer period designated in the request, the participant that receives the request serves upon the requesting participant a written answer or objection addressed to the matters in the request.

(3) An answer must specifically admit or deny the truth of the matters in the request or set forth in detail the reasons why the answering participant cannot admit or deny the truth of each matter. A denial of the truthfulness of the requested admission must fairly discuss the substance of the requested admission and, when good faith requires that a participant qualify the answer or deny only a part of the matter of which an admission is requested, the participant must specify that which is true and qualify or deny the remainder. The answer must be served on all participants.

(c) *Effect of admission.* Any admission made by a participant under this section is for the purpose of the pending proceeding only, is not an admission for any other purpose, and may not be used against the participant in any other proceeding. Any matter admitted under this rule is conclusively established unless the presiding officer, on motion, permits withdrawal or amendment of the admission. The presiding officer may permit withdrawal or amendment of an admission, if the presiding officer finds that the presentation of the merits of the proceeding will be promoted and the participant who obtained the admission has failed to satisfy the presiding officer that withdrawal or amendment of the admission will prejudice that participant in maintaining his position in the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 466–A, 52 FR 35909, Sept. 24, 1987]

§ 385.409 Subpoenas (Rule 409).

(a) *Issuance.* On request, the presiding officer may issue a subpoena for the attendance of a witness at a deposition or hearing or for the production of documents. A request for a subpoena must be served on all participants.

(b) *Service and return.* A subpoena issued under this section must be served by personal service, substituted service, registered mail, or certified mail. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party or an employee of a party and is at least 18 years of age. If personal service is made by any person other than a United States marshal or deputy marshal, return of service must be accompanied by an affidavit to the Secretary or the presiding officer and must state the time and manner of service of the subpoena.

(c) *Fees.* Fees paid to subpoenaed persons will be in accordance with Rule 510(e).

(d) *Objections.* Objections to subpoenas must be made in accordance with Rule 410.

§ 385.410 Objections to discovery, motions to quash or to compel, and protective orders (Rule 410).

(a) *Objection to discovery*—(1) *Notice of objections or motion to quash.* A participant, or a recipient of a subpoena, who does not intend to comply with a discovery request must notify in writing the participant seeking discovery within a reasonable time in advance of the

date on which a response or other action in conformance with the discovery request is due. A recipient of a subpoena may either provide a notice of objection or file a motion to quash.

(2) *Objections to production of documents.* (i) Unless an objection to discovery under this section is based on the ground that production would impose an undue burden, the objecting participant must provide the participant seeking discovery with a schedule of items withheld and a statement of:

(A) The character and specific subject matter of each item; and

(B) The specific objection asserted for each item.

(ii) If an objection under this section is based on the ground that production of the requested material would impose an undue burden, the objecting participant must provide the participant seeking discovery with a description of the approximate number of documents that would have to be produced and a summary of the information contained in such documents.

(3) *Objections to other discovery requests.* If the discovery to which objection is made is not a request for documents, the objection must clearly state the grounds on which the participant bases its objection.

(4) *Objections to compile or process information.* The fact that information has not been compiled or processed in the form requested is not a basis for objection unless the objection presents grounds for limiting discovery under paragraph (c) of this section.

(b) *Motions to compel.* Any participant seeking discovery may file a motion to compel discovery, if:

(1) A participant to whom a data request is made or upon whom an interrogatory is served under Rule 406 fails or refuses to make a full, complete, and accurate response;

(2) A person named in a notice of intent to take a deposition or a subpoena fails or refuses to appear for the deposition;

(3) An organization named in a notice of intent to take a deposition fails or refuses to designate one or more persons to testify on its behalf under Rule 404(b)(3);

(4) A deponent fails or refuses to answer fully, completely, and accurately a question propounded or to sign the transcript of the testimony as required by Rule 404(f)(2);

(5) A participant upon whom a request for admissions is served fails or refuses to respond to the request in accordance with Rule 408(b); or

(6) A participant upon whom an order to produce or to permit inspection or entry is served under Rule 407 fails or refuses to comply with that order.

(c) *Orders limiting discovery.* A presiding officer may, by order, deny or limit discovery or restrict public disclosure of discoverable matter in order to:

(1) Protect a participant or other person from undue annoyance, burden, harassment or oppression;

(2) Prevent undue delay in the proceeding;

(3) Preserve a privilege of a participant, person, or governmental agency;

(4) Prevent a participant from requiring another participant to provide information which is readily available to the requesting participant from other sources with a reasonable expenditure of effort given the requesting participant's position and resources;

(5) Prevent unreasonably cumulative or duplicative discovery requests; or

(6) Provide a means by which confidential matters may be made available to participants so as to prevent public disclosure. Material submitted under a protective order may nevertheless be subject to Freedom of Information Act requests and review.

(d) *Privilege*—(1) *In general.* (i) In the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities.

(ii) A presiding officer may not quash a subpoena or otherwise deny or limit discovery on the ground of privilege unless the presiding officer expressly finds that the privilege claimed is applicable. If a presiding officer finds that a qualified privilege has been established, the participant seeking discovery must make a showing sufficient to warrant discovery despite the qualified privilege.

(iii) A presiding officer may issue a protective order under Rule 410(c) to deny or limit discovery in order to preserve a privilege of a participant, person, or governmental agency.

(2) *Of the Commission.* (i) If discovery under this subpart would require the production of Commission information, documents, or other matter that might fall within a privilege, the Commission trial staff must identify in writing the applicable privilege along with the matters claimed to be privileged or the individuals from whom privileged information is sought, to the presiding officer and the parties.

(ii) If the presiding officer determines that the privilege claimed for the Commission is applicable, the Commission information, documents, or other matter may not be produced. If the presiding officer determines that no privilege is applicable, that a privilege is waived, or that a qualified privilege is overcome, the presiding officer will certify the matter to the Commission in accordance with Rule 714. Certification to the Commission under this paragraph must describe the material to be disclosed and the reasons which, in the presiding officer's view, justify disclosure. The information will not be disclosed unless the Commission affirmatively orders the material disclosed.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 466–A, 52 FR 35910, Sept. 24, 1987]

§ 385.411 Sanctions (Rule 411).

(a) *Disobedience of order compelling discovery.* If a participant or any other person fails to obey an order compelling discovery, the presiding officer may, after notice to the participant or person and an opportunity to be heard, take one or more of the following actions, but may not dismiss or otherwise terminate the proceeding:

(1) Certify the matter to the Commission with a recommendation for dismissal or termination of the proceeding, termination of that participant's right to participate in the proceeding, institution of civil action, or any other sanction available to the Commission by law;

(2) Order that the matters to which the order compelling discovery relates are taken as established for the purposes of the proceeding in accordance with the position of the participant obtaining the order;

(3) Order that a participant be precluded from supporting or opposing such positions or introducing such matters in evidence as the presiding officer designates;

(4) Order that all or part of any pleading by a participant be struck or that the proceeding or a phase of the proceeding be stayed until the order compelling discovery is obeyed; and

(5) Recommend to the Commission that it take action under Rule 2102 against a representative of the participant if the presiding officer believes that the representative has engaged in unethical or improper professional conduct.

(b) *Against representative of a participant.* If the person disobeying an order compelling discovery is an agent, officer, employee, attorney, partner, or director of a participant, the presiding officer may take any of the actions described in paragraph (a) against that participant.

Subpart E—Hearings

§ 385.501 Applicability (Rule 501).

This subpart applies to any proceeding, or part of a proceeding, that the Commission or the Secretary under delegated authority sets for a hearing to be conducted in accordance with this subpart.

[Order 492, 53 FR 16067, May 5, 1988]

§ 385.502 Initiation of hearing (Rule 502).

(a) *Notice or order initiating hearing.* A hearing under this subpart will be initiated by:

(1) Order of the Commission;

(2) Notice by the Secretary at the direction of the Commission or under delegated authority; or

(3) Order of the Oil Pipeline Board.

(b) *Contents of notice or order initiating hearing.* Any order or notice under paragraph (a) of this section will set forth:

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

(2) The nature of the proceeding;

(3) The final date for the filing of interventions, if the dates were not fixed by an earlier notice;

(4) The presiding officer, if designated at that time; and

(5) The date, time, and location of the hearing or prehearing conference, if known; and

(6) Any other appropriate matter.

(c) *Consolidation, severance, and phasing.* Any notice or order under this section may direct consolidation of proceedings, phasing of a proceeding, or severance of proceedings or issues in a proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended at Order 492, 53 FR 16067, May 5, 1988]

§ 385.503 Consolidation, severance and extension of close-of-record date by Chief Administrative Law Judge (Rule 503).

(a) The Chief Administrative Law Judge may, on motion or otherwise, order proceedings pending under this subpart consolidated for hearing on, or settlement of, any or all matters in issue in the proceedings, or order the severance of proceedings or issues in a proceeding. The order may be appealed to the Commission pursuant to Rule 715.

(b) If the Commission orders that the presiding officer close the record in any proceeding by a specific date, the Chief Administrative Law Judge may, upon motion or otherwise, extend the close-of-record date for good cause. This staff action may be appealed to the Commission only under Rule 1902.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 437, 50 FR 48183, Nov. 22, 1985; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.504 Duties and powers of presiding officers (Rule 504).

(a) *Duties.* (1) It shall be the duty of the presiding officer to conduct a fair and impartial hearing and to determine the matter justly under the law.

(2) The presiding officer will cause all appearances during a hearing to be entered on the record with a notation in whose behalf each appearance is made.

(3) The presiding officer will establish the order of presentation of the cases of all participants in the hearing.

(4) The presiding officer will assure that the taking of evidence and subsequent matters proceed with all reasonable diligence and with the least delay practicable.

(5) The presiding officer will prepare and certify an initial decision or a revised initial decision, whichever is appropriate, to the Commission as provided in Subpart G of this part.

(b) *Powers.* Except as otherwise ordered by the Commission or provided by law, the presiding officer may:

(1) Schedule and otherwise regulate the course of the hearing;

(2) Recess, reconvene, postpone, or adjourn the hearing;

(3) Administer oaths;

(4) Rule on and receive evidence;

(5) Cause Discovery to be conducted;

(6) Exercise powers granted a presiding officer under Subpart D;

(7) Hold conferences of the participants, as provided in Subpart F of this part, including for the purpose of considering the use of alternative dispute resolution procedures;

(8) Rule on, and dispose of, procedural matters, including oral or written motions;

(9) Summarily dispose of a proceeding or part of a proceeding, as provided in Rule 217;

(10) Certify a question to the Commission, as provided in Rule 714;

(11) Permit or deny appeal of an interlocutory ruling, as provided in Rule 715;

(12) Rule on motions to intervene, as provided in Rule 214;

(13) Separate any issue or group of issues from other issues in a proceeding and treat such issue or group of issues as a separate phase of the proceeding;

(14) Maintain order, as follows:

(i) Ensure that any disregard by any person of rulings on matters of order and procedure is noted on the record or, if appropriate, is made the subject of a special written report to the Commission;

(ii) In the event any person engages in disrespectful, disorderly, or contumacious language or conduct in connection with the hearing, recess the hearing for such time as necessary to regain order;

(iii) Request that the Commission take appropriate action, including removal from the proceeding, against a participant or counsel, if necessary to maintain order.

(15) Modify any time period, if such modification is in the interest of justice and will result in no undue prejudice to any participant;

(16) Limit the number of expert witnessess who may testify on any issue, consistent with the rule against repetitious testimony in Rule 509(a);

(17) Limit the number of persons, other than staff, representing a similar interest who may examine witnesses or make or argue motions or objections;

(18) Require; or authorize the admission of, further evidence upon any issue at any time before the close of the evidentiary record;

(19) Rule on motions for reconsideration of an initial decision as provided in Rule 717;

(20) Take any other action necessary or appropriate to the discharge of the duties of a presiding officer, consistent with applicable law and policy.

(c) *Disqualification*. (1) A presiding officer may withdraw from a proceeding, if that officer believes himself or herself disqualified.

(2) The Commission may, for good cause, order the removal of any presiding officer from a proceeding, on motion filed with the Commission or otherwise.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 466, 52 FR 6970, Mar. 6, 1987; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.505 Right of participants to present evidence (Rule 505).

Consistent with the provisions of this part, a participant has the right to present such evidence, including rebuttal evidence, to make such objections and arguments, and to conduct such cross-examination, as may be necessary to assure true and full disclosure of the facts.

§ 385.506 Examination of witnesses during hearing (Rule 506).

(a) *Prepared written direct and rebuttal testimony*. Unless the presiding officer orders such testimony to be presented orally, direct and rebuttal testimony of a witness in a hearing must be prepared and submitted in written form, as required by Rule 507. Any witness submitting written testimony must be available for cross-examination, as provided in this subpart.

(b) *Oral testimony during hearing*. Oral examination of a witness in a hearing must be conducted under oath and in the presence of the presiding officer, with opportunity for all participants to question the witness to the extent consistent with Rules 504(b)(17), 505, and 509(a).

§ 385.507 Prepared written testimony (Rule 507).

(a) *Offered as an exhibit*. The prepared written testimony of any witness must be offered as an exhibit. The presiding officer will allow a reasonable period of time for the preparation of such written testimony.

(b) *Time for filing*. Any prepared written testimony must be filed and served within the time provided by the presiding officer, in no case later than 10 days before the session of the hearing at which such exhibit is offered, unless a shorter period is permitted under paragraph (c) of this section.

(c) *Late-filed testimony*. (1) If all participants in attendance at the hearing agree, the 10-day requirement for filing any written testimony under paragraph (b) of this section is waived.

(2) The presiding officer may permit the introduction of any prepared written testimony without compliance with paragraph (b) of this section, if the presiding officer determines that the introduction of the testimony:

(i) Is necessary for a full disclosure of the facts or is warranted by any other showing of good cause; and

(ii) Would not be unduly prejudicial to any participant.

(3) If any written testimony is served and filed within the 10 day period provided in paragraph (b) of this section, the presiding officer will provide the participants in attendance with a reasonable opportunity to inspect the testimony.

(d) *Form; authentication*. Prepared written testimony must have line numbers inserted in the left-hand margin of each page and must be authenticated by an affidavit of the witness.

§ 385.508 Exhibits (Rule 508).

(a) *General rules.* (1) Except as provided in paragraphs (b) through (e) of this section, any material offered in evidence, other than oral testimony, must be offered in the form of an exhibit.

(2) Any participant who seeks to have an exhibit admitted into evidence must provide one copy of the exhibit to the presiding officer and two copies to the reporter, not later than the time that the exhibit is marked for identification.

(3) The presiding officer will cause each exhibit offered by a participant to be marked for identification.

(b) *Designation and treatment of matter sought to be admitted.* (1) If a document offered as an exhibit contains material not offered as evidence, the participant offering the exhibit must:

(i) Plainly designate the matter offered as evidence; and

(ii) Segregate and exclude the material not offered in evidence, to the extent practicable.

(2) If, in a document offered as an exhibit, material not offered in evidence is so extensive as to unnecessarily encumber the record, the material offered in evidence will be marked for identification. The remainder of the document will be considered not to have been offered in evidence.

(3) Copies of any document offered as an exhibit under paragraph (b)(2) of this section must be delivered to the other participants appearing at the hearing by the participant offering the exhibit in evidence. The participants will be offered an opportunity to inspect the entire document and to offer as an exhibit in evidence, in like manner, any other portions of the document.

(c) *Public document items by reference.* If all or part of a public document is offered in evidence and the participant offering the document shows that all or the pertinent part of the document, is reasonably available to the public, the document need not be produced or marked for identification but may be offered in evidence as a public document by identifying all or the relevent part of the document to be offered.

(d) *Official notice of facts.* (1) A presiding officer may take official notice of any matter that may be judicially noticed by the courts of the United States, or of any matter about which the Commission, by reason of its functions, is expert.

(2) The presiding officer must afford any participant, making a timely request, an opportunity to show the contrary of an officially noticed fact.

(3) Any participant requesting official notice of facts after the conclusion of the hearing must set forth reasons to justify the failure to request official notice prior to the close of the hearing.

(e) *Stipulations.* (1) Participants in a proceeding may stipulate to any relevant matters of fact or the authenticity of any relevant documents.

(2) A stipulation may be received in evidence at the hearing and, if received in evidence, the stipulation is binding on the stipulating participants with respect to any matter stipulated.

(3) A stipulation may be written or made orally at the hearing.

§ 385.509 Admissibility of evidence (Rule 509).

(a) *General standard.* The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material. The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.

(b) *Ruling on evidence.* (1) The presiding officer will rule on the admissibility of any evidence offered.

(2) If any participant objects to the admission or exclusion of evidence, the participant must state briefly the grounds for the objection.

(3) The presiding officer will not permit formal exceptions to any ruling on evidence. This prohibition against formal exceptions does not preclude a participant from raising, as an issue, the validity of any ruling on evidence later in the proceeding, consistent with Rule 711.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 225–A, 47 FR 35956, Aug. 18, 1982]

§ 385.510 Miscellaneous provisions (Rule 510).

(a) *Transcript.* (1) Any statement made at a hearing session will be transcribed in a verbatim report, with nothing omitted except as directed by the presiding officer on the record. A statement at a hearing may not occur off-the-record, except as otherwise directed by the presiding officer.

(2) After the closing of a record, changes in the transcript are not permitted, except as provided in paragraph (b) of this section.

(b) *Transcript corrections.* (1) Any correction in the transcript of a hearing may be made only if the correction conforms the transcript to the evidence presented at the hearing and to the truth.

(2) A transcript correction may be incorporated in the record, in accordance with a ruling of the presiding officer, if:

(i) Agreed to by all participants and approved by the presiding officer; or

(ii) The presiding officer requests submittal of transcript corrections and rules on the corrections submitted.

(3) Transcript corrections may be made at any time during the hearing or after the close of evidence, as the presiding officer determines appropriate, but only if the correction is made not less than 10 days before the time for filing final briefs.

(c) *Close of evidentiary record.* The presiding officer will designate the time at which the evidentiary record is closed. Evidence may not be added to the evidentiary record after the record is closed, unless the record is reopened under Rule 716.

(d) *Copies of exhibits and motions to participants.* Except as otherwise provided in this subpart, copies of exhibits and motions will be provided at the hearing to any participants who have not been provided copies.

(e) *Fees of subpoenaed witnesses.* (1) Any witnesses subpoenaed by the Commission must be paid the same fees and mileage provided for similar services in the district courts of the United States.

(2) Any fees and mileage paid to a subpoenaed witness under paragraph (e)(1) of this section will be paid by the Commission, unless the witness is subpoenaed at the instance of a party.

(3) If the witness is subpoenaed at the instance of a party, any fees and mileage paid to the witness under paragraph (e)(1) of this section must be paid by the party. The Commission, before issuing any subpoena at the instance of the party, may require the party to deposit an amount adequate to cover the witness probable fees and mileage under paragraph (e)(1) of this section. The deposit will be refunded when the party pays the witness in full.

(f) *Offers of proof.* (1) Any offer of proof made in connection with a ruling of the presiding officer rejecting or excluding proffered oral testimony must consist of a statement of the substance of the evidence which the participant claims would be adduced by the testimony.

(2) If any excluded evidence is in the form of an exhibit or is a public document, a copy of such exhibit will constitute the offer of proof or the public document will be specified for identification.

Subpart F—Conferences, Settlements, and Stipulations

§ 385.601 Conferences (Rule 601).

(a) *Convening.* The Commission or other decisional authority, upon motion or otherwise, may convene a conference of the participants in a proceeding at any time for any purpose related to the conduct or disposition of the proceeding, including submission and consideration of offers of settlement or the use of alternative dispute resolution procedures.

(b) *General requirements.* (1) The participants in a proceeding must be given due notice of the time and place of a conference under paragraph (a) of this section and of the matters to be addressed at the conference. Participants attending the conference must be prepared to discuss the matters to be addressed at the conference, unless there is good cause for a failure to be prepared.

(2) Any person appearing at the conference in a representative capacity must be authorized to act on behalf of that person's principal with respect to

matters to be addressed at the conference.

(3) If any party fails to attend the conference such failure will constitute a waiver of all objections to any order or ruling arising out of, or any agreement reached at, the conference.

(c) *Powers of decisional authority at conference.* (1) The decisional authority, before which the conference is held or to which the conference reports, may dispose, during a conference, of any procedural matter on which the decisional authority is authorized to rule and which may appropriately and usefully be disposed of at that time.

(2) If, in a proceeding set for hearing under subpart E, the presiding officer determines that the proceeding would be substantially expedited by distribution of proposed exhibits, including written prepared testimony and other documents, reasonably in advance of the hearing session, the presiding officer may, with due regard for the convenience of the participants, direct advance distribution of the exhibits by a prescribed date. The presiding officer may also direct the preparation and distribution of any briefs and other documents which the presiding officer determines will substantially expedite the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.602 Submission of settlement offers (Rule 602).

(a) *Applicability.* This section applies to written offers of settlement filed in any proceeding pending before the Commission or set for hearing under subpart E. For purposes of this section, the term ''offer of settlement'' includes any written proposal to modify an offer of settlement.

(b) *Submission of offer.* (1) Any participant in a proceeding may submit an offer of settlement at any time.

(2) An offer of settlement must be filed with the Secretary. The Secretary will transmit the offer to:

(i) The presiding officer, if the offer is filed after a hearing has been ordered under subpart E of this part and before the presiding officer certifies the record to the Commission; or

(ii) The Commission.

(3) If an offer of settlement pertains to multiple proceedings that are in part pending before the Commission and in part set for hearing, any participant may by motion request the Commission to consolidate the multiple proceedings and to provide any other appropriate procedural relief for purposes of disposition of the settlement.

(c) *Contents of offer.* (1) An offer of settlement must include:

(i) The settlement offer;

(ii) A separate explanatory statement;

(iii) Copies of, or references to, any document, testimony, or exhibit, including record citations if there is a record, and any other matters that the offerer considers relevant to the offer of settlement; and

(2) If an offer of settlement pertains to a tariff or rate filing, the offer must include any proposed change in a form suitable for inclusion in the filed rate schedules or tariffs, and a number of copies sufficient to satisfy the filing requirements applicable to tariff or rate filings of the type at issue in the proceeding.

(d) *Service.* (1) A participant offering settlement under this section must serve a copy of the offer of settlement:

(i) On every participant in accordance with Rule 2010;

(ii) On any person required by the Commission's rules to be served with the pleading or tariff or rate schedule filing, with respect to which the proceeding was initiated.

(2) The participant serving the offer of settlement must notify any person or participant served under paragraph (d)(1) of this section of the date on which comments on the settlement are due under paragraph (f) of this section.

(e) *Use of non-approved offers of settlement as evidence.* (1) An offer of settlement that is not approved by the Commission, and any comment on that offer, is not admissible in evidence against any participant who objects to its admission.

(2) Any discussion of the parties with respect to an offer of settlement that is not approved by the Commission is not subject to discovery or admissible in evidence.

(f) *Comments.* (1) A comment on an offer of settlement must be filed with

the Secretary who will transmit the comment to the Commission, if the offer of settlement was transmitted to the Commission, or to the presiding officer in any other case.

(2) A comment on an offer of settlement may be filed not later than 20 days after the filing of the offer of settlement and reply comments may be filed not later than 30 days after the filing of the offer, unless otherwise provided by the Commission or the presiding officer.

(3) Any failure to file a comment constitutes a waiver of all objections to the offer of settlement.

(4) Any comment that contests an offer of settlement by alleging a dispute as to a genuine issue of material fact must include an affidavit detailing any genuine issue of material fact by specific reference to documents, testimony, or other items included in the offer of settlement, or items not included in the settlement, that are relevant to support the claim. Reply comments may include responding affidavits.

(g) *Uncontested offers of settlement.* (1) If comments on an offer are transmitted to the presiding officer and the presiding officer finds that the offer is not contested by any participant, the presiding officer will certify to the Commission the offer of settlement, a statement that the offer of settlement is uncontested, and any hearing record or pleadings which relate to the offer of settlement.

(2) If comments on an offer of settlement are transmitted to the Commission, the Commission will determine whether the offer is uncontested.

(3) An uncontested offer of settlement may be approved by the Commission upon a finding that the settlement appears to be fair and reasonable and in the public interest.

(h) *Contested offers of settlement.* (1)(i) If the Commission determines that any offer of settlement is contested in whole or in part, by any party, the Commission may decide the merits of the contested settlement issues, if the record contains substantial evidence upon which to base a reasoned decision or the Commission determines there is no genuine issue of material fact.

(ii) If the Commission finds that the record lacks substantial evidence or that the contesting parties or contested issues can not be severed from the offer of settlement, the Commission will:

(A) Establish procedures for the purpose of receiving additional evidence before a presiding officer upon which a decision on the contested issues may reasonably be based; or

(B) Take other action which the Commission determines to be appropriate.

(iii) If contesting parties or contested issues are severable, the contesting parties or uncontested portions may be severed. The uncontested portions will be decided in accordance with paragraph (g) of this section.

(2)(i) If any comment on an offer of settlement is transmitted to the presiding officer and the presiding officer determines that the offer is contested, whole or in part, by any participant, the presiding officer may certify all or part of the offer to the Commission. If any offer or part of an offer is contested by a party, the offer may be certified to the Commission only if paragraph (h)(2)(ii) or (iii) of this section applies.

(ii) Any offer of settlement or part of any offer may be certified to the Commission if the presiding officer determines that there is no genuine issue of material fact. Any certification by the presiding officer must contain the determination that there is no genuine issue of material fact and any hearing record or pleadings which relate to the offer or part of the offer being certified.

(iii) Any offer of settlement or part of any offer may be certified to the Commission, if:

(A) The parties concur on a motion for omission of the initial decision as provided in Rule 710, or, if all parties do not concur in the motion, the presiding officer determines that omission of the initial decision is appropriate under Rule 710(d), and

(B) The presiding officer determines that the record contains substantial evidence from which the Commission may reach a reasoned decision on the merits of the contested issues.

(iv) If any contesting parties or contested issues are severable, the uncontested portions of the settlement may be certified immediately by the presiding officer to the Commission for decision, as provided in paragraph (g) of this section.

(i) *Reservation of rights.* Any procedural right that a participant has in the absence of an offer of settlement is not affected by Commission disapproval, or approval subject to condition, of the uncontested portion of the offer of settlement.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 541, 57 FR 21734, May 22, 1992; Order 578, 60 FR 19505, Apr. 19, 1995]

§ 385.603 Settlement of negotiations before a settlement judge (Rule 603).

(a) *Applicability.* This section applies to any proceeding set for hearing under subpart E of this part and to any other proceeding in which the Commission has ordered the appointment of a settlement judge.

(b) *Definition.* For purposes of this section, *settlement judge* means the administrative law judge appointed by the Chief Administrative Law Judge to conduct settlement negotiations under this section.

(c) *Requests for appointment of settlement judges.* (1) Any participant may file a motion requesting the appointment of a settlement judge with the presiding officer, or, if there is no presiding officer for the proceeding, with the Commission.

(2) A presiding officer may request the Chief Administrative Law Judge to appoint a settlement judge.

(3) A motion under paragraph (c)(1) of this section may be acted upon at any time, and the time limitations on answers in Rule 213(d) do not apply.

(4) Any answer or objection filed after a motion has been acted upon will not be considered.

(d) *Commission order directing appointment of settlement judge.* The Commission may, on motion or otherwise, order the Chief Administrative Law Judge to appoint a settlement judge.

(e) *Appointment of settlement judge by Chief Administrative Law Judge.* The Chief Administrative Law Judge may appoint a settlement judge for any proceeding, if requested by the presiding officer under paragraph (c)(2) of this section or if the presiding officer concurs in a motion made under paragraph (c)(1) of this section.

(f) *Order appointing settlement judge.* The Chief Administrative Law Judge will appoint a settlement judge by an order, which specifies whether, and to what extent, the proceeding is suspended pending termination of settlement negotiations conducted in accordance with this section. The order may confine the scope of any settlement negotiations to specified issues.

(g) *Powers and duties of settlement judge.* (1) A settlement judge will convene and preside over conferences and settlement negotiations between the participants and assess the practicalities of a potential settlement.

(2)(i) A settlement judge will report to the Chief Administrative Law Judge or the Commission, as appropriate, describing the status of the settlement negotiations and evaluating settlement prospects.

(ii) In any such report, the settlement judge may recommend the termination or continuation of settlement negotiations conducted under this section.

(iii) The first report by the settlement judge will be made not later than 30 days after the appointment of the settlement judge. The Commission or the Chief Administrative Law Judge may order additional reports at any time.

(h) *Termination of settlement negotiations before a settlement judge.* Unless an order of the Commission directing the appointment of a settlement judge provides otherwise, settlement negotiations conducted under this section will terminate upon the order of the Chief Administrative Law Judge issued after consultation with the settlement judge.

(i) *Non-reviewability.* Any decision concerning the appointment of a settlement judge or the termination of any settlement negotiations is not subject to review by, appeal to, or rehearing by the presiding officer, Chief Administrative Law Judge, or the Commission.

(j) *Multiple settlement negotiations.* If settlement negotiations are terminated under paragraph (h) of this section, the Chief Administrative Law Judge may subsequently appoint a settlement judge in the same proceeding to conduct settlement negotiations in accordance with this section.

§ 385.604 Alternative means of dispute resolution (Rule 604).

(a) *Applicability.* (1) Participants may, subject to the limitations of paragraph (a)(2) of this section, use alternative means of dispute resolution to resolve all or part of any pending matter if the participants agree. The alternative means of dispute resolution authorized under subpart F of this part will be voluntary procedures that supplement rather than limit other available dispute resolution techniques.

(2) Except as provided in paragraph (a)(3) of this section, the decisional authority will not consent to use of an alternative dispute resolution proceeding if:

(i) A definitive or authoritative resolution of the matter is required for precedential value;

(ii) The matter involves or may bear upon significant questions of policy that require additional procedures before a final resolution may be made, and the proceeding would not likely serve to develop a recommended policy;

(iii) Maintaining established policies is of special importance;

(iv) The matter significantly affects persons or organizations who are not parties to the proceeding;

(v) A full public record of the proceeding is important, and a dispute resolution proceeding cannot provide a record; or

(vi) The Commission must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in the light of changed circumstances, and a dispute resolution proceeding would interfere with the Commission's fulfilling that requirement.

(3) If one or more of the factors outlined in paragraph (a)(2) of this section is present, alternative dispute resolution may nevertheless be used if the alternative dispute resolution proceeding can be structured to avoid the identified factor or if other concerns significantly outweigh the identified factor.

(4) A determination to use or not to use a dispute resolution proceeding under subpart F of this part is not subject to judicial review.

(5) Settlement agreements reached through the use of alternative dispute resolution pursuant to subpart F of this part will be subject to the provisions of Rule 602, unless the decisional authority, upon motion or otherwise, orders a different procedure.

(b) *Definitions.* For the purposes of subpart F of this part:

(1) *Alternative means of dispute resolution* means any procedure that is used, in lieu of an adjudication, to resolve issues in controversy, including but not limited to, settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination thereof;

(2) *Award* means any decision by an arbitrator resolving the issues in controversy;

(3) *Dispute resolution communication* means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or non-party participant. A written agreement to enter into a dispute resolution proceeding, or a final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

(4) *Dispute resolution proceeding* means any alternative means of dispute resolution that is used to resolve an issue in controversy in which a neutral may be appointed and specified parties participate;

(5) *In confidence* means information is provided:

(i) With the expressed intent of the source that it not be disclosed, or

(ii) Under circumstances that create a reasonable expectation on behalf of the source that the information will not be disclosed;

(6) *Issue in controversy* means an issue which is or is anticipated to be material to a decision in a proceeding before

the Commission and which is the subject of disagreement between participants who would be substantially affected by the decision or between the Commission and any such participants;

(7) *Neutral* means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;

(8) *Participants* in a dispute resolution proceeding that is used to resolve an issue in controversy in a proceeding involving an application for a license or exemption to construct, operate, and maintain a hydroelectric project pursuant to the Federal Power Act or the Public Utility Regulatory Policies Act shall include such state and federal agencies and Indian tribes as have statutory roles or a direct interest in such hydroelectric proceedings.

(c) *Neutrals.* (1) A neutral may be a permanent or temporary officer or employee of the Federal Government (including an administrative law judge), or any other individual who is acceptable to the participants to a dispute resolution proceeding. A neutral must have no official, financial, or personal conflict of interest with respect to the issues in controversy, except that a neutral who is not a government employee may serve if the interest is fully disclosed in writing to all participants and all participants agree.

(2) A neutral serves at the will of the participants, unless otherwise provided.

(3) Neutrals may be selected from among the Commission's administrative law judges or other employees, from rosters kept by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, the American Arbitration Association, or from any other source.

(d) *Submission of proposal to use alternative means of dispute resolution.* (1) The participants may at any time submit a written proposal to use alternative means of dispute resolution to resolve all or part of any matter in controversy or anticipated to be in controversy before the Commission.

(2) For matters set for hearing under Subpart E of this part, a proposal to use alternative means of dispute resolution other than binding arbitration must be filed with the presiding administrative law judge.

(3) A proposal to use binding arbitration must be filed with the Secretary for consideration by the Commission.

(4) For all other matters, a proposal to use alternative means of dispute resolution may be filed with the Secretary for consideration by the appropriate decisional authority.

(5) The appropriate decisional authority will issue an order, approving or denying, under the guidelines in Rule 604(a) (2) and (3), a proposal to use alternative means of dispute resolution. Denial of a proposal to use alternative dispute resolution will be in the form of an order and will identify the specific reasons for the denial. A proposal to use alternative dispute resolution is deemed approved unless an order denying approval is issued within 30 days after the proposal is filed.

(6) Any request to modify a previously-approved ADR proposal must follow the same procedure used for the initial approval.

(e) *Contents of proposal.* A proposal to use alternative means of dispute resolution must be in writing and include:

(1) A general identification of the issues in controversy intended to be resolved by the proposed alternative dispute resolution method,

(2) A description of the alternative dispute resolution method(s) to be used,

(3) The signatures of all participants or evidence otherwise indicating the consent of all participants; and

(4) A certificate of service pursuant to Rule 2010(h).

(f) *Monitoring the alternative dispute resolution proceeding.* The decisional authority may order reports on the status of the alternative dispute resolution proceeding at any time.

(g) *Termination of alternative dispute resolution proceeding.* (1) The decisional authority, upon motion or otherwise, may terminate any alternative dispute resolution proceeding under Rule 604 or 605 by issuing an order to that effect.

(2) A decision to terminate an alternative dispute resolution proceeding is not subject to judicial review.

[Order 578, 60 FR 19506, Apr. 19, 1995]

§ 385.605 Arbitration (Rule 605).

(a) *Authorization of arbitration.* (1) The participants may at any time submit a written proposal to use binding arbitration under the provisions of Rule 605 to resolve all or part of any matter in controversy, or anticipated to be in controversy, before the Commission.

(2) The proposal must be submitted as provided in Rule 604(d).

(3) The proposal must be in writing and contain the information required in Rule 604(e).

(4) An arbitration proceeding under this rule may be monitored and terminated as provided in Rule 604 (d) and (g).

(5) No person may be required to consent to arbitration as a condition of entering into a contract or obtaining a benefit. All interested parties must expressly consent before arbitration may be used.

(b) *Arbitrators.* (1) The participants to an arbitration proceeding are entitled to select the arbitrator.

(2) The arbitrator must be a neutral who meets the criteria of a neutral under Rule 604(c).

(c) *Authority of arbitrator.* An arbitrator to whom a dispute is referred under this section may:

(1) Regulate the course of and conduct arbitral hearings;

(2) Administer oaths and affirmations;

(3) Compel the attendance of witnesses and the production of evidence to the extent the Commission is authorized by law to do so; and

(4) Make awards.

(d) *Arbitration proceedings.* (1) The arbitrator will set a time and place for the hearing on the dispute and must notify the participants not less than 5 days before the hearing.

(2) Any participant wishing that there be a record of the hearing must:

(i) Prepare the record;

(ii) Notify the other participants and the arbitrator of the preparation of the record;

(iii) Furnish copies to all identified participants and the arbitrator; and

(iv) Pay all costs for the record, unless the participants agree otherwise or the arbitrator determines that the costs should be apportioned.

(3)(i) Participants to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing to the same extent as in a proceeding under Subpart E of this part;

(ii) The arbitrator may, with the consent of the participants, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each participant has an opportunity to participate.

(iii) The hearing must be conducted expeditiously and in an informal manner.

(iv) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(v) The arbitrator will interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(4) No interested person will make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the participants agree otherwise. If a communication is made in violation of this prohibition, the arbitrator will ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of such communication, the arbitrator may require the offending participant to show cause why the claim of the participant should not be resolved against the participant as a result of the improper conduct.

(5) The arbitrator will make the award within 30 days after the close of the hearing or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the participants and the arbitrator agree to some other time limit.

(e) *Arbitration awards.* (1)(i) The award in an arbitration proceeding under Subpart F of this chapter will include a brief, informal discussion of the factual and legal basis for the award.

(ii) The prevailing participants must file the award with the Commission, along with proof of service on all participants.

(2) The award in an arbitration proceeding will become final 30 days after it is filed, unless the award is vacated. The Commission, upon motion or otherwise, may extend the 30-day period for one additional 30-day period by issuing a notice of the extension before the end of the first 30-day period.

(3) A final award is binding on the participants to the arbitration proceeding.

(4) An award may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. The award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding or in any other arbitration proceeding.

(f) *Vacating an award.* (1) Within 10 days after the award is filed, any person may file a request with the Commission to vacate an arbitration award and must serve the request to vacate on all participants. Responses to such a request are due 10 days after the request is filed.

(2) Upon request or otherwise, the Commission may vacate any award issued under this rule before the award becomes final by issuing an order to that effect, in which case the award will be null and void.

(3) Rule 2202 regarding separation of functions applies with respect to a decision to vacate an arbitration award.

(4) If the Commission vacates an award under paragraph (f)(3) of this section, a party to the arbitration may, within 30 days of the action, petition the Commission for an award of attorney fees and expenses incurred in connection with the arbitration proceeding. The Commission will award the petitioning party those fees and expenses that would not have been incurred in the absence of the arbitration proceeding, unless the Commission finds that special circumstances make the award unjust. The fees and expenses awarded will be paid by the Commission.

(5) An arbitration award vacated under this paragraph will not be admissible in any proceeding relating to the issues in controversy with respect to which the award was made.

(6) A decision by the Commission to vacate an arbitration award is not subject to rehearing or judicial review.

[Order 578, 60 FR 19507, Apr. 19, 1995]

§ 385.606 Confidentiality in dispute resolution proceedings (Rule 606).

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless:

(1) All participants in the dispute resolution proceeding and the neutral consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make the communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that the testimony or disclosure is necessary to:

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential.

(b) A participant in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication, unless:

(1) All participants to the dispute resolution proceeding consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public;

(4) A court determines that the testimony or disclosure is necessary to:

(i) Prevent a manifest injustice;

(ii) Help establish a violation of law; or

(iii) Prevent harm to the public health and safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential; or

(5) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of the agreement or award.

(c) Any dispute resolution communication that is disclosed in violation of paragraphs (a) or (b) of this section shall not be admissible in any proceeding.

(d) The participants may agree to alternative confidential procedures for disclosures by a neutral. The participants must inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of this section that will govern the confidentiality of the dispute resolution proceeding. If the participants do not so inform the neutral, paragraph (a) of this section shall apply.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a participant regarding a dispute resolution communication, the participant will make reasonable efforts to notify the neutral and the other participants of the demand. Any participant who receives the notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information waives any objection to the disclosure.

(f) Nothing in Rule 606 prevents the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding. See sections 385.410 and 388.112 of this chapter.

(g) Paragraphs (a) and (b) of this section do not preclude disclosure of information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section do not prevent the gathering of information for research and educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the participants and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section do not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a participant in the proceeding, so long as the communication is disclosed only to the extent necessary to resolve the dispute.

(j) Nothing in this section precludes parties from seeking privileged treatment for documents under section 388.112 of this chapter.

(k) Where disclosure is authorized by this section, nothing in this section precludes use of a protective agreement or protective orders.

[Order 578, 60 FR 19508, Apr. 19, 1995]

Subpart G—Decisions

§ 385.701 Applicability (Rule 701).

This subpart applies to decisions in proceedings set for hearing under subpart E of this part, including any decision on a certified question, interlocutory appeal, or reopening, and to any decision on rehearing, except that:

(a) The provisions of this subpart, other than those relating to rehearing or reopening, do not apply to consideration of an offer of settlement; and

(b) This subpart applies to summary disposition only to the extent provided in Rule 217.

§ 385.702 Definitions (Rule 702).

For purposes of this subpart:

(a) *Initial decision* means any decision rendered by a presiding officer in accordance with Rule 708;

(b) *Final decision* means any decision referred to in Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.703 Contents of decisions (Rule 703).

Any decision in a proceeding is part of the record of that proceeding and will contain:

(a) A ruling on each exception presented and any finding or conclusion, with supporting reasons, on any material issue of fact, law, or discretion presented on the record; and

(b) The appropriate rule, order, sanction, relief, or a denial of any rule, order, motion, or relief.

§ 385.704 Rights of participants before initial decision (Rule 704).

After testimony is taken in a proceeding, or phase of a proceeding, the presiding officer will afford every participant an opportunity to:

(a) Submit written initial briefs in accordance with Rule 706, except that the presiding officer may provide an opportunity for oral argument in lieu of, or in addition to, initial briefs; and

(b) Submit written reply briefs in accordance with Rule 706, except that the presiding officer may:

(1) Provide an opportunity for oral reply argument in lieu of, or in addition to, reply briefs; or

(2) For good cause, deny opportunity for reply or limit the issues which may be addressed in any reply.

§ 385.705 Additional powers of presiding officer with respect to briefs (Rule 705).

(a) *Limitations on briefs.* A presiding officer, with due regard to the nature of the proceeding, may limit the length of any brief to be filed under Rule 706.

(b) *Additional briefs and other filings.* If appropriate, the presiding officer may permit or require briefs or other filings in addition to those provided for in Rule 706.

§ 385.706 Initial and reply briefs before initial decision (Rule 706).

(a) *When filed.* The presiding officer will prescribe a time for filing initial or reply briefs and for service of such briefs, giving due regard to the nature of the proceeding, the extent of the record, and the number and complexity of the issues. Unless the presiding officer otherwise orders, the time prescribed in a proceeding for filing briefs will be the same for all initial briefs and the same for all reply briefs.

(b) *Contents.* (1) An initial brief filed with the presiding officer must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings and conclusions, unless waived by the presiding officer;

(iii) Arguments in support of the participant's position; and

(iv) Any other matter requird by the presiding officer.

(2)(i) A reply brief filed with the presiding officer must be limited to a response to any arguments and issues raised in the initial briefs.

(ii) The presiding officer may impose limits on the reply brief in addition to any prescribed under paragraph (b)(2)(i) of this section.

(c) *Form.* (1) An exhibit admitted in evidence or marked for identification in the record may not be reproduced in the brief, but may be reproduced, within reasonable limits, in an appendix to the brief. Any pertinent analysis of an exhibit may be included in a brief.

(2) If a brief exceeds 20 pages, the brief must be accompanied by a table of contents and of points made, including page references, and an alphabetical list of citations, with page references.

(d) *Record.* All initial and reply briefs will accompany the record and be available to the Commission and the presiding officer for consideration in deciding the case.

§ 385.707 Oral argument before initial decision (Rule 707).

(a) *Procedure.* The presiding officer will designate the order of any oral argument to be held, set a time limit on each argument, and make any other procedural rulings.

(b) *Scope.* (1) If oral argument is held without an initial brief, each participant must be given the opportunity to present orally the information required or permitted to be included in initial briefs under Rule 706(b).

(2) If oral argument is held in addition to an initial or reply brief, oral argument may be limited to issues considered by the presiding officer to be appropriate issues for oral argument.

(c) *Inclusion of transcript of oral argument.* All oral arguments will be transcribed and included in the record and will be available to the Commission and the presiding officer in deciding the case.

§ 385.708 Initial decisions by presiding officer (Rule 708).

(a) *Applicability.* This section applies to any proceeding in which a presiding officer, other than the Commission, presided over the reception of the evidence.

(b) *General rule.* (1) Except as otherwise ordered by the Commission or provided in paragraph (b)(2) of this section, the presiding officer will prepare a written initial decision.

(2)(i) If time and circumstances require, the presiding officer may issue an order stating that an oral initial decision will be issued.

(ii) An oral decision is considered served upon all participants when the decision is issued orally on the record. Promptly after service of the oral decision, the presiding officer will prepare the oral initial decision contained in the transcript in the format of a written initial decision.

(3) Any initial decision prepared under paragraph (b)(1) or (b)(2) of this section will be certified to the Commission by the presiding officer with a copy of the record in the proceeding.

(4) Not later than 35 days after the certification of an initial decision, under paragraph (b)(3) of this section, the presiding officer, after notifying the participants and receiving no objection from them, may make technical corrections to the initial decision.

(c) *Initial decision prepared and certified by presiding officer.* (1) The presiding officer who presides over the reception of evidence will prepare and certify the initial decision, if any, unless the officer is unavailable or the Commission provides otherwise in accordance with 5 U.S.C. 557(b).

(2) If the presiding officer who presided over the reception of evidence becomes unavailable, the Chief Administrative Law Judge may issue an order designating another qualified presiding officer to prepare and certify the initial decision.

(d) *Finality of initial decision.* For purposes of requests for rehearing under Rule 713, an initial decision becomes a final Commission decision 10 days after exceptions are due under Rule 711 unless:

(1) Exceptions are timely filed under Rule 711; or

(2) The Commission issues an order staying the effectiveness of the decision pending review under Rule 712.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.709 Other types of decisions (Rule 709).

In lieu of an initial decision under Rule 708, the Commission may order any type of decision as provided by 5 U.S.C. 557(b), or permit waiver of the initial decision as provided by Rule 710.

§ 385.710 Waiver of the initial decision (Rule 710).

(a) *General rule.* Any participant may file a motion requesting the Commission to issue a final decision without any initial decision. If all participants join in the motion, the motion is granted, unless the Commission denies the motion within 10 days after the date of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 10 days after the motion is transmitted to the Commission. If all participants do not join in the motion, the motion is denied unless the Commission grants the motion within 30 days of filing of the motion or, in the case of an oral motion under paragraph (c)(2) of this section, within 30 days after the motion is transmitted to the Commission.

(b) *Content.* Any motion to waive the initial decision filed with the Commission must specify:

(1) Whether any participant waives any procedural right;

(2) Whether all participants concur in the request to waive the initial decision;

(3) The reasons that waiver of the initial decision is in the interest of parties and the public interest;

(4) Whether any participant desires an opportunity for filing briefs; and

(5) Whether any participant desires an opportunity for oral argument before the presiding officer, the Commission, or an individual Commissioner.

(c) *How and when made.* (1) Any written motion under this section may be filed at any time, but not later than the fifth day following the close of the hearing conducted under subpart E of this part.

(2) An oral motion under this section may be made during a hearing session, in which case the presiding officer will transmit to the Commission the relevant portions of the transcript of the hearing in which the motion was made.

(d) *Waiver by presiding officer.* A motion for waiver of the initial decision, requested for the purpose of certification of a contested settlement pursuant to Rule 602(h)(2)(iii)(A), may be filed with, and decided by, the presiding officer. If all parties join in the motion, the presiding officer will grant the motion. If not all parties join in the motion, the motion is denied unless the presiding officer grants the motion within 30 days of filing the written motion or presenting an oral motion. The contents of any motion filed under paragraph (d) of this section must comply with the requirements in paragraph (b) of this section. A motion may be oral or written, and may be made whenever appropriate for the consideration of the presiding officer.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 578, 60 FR 19508, Apr. 19, 1995]

§ 385.711 Exceptions and briefs on and opposing exceptions after initial decision (Rule 711).

(a) *Exceptions.* (1)(i) Any participant may file with the Commission exceptions to the initial decision in a brief on exceptions not later than 30 days after service of the initial decision.

(ii) Not later than 20 days after the latest date for filing a brief on exceptions, any participant may file a brief opposing exceptions in response to a brief on exceptions.

(iii) A participant may file, within the time set for filing briefs opposing exceptions, a brief on exceptions solely for the purpose of incorporating by reference one or more numbered exceptions contained in the brief of another participant. A brief filed under this clause need not comply with the requirements set forth in paragraph (b) of this section.

(2) A brief on exceptions or a brief opposing exceptions may not exceed 100 pages, unless the Chief Administrative Law Judge, upon motion, changes the page limitation.

(3) The Secretary may extend, on motion or upon direction of the Commission, the time limits for any brief on or opposing exceptions. No additional briefs are permitted, unless specifically ordered by the Commission.

(4) A participant may not attach to, or incorporate by reference in, any brief on exceptions or brief opposing exceptions any portion of an initial or reply brief filed in the proceeding.

(b) *Nature of briefs on exceptions and of briefs opposing exceptions.* (1) Any brief on exceptions and any brief opposing exceptions must include:

(i) If the brief exceeds 10 pages in length, a separate summary of the brief not longer than five pages; and

(ii) A presentation of the participant's position and arguments in support of that position, including references to the pages of the record or exhibits containing evidence and arguments in support of that position.

(2) Any brief on exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A short statement of the case;

(ii) A list of numbered exceptions, including a specification of each error of fact or law asserted; and

(iii) A concise discussion of the policy considerations that may warrant full Commission review and opinion.

(3) A brief opposing exceptions must include, in addition to matters required by paragraph (b)(1) of this section:

(i) A list of exceptions opposed, by number; and

(ii) A rebuttal of policy considerations claimed to warrant Commission review.

(c) *Oral argument.* (1) Any participant filing a brief on exceptions or brief opposing exceptions may request, by written motion, oral argument before the Commission or an individual Commissioner.

(2) A motion under paragraph (c)(1) of this section must be filed within the time limit for filing briefs opposing exceptions.

(3) No answer may be made to a motion under paragraph (c)(1) and, to that extent, Rule 213(a)(3) is inapplicable to a motion for oral argument.

(4) A motion under paragraph (c)(1) of this section may be granted at the discretion of the Commission. If the motion is granted, any oral argument will be limited, unless otherwise specified, to matters properly raised by the briefs.

(d) *Failure to take exceptions results in waiver*—(1) *Complete waiver.* If a participant does not file a brief on exceptions within the time permitted under this section, any objection to the initial decision by the participant is waived.

(2) *Partial waiver.* If a participant does not object to a part of an initial decision in a brief on exceptions, any objections by the participant to that part of the initial decision are waived.

(3) *Effect of waiver.* Unless otherwise ordered by the Commission for good cause shown, a participant who has waived objections under paragraph (d)(1) or (d)(2) of this section to all or part of an initial decision may not raise such objections before the Commission in oral argument or on rehearing.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.712 Commission review of initial decisions in the absence of exceptions (Rule 712).

(a) *General rule.* If no briefs on exceptions to an initial decision are filed within the time established by rule or order under Rule 711, the Commission may, within 10 days after the expiration of such time, issue an order staying the effectiveness of the decision pending Commission review.

(b) *Briefs and argument.* When the Commission reviews a decision under this section, the Commission may require that participants file briefs or present oral arguments on any issue.

(c) *Effect of review.* After completing review under this section, the Commission will issue a decision which is final for purposes of rehearing under Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.713 Request for rehearing (Rule 713).

(a) *Applicability.* (1) This section applies to any request for rehearing of a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order.

(2) For the purposes of rehearing under this section, a final decision in any proceeding set for hearing under subpart E of this part includes any Commission decision:

(i) On exceptions taken by participants to an initial decision;

(ii) When the Commission presides at the reception of the evidence;

(iii) If the initial decision procedure has been waived by consent of the participants in accordance with Rule 710;

(iv) On review of an initial decision without exceptions under Rule 712; and

(v) On any other action designated as a final decision by the Commission for purposes of rehearing.

(3) For the purposes of rehearing under this section, any initial decision under Rule 709 is a final Commission decision after the time provided for Commission review under Rule 712, if there are no exceptions filed to the decision and no review of the decision is initiated under Rule 712.

(b) *Time for filing; who may file.* A request for rehearing by a party must be filed not later than 30 days after issuance of any final decision or other final order in a proceeding.

(c) *Content of request.* Any request for rehearing must:

(1) State concisely the alleged error in the final decision or final order;

(2) Conform to the requirements in Rule 203(a) which are applicable to pleadings; and

(3) Set forth the matters relied upon by the party requesting rehearing, if rehearing is sought based on matters not available for consideration by the Commission at the time of the final decision or final order.

(d) *Answers.* (1) The Commission will not permit answers to requests for rehearing.

(2) The Commission may afford parties an opportunity to file briefs or present oral argument on one or more issues presented by a request for rehearing.

(e) *Request is not a stay.* Unless othewise ordered by the Commission, the filing of a request for rehearing does not stay the Commission decision or order.

(f) *Commission action on rehearing.* Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995; 60 FR 16567, Mar. 31, 1995]

§ 385.714 Certified questions (Rule 714).

(a) *General rule.* During any proceeding, a presiding officer may certify or, if the Commission so directs, will certify, to the Commission for consideration and disposition any question arising in the proceeding, including any question of law, policy, or procedure.

(b) *Notice.* A presiding officer will notify the participants of the certification of any question to the Commission and of the date of any certification. Any such notification may be given orally during the hearing session or by order.

(c) *Presiding officer's memorandum; views of the participants.* (1) A presiding officer should solicit, to the extent practicable, the oral or written views of the participants on any question certified under this section.

(2) The presiding officer must prepare a memorandum which sets forth the relevant issues, discusses all the views of participants, and recommends a disposition of the issues.

(3) The presiding officer must append to any question certified under this section the written views submitted by the participants, the transcript pages containing oral views, and the memorandum of the presiding officer.

(d) *Return of certified question to presiding officer.* If the Commission does not act on any certified question within 30 days after receipt of the certification under paragraph (a) of this section, the question is deemed returned to the presiding officer for decision in accordance with the other provisions of this subpart.

(e) *Certification not suspension.* Unless otherwise directed by the Commission or the presiding officer, certification under this section does not suspend the proceeding.

§ 385.715 Interlocutory appeals to the Commission from rulings of presiding officers (Rule 715).

(a) *General rule.* A participant may not appeal to the Commission any ruling of a presiding officer during a proceeding, unless the presiding officer under paragraph (b) of this section, or the motions Commissioner, under paragraph (c) of this section, finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person.

(b) *Motion to the presiding officer to permit appeal.* (1) Any participant in a proceeding may, during the proceeding, move that the presiding officer permit appeal to the Commission from a ruling of the presiding officer. The motion must be made within 15 days of the ruling of the presiding officer and must state why prompt Commission review is necessary under the standards of paragraph (a) of this section

(2) Upon receipt of a motion to permit appeal under subparagraph (a)(1) of this section, the presiding officer will determine, according to the standards of paragraph (a) of this section, whether to permit appeal of the ruling to the Commission. The presiding officer need not consider any answer to this motion.

(3) Any motion to permit appeal to the Commission of an order issued under Rule 604, or appeal of a ruling under paragraph (a) or (b) of Rule 905, must be granted by the presiding officer.

(4) A presiding officer must issue an order, orally or in writing, containing the determination made under paragraph (b)(2) of this section, including the date of the action taken.

(5) If the presiding officer permits appeal, the presiding officer will transmit to the Commission:

(i) A memorandum which sets forth the relevant issues and an explanation of the rulings on the issues; and

(ii) the participant's motion under paragraph (b)(1) of this section and any answer permitted to the motion.

(6) If the presiding officer does not issue an order under paragraph (b)(1) of this section within 15 days after the motion is filed under paragraph (b)(1) of this section, the motion is denied.

(c) *Appeal of a presiding officer's denial of motion to permit appeal.* (1) If a motion to permit appeal is denied by the presiding officer, the participant who made the motion may appeal the denial to the Commissioner who is designated Motions Commissioner, in accordance with this paragraph. For purposes of this section, ''Motions Commissioner'' means the Chairman or a member of the Commission designated by the Chairman to rule on motions to permit interlocutory appeal. Any person filing an appeal under this paragraph must serve a separate copy of the appeal on the Motions Commissioner by Express Mail or by hand delivery.

(2) A participant must submit an appeal under this paragraph not later than 7 days after the motion to permit appeal under paragraph (b) of this section is denied. The appeal must state why prompt Commission review is necessary under the standards set forth in paragraph (c)(5) of this section. The appeal must be labeled in accordance with § 385.2002(b) of this chapter.

(3) A participant who appeals under this paragraph must file with the appeal a copy of the written order denying the motion or, if the denial was issued orally, the relevant portions of the transcript.

(4) The Motions Commissioner may, in considering an appeal under this paragraph, order the presiding officer or any participant in the proceeding to provide additional information.

(5) The Motions Commissioner will permit an appeal to the Commission under this paragraph only if the Motions Commissioner finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or to prevent irreparable harm to a person. If the Motions Commissioner makes no determination within 7 days after filing the appeal under this paragraph or within the time the Motions Commissioner otherwise provides to receive and consider information under this paragraph, the appeal to the Commission under paragraph (b) of this section will not be permitted.

(6) If appeal under paragraph (b) of this section is not permitted, the contested ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(7) If the Motions Commissioner permits an appeal to the Commission, the Secretary will issue an order containing that decision.

(d) *Commission action.* Unless the Commission acts upon an appeal permitted by a presiding officer under paragraph (b) of this section, or by the Motions Commissioner under paragraph (c) of this section, within 15 days after the date on which the presiding officer or Motions Commissioner permits appeal, the ruling of the presiding officer will be reviewed in the ordinary course of the proceeding as if the appeal had not been made.

(e) *Appeal not to suspend proceeding.* Any decision by a presiding officer to permit appeal under paragraph (b) of this section or by the Motions Commissioner to permit an appeal under paragraph (c) of this section will not suspend the proceeding, unless otherwise ordered by the presiding officer or the Motions Commissioner.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21705, May 23, 1984; Order 402, 49 FR 39539, Oct. 9, 1984]

§ 385.716 Reopening (Rule 716).

(a) *General rule.* To the extent permitted by law, the presiding officer or the Commission may, for good cause under paragraph (c) of this section, reopen the evidentiary record in a proceeding for the purpose of taking additional evidence.

(b) *By motion.* (1) Any participant may file a motion to reopen the record.

(2) Any motion to reopen must set forth clearly the facts sought to be proven and the reasons claimed to constitute grounds for reopening.

(3) A participant who does not file an answer to any motion to reopen will be deemed to have waived any objection to the motion provided that no other participant has raised the same objection.

(c) *By action of the presiding officer or the Commission.* If the presiding officer or the Commission, as appropriate, has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest, the record in the proceeding may be reopened by the presiding officer before the initial or revised initial decision is served or by the Commission after the initial decision or, if appropriate, the revised initial decision is served.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984]

Subpart H—Shortened Procedures

§ 385.801 Waiver of hearing (Rule 801).

In any proceeding in which the Commission is authorized to act after opportunity for hearing, if the parties waive hearing, such opportunity will be deemed to have been afforded by service or publication in the FEDERAL REGISTER of notice of the application or other initial pleading, request, or other filing, such notice fixing a reasonable period of time within which any person desiring to be heard may file a protest or petition. Upon the expiration of such period of time, in the absence of a request for hearing, the Commission may forthwith dispose of the matter upon the basis of the pleadings and other submittals and the studies and recommendations of the staff. A party not requesting oral hearing in its pleadings will be deemed to have waived a hearing for the purpose of such disposition, but will not be bound by such a waiver for the purposes of any request for rehearing with respect to an order so entered.

§ 385.802 Noncontested proceedings (Rule 802).

Noncontested proceedings. In any proceeding required by statute to be set for hearing, the Commission, when it appears to be in the public interest and to be in the interest of the parties to grant the relief or authority requested in the initial pleading, and to omit the intermediate decision procedure, may, after a hearing during which no opposition or contest develops, forthwith dispose of the proceedings upon consideration of the pleadings and other evidence filed and incorporated in the record: *Provided,* (a) The applicant or other initial pleader requests that the intermediate decision procedure be omitted and waives oral hearing and opportunity for filing exceptions to the decision of the Commission; and (b) no issue of substance is raised by any request to be heard, protest or petition filed subsequent to publication in the FEDERAL REGISTER of the notice of the filing of an intial pleading and notice or order fixing of hearing, which notice or order will state that the Commission considers the proceeding a proper one for disposition under the provisions of this subpart. Requests for the procedure provided by this subpart may be contained in the initial pleading or subsequent request in writing to the Commission. The decision of the Commission in such proceeding after noncontested hearing, will be final, subject to reconsideration by the Commission upon request for rehearing as provided by statute.

Subpart I—Commission Review of Remedial Orders

§ 385.901 Scope (Rule 901).

(a) *Proceedings to which applicable.* The provisions of this subpart apply to proceedings of the Commission held in accordance with section 503(c) of the Department of Energy Organization Act (42 U.S.C. 7193(c)) to review orders issued by the Secretary of Energy pursuant to section 503(a) of the Department of Energy Organization Act (42 U.S.C. 7193(c)), and initiated by notices of probable violation, proposed remedial orders, or other formal administrative initiating documents issued on or after October 1, 1977, which are contested by the recipient.

(b) *Relationship to other rules.* (1) Where a provision of this subpart is inconsistent with a provision in any other subpart of this part, the provision in this subpart controls.

(2) Subpart F of this part, except Rule 601, does not apply to proceedings under this subpart.

§ 385.902 Definitions (Rule 902).

For purposes of this subpart:

(a) *Contested order* means the remedial order, interim remedial order for immediate compliance or order of disallowance being contested in proceeding pursuant to this subpart;

(b) *Interim remedial order for immediate compliance* means an interim remedial order for immediate compliance issued pursuant to 10 CFR 205.199D (interim remedial order of immediate compliance);

(c) *Order of disallowance* means an order of disallowance issued pursuant to 10 CFR 205.199E (disallowance);

(d) *Participant* means, as appropriate, the Secretary, the petitioner, and intervenors;

(e) *Petitioner* means a person who has received a remedial order, interim remedial order for immediate compliance, or order of disallowance who notifies the Secretary that he intends to contest the order;

(f) *Remedial order* means a remedial order issued pursuant to 10 CFR 205.199B (remedial orders);

(g) *Secretary* means the Secretary of Energy or his delegate.

§ 385.903 Request for nondisclosure of information (Rule 903).

(a) For purposes of this section, nondisclosure means nondisclosure except as to the participants in the proceeding under conditions provided in paragraphs (d) and (e) of this section.

(b) If any person filing under this subpart claims that some or all of the information contained in a document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in section 1905 of title 18 of the United States Code (18 U.S.C. 1905) (disclosure of confidential information), or is otherwise exempt by law from public disclosure, the person:

(1) Must request the presiding officer not to disclose such information, except to the participants in the proceeding under the conditions provided in paragraphs (d) and (e) of this section, which request the person must serve upon the participants in the proceeding;

(2) Must file, together with the document, a second copy of the document from which has been deleted the information for which the person requests nondisclosure and must indicate in the original document that the original document is exempt, or contains information which is exempt, from disclosure;

(3) Must include a statement specifying why the information is privileged or confidential, if the information for which nondisclosure is requested is claimed to come within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information;

(4) Must include a statement specifying the justification for nondisclosure, if the information for which nondisclosure is requested is not within the exception in 5 U.S.C. 552(b)(4).

(c) If the person filing a document does not submit a second copy of the document from which the appropriate information has been deleted, the presiding officer may assume that there is no objection to public disclosure of the document in its entirety.

(d) If information is submitted in accordance with paragraph (b) of this section, the information will not be disclosed except as provided in the Freedom of Information Act, in accordance with part 388 of this subchapter and upon request in accordance with paragraph (e) of this section, to participants in the proceeding under the restrictions that the participants may not use or disclose the information except in the context of the proceeding conducted pursuant to this subpart and that the participants must return all copies of the information at the conclusion of the proceeding to the person who submitted the information under paragraph (b) of this section.

(e) At any time, a participant may request the presiding officer to direct a person submitting information under paragraph (b) of this section to provide that information to the participant requesting the information under this paragraph. The presiding officer will so direct if the participant requesting the information agrees:

(1) Not to use or disclose the information except in the context of the proceeding conducted pursuant to this subpart; and

(2) To return all copies of the information, at the conclusion of the proceeding, to the person submitting the information under paragraph (b) of this section.

(f) At any time, a participant may request the presiding officer to direct that the complete record of prior proceedings, including information determined by the Secretary to be exempt from disclosure, be made available to that participant by the Secretary. The presiding officer will so direct if the participant requesting the complete record agrees:

(1) Not to use or disclose the information determined to be exempt except in the context of the proceeding conducted pursuant to this subpart, and

(2) To return all copies of the information determined to be exempt to the presiding officer at the conclusion of the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985]

§ 385.904 Commencement of proceeding (Rule 904).

(a) Except as provided in paragraph (b) of this section, the proceeding pursuant to this subpart will be commenced by filing with the Secretary of the Commission either an answer by a petitioner pursuant to Rule 906(b)(1), or a written notice by the Secretary that a petitioner has filed a notice of intent to contest an order reviewable under this subpart, whichever is filed first. The Secretary must file written notice that a petitioner has filed a notice of intent to contest an order reviewable under this subpart within 15 days of the Secretary's receipt of such notice of intent. When the Secretary files the written notice, the Secretary must serve a copy of the contested order upon other participants in the prior proceedings and upon persons denied intervention in the prior proceedings, and must certify to the Commission that such service has been made, stating the names and addresses of persons served.

(b) The proceeding pursuant to this subpart with respect to an interim remedial order for immediate compliance will be commenced by a petitioner's filing with the Secretary of the Commission, for the Commission, and serving on other participants in the prior proceedings, if any, a notice of petition for review of an interim remedial order for immediate compliance pursuant to 10 CFR 205.199D(i)(1) (interim remedial order of immediate compliance). The Commission will defer consideration of the merits of the order until a final remedial order is issued by the Secretary.

(c) Upon commencement of a proceeding, the Commission or its designee will designate a presiding officer for the proceeding, and the Commission or its designee will notify participants in the prior proceedings and persons denied intervention in the prior proceedings of such designation.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416–A, 50 FR 36053, Sept. 5, 1985]

§ 385.905 Stay of contested order (Rule 905).

(a) Upon commencement of a proceeding, the contested order will be automatically stayed pending review pursuant to this subpart unless and until, upon request of the Secretary or other participant, the presiding officer finds that the public interest requires immediate compliance with the contested order.

(b) The Secretary or other participants may at any time prior to the hearing under Rule 909 (Hearing), if requested; or, if there is no hearing, within 30 days of the commencement of the proceeding under Rule 904 (Commencement of proceeding); file a petition requesting that the contested order not be stayed, or that the stay be lifted, and setting forth the legal and factual basis for the request.

(c) The presiding officer may request a written statement of the views of participants regarding whether the contested order should be stayed or continue to be stayed and may convene an expedited hearing or conference on a petition under paragraph (b) of this section.

(d) The presiding officer may grant the petition requesting immediate compliance where he finds that the

public interest so requires and will notify the participants of the determination.

(e) If the presiding officer does not grant the petition under paragraph (b) of this section within 10 days after it is filed, the petition is denied. Prior to the expiration of the 10-day period the presiding officer may extend the period for decision for up to 7 days. At the end of the extension, the petition, if not granted, is denied.

(f) If the petition under paragraph (b) of this section is denied, the presiding officer will notify the participants of such denial.

(g) A grant or denial of petition under paragraphs (b) or (c) of this section may be appealed, within 10 days after the grant or denial, to the Commission in accordance with Rule 715 (relating to interlocutory appeals). The contested order will remain stayed pending the Commission's disposition of the appeal.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985; Order 416–A, 50 FR 36054, Sept. 5, 1985]

§ 385.906 Pleadings (Rule 906).

(a) *By the Secretary*. (1) Within 20 days after the commencement of a proceeding, the Secretary:

(i) Will file with the Secretary for the presiding officer a copy of the contested order; and

(ii) May, in addition, elect to file a statement setting forth the factual elements of the alleged violation, which statement the Secretary will serve on all participants in the proceeding.

(2) If the petitioner requests permission to raise new facts or issues pursuant to Rule 907(a) (new facts and issues), the Secretary may file, within 10 days after the filing of the petitioner's answer, a reply responding to the petitioner's request to raise new facts or issues. In the reply, the Secretary may also request the permission of the presiding officer to raise new facts or issues under the criteria set forth in Rule 907(b) (new facts and issues) and to conduct discovery relating to the new facts or issues he may raise pursuant to Rule 907(b) (new facts and issues). Failure by the Secretary to request permission to raise new facts or issues or to conduct discovery in this reply constitutes a waiver of the opportunity to do so at a later time in the proceeding.

(3) The Secretary will file with the Secretary of the Commission, for the presiding officer, and serve upon other participants in the proceedings, a brief in support of the affirmative case, which will set forth:

(i) The elements of the alleged violation, including references to the authorities upon which the Secretary relies, including but not limited to regulations, rulings, interpretations and decisions on appeals and exceptions issued by the Department or its predecessor agencies and precedents established by the Commission; and

(ii) A complete statement of the factual and legal basis of the contested order.

(4) The Secretary's brief will be filed according to the following time period appropriate to the particular proceeding:

(i) If no participant (including persons requesting intervention) has requested permission to raise new facts or issues or to conduct discovery pursuant to paragraphs (a)(2), (b)(2), (c)(7), and (c)(8) of this section, within 20 days after the filing of the petitioner's answer under paragraph (b)(1) of this section;

(ii) If the presiding officer has determined, under Rule 908(d) (discovery) that no discovery shall be permitted, within 20 days after the presiding officer's determination under such rule;

(iii) If discovery is permitted under Rule 908(d) (discovery) within 20 days after the conclusion of the time period set for discovery under such rule;

(b) *By the petitioner*. (1) Within 15 days after petitioner gives written notice to the Office of Hearings and Appeals of the Department of Energy pursuant to 10 CFR 205.199C(b) that petitioner wishes to appeal the remedial order, the petitioner must file with the Secretary of the Commission, for the presiding officer, and serve upon the Secretary and other participants in the proceedings, an answer to the contested order admitting or denying each of the Secretary's findings in the contested order and setting forth affirmative defenses, if any. Each answer filed with the Secretary of the Commission

by the petitioner, in accordance with this paragraph, must be accompanied by the fee prescribed by § 381.303 of this chapter.

(2) In the answer, the petitioner may:

(i) Contest any part of the record;

(ii) Request permission to raise new facts or issues not raised in the prior proceedings if the new facts or issues meet the criteria set forth in Rule 907(a) (new facts and issues); and

(iii) Request permission to conduct discovery, subject to criteria provided in Rule 908(a) (discovery). Failure by the petitioner to contest the record or to request permission to raise new facts or issues or to conduct discovery in this answer constitutes a waiver of the opportunity to do so at a later time in the proceeding.

(3) Within 15 days after filing of the Secretary's brief under paragraph (a)(3) of this section, the petitioner shall file with the Secretary of the Commission, for the presiding officer, and serve upon other participants in the proceeding, a brief stating fully the objections to the contested order, including references to the authorities upon which the petitioner relies, including but not limited to regulations, rulings, interpretations, and decisions on appeals and exceptions issued by the Department or its predecessor agencies and precedents established by the Commission.

(c) *By interveners.* (1) A person qualifying under paragraph (c)(2) of this section, may request the presiding officer to permit intervention in the proceeding under this subpart in accordance with the procedures described in this paragraph.

(2) A motion to intervene may be filed by any person claiming:

(i) An interest which may be directly affected and which is not adequately protected by existing parties and as to which the persons requesting intervention may be bound by the Commissions action in the proceeding; or

(ii) Any other interest of such nature that participation by the person requesting intervention may be in the public interest.

(3) A motion to intervene must set forth clearly and concisely the facts from which the nature of the requester's alleged right or interest can be determined, the grounds of the proposed intervention, and the position of the intervener in the proceeding, so as fully and completely to advise the participants and the presiding officer as to the specific issues of fact or law to be raised or controverted, by admitting, denying, or otherwise answering, specifically and in detail, each material allegation of fact or law raised or controverted, including references to the authorities upon which the requester relies, including, but not limited to, regulations, rulings, interpretations, and decisions on appeals and exceptions issued by the Department or its predecessor agencies and precedents established by the Commission.

(4) Motions to intervene may be filed with the Secretary of the Commission, for the presiding officer, within 20 days after the commencement of the proceeding under Rule 904 (commencement of proceedings) unless, in extraordinary circumstances and for good cause shown, the presiding officer authorizes a late filing. A person requesting intervention must serve the motion to intervene on the participants in the proceeding at the same time the request is filed with the Secretary of the Commission.

(5) A participant in the proceedings may file an answer to a motion to intervene. Failure to object constitutes a waiver of any objection to the granting of such request. If made, answers must be filed within 15 days after the filing of the request to intervene.

(6) After expiration of the time for filing answers to requests to intervene or default thereof, as provided in paragraph (c)(5) of this section, the presiding officer will grant or deny such request, in whole or in part, or may, if found to be appropriate, authorize limited participation. The presiding officer will serve the determination on a motion to intervene upon the participants in the proceeding and upon the person requesting intervention. A person wholly or partially denied intervention may take an interlocutory appeal of the order denying intervention, under Rule 715 (interlocutory appeals to the Commission from rulings of presiding officers), and will be considered a ''participant'' (as that term is defined

in Rule 102(b) (definitions)) for the limited purpose of permitting that person to file an interlocutory appeal under Rule 715 (interlocutory appeals to the Commission from rulings of presiding officers) contesting denial, in whole or in part, of that person's motion to intervene.

(7) A person filing a motion to intervene, may request therein the permission of the presiding officer to raise new facts or issues not raised in the prior proceedings on the contested order, if the new facts or issues meet the criteria set forth in Rule 903(c) (request for nondisclosure of information). Failure by the person requesting permission to intervene to request permission to raise new facts or issues in the motion to intervene constitutes a waiver of the opportunity to do so at a later time in the proceeding.

(8) A person filing a motion to intervene may request the permission of the presiding officer to conduct discovery, subject to the conditions set forth in Rule 908(c) (discovery). Failure by the person requesting permission to intervene to request permission to conduct discovery in the motion to intervene constitutes a waiver of the opportunity to do so at a later time in the proceeding.

(d) *Attachments of pleadings.* (1) Each party will file, as an appendix to each pleading which cites documents in the record developed in the prior proceedings on the remedial order, one copy of each such document in its entirety and, if any such document contains information exempt from public disclosure pursuant to Rule 903, a second copy of such document with such information deleted. The top of the first page of each such document will contain the word ''PUBLIC'' or ''NON-PUBLIC,'' to indicate whether it contains such exempt information.

(2) One copy of each version shall be served on counsel for the petitioner and/or the Secretary, and one copy of the PUBLIC version shall be served on counsel for each other participant separately represented unless the conditions of Rule 903 are met, in which situation such counsel shall be served with copies of both versions.

(3) In compiling their appendices, the parties will include only documents specifically cited and relied upon in their pleadings. They will have regard for the fact that the Secretary's entire administrative record is always available to the Commission and will not include irrelevant or duplicative documents in the appendices.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984; Order 416, 50 FR 15733, Apr. 22, 1985; Order 416–A, 50 FR 36054, Sept. 5, 1985]

§ 385.907 New facts and issues (Rule 907).

(a) *Raised by the petitioner.* In the answer, as provided in Rule 906(b)(2)(ii) (new facts and issues) the petitioner may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1)(i) Are facts or issues that were not known and could not, with the exercise of due care, have been known to the petitioner at the time they would otherwise have been raised during the prior proceedings;

(ii) Are facts or issues that the petitioner was unable to raise at the time they could have been raised during the prior proceedings because of unduly restrictive time limits imposed by the Secretary; or

(iii) Are facts or issues that the petitioner was not permitted to raise in the prior proceedings due to erroneous adverse procedural rulings; and

(2) Are necessary for a full and true disclosure of the facts.

(b) *Raised by the Secretary.* In the reply under Rule 906(a)(2) (pleadings), the Secretary may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1) Are necessary to support the Secretary's case as a result of new facts or issues raised by the petitioner under Rule 906(b)(2)(ii) (pleadings) and this section; and

(2) Are necessary for a full and true disclosure of the facts.

(c) *Raised by interveners.* In the motion to intervene under Rule 906(c)(3) (pleadings) and this section, an intervener may request permission of the presiding officer to raise new facts or issues not raised in prior proceedings on the contested order that:

(1) If the intervener did not participate in the prior proceeding, meet the criteria of paragraphs (a)(1) and (a)(2) of this section; or

(2) If the intervener participated in the prior proceedings, are:

(i)(A) Facts or issues that were not known and could not, with the exercise of due care, have been known to the intervener at the time they would otherwise have been raised during the prior proceedings;

(B) Facts or issues that the intervener was unable to raise at the time they could have been raised during the prior proceedings because of unduly restrictive time limits imposed by the Secretary; or

(C) Facts or issues that the intervener was not permitted to raise in the prior proceedings due to erroneous adverse procedural rulings; and

(ii) Are necessary for a full and true disclosure of the facts.

(d) *Determination by the presiding officer.* The presiding officer will determine whether to grant or deny, in whole or in part, the requests of the participants to raise new facts or issues and will serve those determinations on the participants in the proceeding.

§ 385.908 Discovery (Rule 908).

(a) *By petitioner.* In the answer under Rule 906(b)(2) (pleadings), the petitioner may request permission of the presiding officer to conduct discovery, where such discovery:

(1) Relates to new facts or issues raised in accordance with Rule 907(a) (new facts and issues); or

(2)(i) Was not permitted in the prior proceedings on the contested order due to erroneous adverse procedural rulings; and

(ii) Is necessary for a full and true disclosure of the facts.

(b) *By the Secretary.* In the reply under Rule 906(a)(2) (pleadings), the Secretary may request permission of the presiding officer to conduct discovery where such discovery relates to new facts or issues raised in accordance with Rule 907(b) (new facts and issues).

(c) *By interveners.* In a motion to intervene under Rule 906(c)(8) (pleadings) an intervener may request permission of the presiding officer to conduct discovery where such discovery:

(1) Relates to new facts or issues raised in accordance with Rule 907(c) (new facts and issues); or

(2) If the intervener participated in the prior proceedings,

(i) Such discovery was not permitted in prior proceedings on the contested order due to erroneous adverse procedural rulings; and

(ii) Such discovery is necessary for a full and true disclosure of the facts.

(d) *Determinations by the presiding officer.* The presiding officer will determine whether to grant or deny, in whole or in part, the requests of the participants for discovery and will set a time limit within which discovery must be conducted.

(e) *Interrogatories.* In addition to discovery devices applicable to this subpart under other subparts of this part, participants may conduct discovery by means of written interrogatories under conditions determined by the presiding officer.

§ 385.909 Hearing (Rule 909).

(a) Participant may file, within 20 days after the commencement of the proceeding under Rule 904 (Commencement of proceeding), a request for a hearing or a motion for the opportunity for cross-examination including the reasons why cross-examination is necessary for a full and true disclosure of the facts.

(b) If a participant has filed a request for a hearing, the presiding officer will grant the request for a hearing. The hearing will include an opportunity for the submission of oral or documentary evidence and oral arguments.

(c) The presiding officer may at any time, convene a hearing.

(d) As soon as practicable after receiving a request for hearing under paragraph (a) of this section or after determination that a hearing will be held under paragraph (c) of this section, the presiding officer will give notice to the participants of the time and place of the hearing.

(e) The presiding officer will determine the issues to be resolved in the proceeding, may specify the time available for oral argument, and will give notice thereof to the participants. The

presiding officer may require additional information from the participants, and may convene a prehearing conference for the purpose of determining the issues or the nature of the proceeding to be held.

(f) If at any time prior to the certification of the record by the presiding officer under Rule 913 (Certification of the record), with or without a motion of a participant, the presiding officer determines that it is necessary for a full and true disclosure of the facts, the presiding officer may order that the participants be afforded the opportunity for cross-examination on any facts or issues raised in the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985; Order 416–A, 50 FR 36054, Sept. 5, 1985]

§ 385.910 Conduct of the hearing (Rule 910).

The presiding officer is responsible for conduct of the hearing, including the order of procedure.

§ 385.911 Burden of proof (Rule 911).

(a) The Secretary has the burden of going forward and must sustain the burden of proof with respect to disputed elements of affirmative case of the Secretary.

(b) The Commission order will be based on a preponderance of the evidence.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985]

§ 385.912 Proposed findings of fact, conclusions of law, and comments (Rule 912).

(a) Within 10 days after the conclusion of the hearing, or, if no hearing is held, within 20 days after the filing of the petitioner's brief under Rule 906(b)(3) (pleadings), a participant may file with the Secretary of the Commission for the presiding officer, and serve upon the other participants proposed findings of fact and conclusions of law, comments in support thereof and any objections with respect to procedural rulings of the presiding officer.

(b) Within 10 days after the filing of proposed findings of fact and conclusions of law under paragraph (a) of this section, a participant may file, and must serve on other participants, a reply thereto.

§ 385.913 Proposed order (Rule 913).

(a) After the conclusion of the hearing and after the filings under Rule 912 (a) and (b), (proposed findings of fact, conclusions of law, and comments) the presiding officer will issue a decision and proposed order based on findings of fact affirming, modifying, or vacating the contested order or directing other appropriate relief. The proposed order will be based on the entire record before the presiding officer, including the record of prior proceedings certified by the Secretary.

(b) Participants may file with the Secretary of the Commission, within 15 days of issuance of the proposed order of the presiding officer, written comments on the presiding officer's decision and proposed order.

(c) Participants may file with the Secretary of the Commission, within seven days of the end of comment period prescribed in paragraph (b) of this section, reply comments limited to a response to any arguments and issues raised in the written comment.

(d) The presiding officer will certify and file with the Secretary of the Commission a copy of the record in the proceedings and copies of the written and reply comments filed pursuant to paragraphs (b) and (c) of this section.

(e) Unless otherwise ordered by the Chief Administrative Law Judge, written comments and reply comments must be limited to 15 pages, doublespaced.

[Order 495, 53 FR 16408, May 9, 1988, as amended at 58 FR 1629, Jan. 12, 1994]

§ 385.914 Commission action (Rule 914).

The Commission will upon consideration of the entire record, issue a final order affirming, modifying, or vacating the contested order or directing other appropriate relief. The Commission will serve the final order on the participants.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 416, 50 FR 15733, Apr. 22, 1985]

§385.915 Ex parte communications (Rule 915).

The provisions of Rule 2201 (*ex parte* communications) apply to proceedings pursuant to this subpart, commencing at the time the Secretary issues a proposed remedial order under 10 CFR 205.192, an interim remedial order for immediate compliance under 10 CFR 205.199D, or a proposed order of disallowance under 10 CFR 205.199E, as if proceedings were contested on-the-record proceedings pending before the Commission.

§385.916 Withdrawal of petition for review (Rule 916).

(a) At any time, including after a hearing has been held or convened, the petitioner may submit to the presiding officer, and serve on other participants in the proceeding, a withdrawal of the petition for review of the contested order. The presiding officer will thereupon issue, and serve the participants, an order terminating the proceeding conducted pursuant to this subpart, which order will be effective 10 days after issuance.

(b) Termination of the proceeding under paragraph (a) of this section, may be appealed to the Commission, within 10 days after issuance of the termination order, except that if the Commission does not act on an appeal within 30 days, it is deemed denied. The termination order is stayed pending the appeal. If the Commission rescinds the termination order, the proceeding will continue in accordance with this subpart.

§385.917 Sanctions (Rule 917).

Whenever it appears to the Commission that a person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of rule, regulation, or order, made or imposed by the Commission or the presiding officer under this subpart, it may bring an action in the proper court of the United Statas to enjoin that act or practice and to enforce compliance with the order, and upon a proper showing, a permanent or temporary injunction or decree or restraining order will be granted without bond. The Commission may transmit such evidence as may be available concerning that act or practice to the Attorney General, who may institute the necessary criminal proceedings.

Subpart J—Commission Review of Adjustment Request Denials

§385.1001 Scope (Rule 1001).

(a) *Applicability*. This subpart applies to proceedings of the Commission held in accordance with section 504(b) of the Department of Energy Organization Act, 42 U.S.C. 719(b), to review orders issued by the Secretary of Energy pursuant to section 504(a) of the Department of Energy Organization Act denying, in whole or in part, requests for adjustments.

(b) *Relationship to other rules.* When a provision of this subpart is inconsistent with a provision of any other subpart of this part, the former provision controls.

§385.1002 Definitions (Rule 1002).

For purposes of this subpart:

(a) *Commission* includes an officer or employee designated as presiding officer in a proceeding under this subpart.

(b) *Petitioner* means a person who is aggrieved or adversely affected by a contested order, as defined in this section, and who requests a review, pursuant to this subpart, by the Commission of the denial by the Secretary.

(c) *Secretary* means the Secretary of Energy or his delegate.

(d) *Contested order* means the decision or order issued by the Secretary denying, in whole or in part, a request for adjustment.

(e) *Participant* means, as appropriate, the petitioner, the Secretary, or an intervener.

§385.1003 Request for nondisclosure of information (Rule 1003).

(a) For purposes of this section, nondisclosure means nondisclosure except to the participants in the proceedings and under the conditions as provided in paragraph (e) of this section.

(b) If an person filing under this subpart claims that some or all of the information contained in a document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or

is otherwise exempt by law from public disclosure, the person:

(1) Will request the presiding officer not to disclose such information, except to the participants in the proceedings and under the conditions as provided in paragraph (e) of this section, which request the person must serve upon the participants in the proceedings;

(2) Will file, together with the document, a second copy of the document from which has been deleted the information for which the person requests nondisclosure and must indicate in the original document that the original document is confidential or contains confidential information;

(3) If the information is claimed to come within the exception in 5 U.S.C. 552(b)(4), for trade secrets and commercial or financial information, it must include a statement specifying why the information is privileged or confidential;

(4) If the information for which nondisclosure is requested is not within the exception in 5 U.S.C. 552(b)(4), it must include a statement specifying the justification for nondisclosure.

(c) If the person filing a document does not submit a second copy of the document from which the appropriate information has been deleted, the presiding officer may assume that there is no objection to public disclosure of the document in its entirety.

(d) If information is submitted in accordance with paragraph (b) of this section, the information will not be disclosed except as provided in the Freedom of Information Act, in accordance with Part 388 of this subchapter and upon request in accordance with paragraph (e) of this section, to participants in the proceeding under the restrictions that the participants may not use or disclose the information except in the context of the proceeding couducted pursuant to this subpart and that the participants must return all copies of the information at the conclusion of the proceeding to the person who submitted the information under paragraph (b) of this section.

(e) At any time, a participant may request the presiding officer to direct a person submitting information under paragraph (b) of this section to provide that information to the participant requesting the information under this paragraph. The presiding officer will so direct if the participant requesting the information agrees:

(1) Not to use or disclose the information except in the context of the proceeding conducted pursuant to this subpart; and

(2) To return all copies of the information, at the conclusion of the proceeding, to the person submitting the information under paragraph (b) of this section.

(f) At any time, a participant may request the presiding officer to direct that the complete record of prior proceedings, including information determined by the Secretary to be exempt from disclosure, be made available to that participant. The presiding officer will so direct if the participant requesting the complete record agrees:

(1) Not to use or disclose the information determined to be exempt except in the context of the proceeding conducted pursuant to this subpart, and

(2) To return all copies of the information determined to be exempt to the presiding officer at the conclusion of the proceeding.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 422, 50 FR 21600, May 28, 1985]

§ 385.1004 Commencement of proceedings (Rule 1004).

(a) A petitioner commences proceedings, pursuant to this subpart, by filing with the Commission and serving upon the Secretary and any other participants in prior proceedings on the contested order a petition for review, which must contain:

(1) A copy of the decision or order denying, in whole or in part, request for adjustment (the contested order); and

(2) A complete statement of the petitioner's objections factual or legal to the contested order, including references to all authorities upon which the petitioner relies including but not limited to regulations, rulings, interpretations, and decisions on exceptions and appeals issued by the Department or its predecessor agencies and precedents established by the Commission.

(b) A petition for review must be filed within 30 days of issuance by the Secretary of the order to be contested pursuant to this subpart.

(c) Each petition for review filed with the Secretary of the Commission must be accompanied by the fee prescribed by §381.304 of this chapter.

(d) Upon receiving a petition for review and the fee required by paragraph (c), of this section, the Commission or its designee will designate a presiding officer for the proceedings.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 395, 49 FR 35357, Sept. 7, 1984]

§385.1005 Replies (Rule 1005).

(a) *By the Secretary*. Within 20 days of service of the petition for review, the Secretary will file with the Commission and serve on the petitioners and the other participants in prior proceedings on the contested order, a reply to the petition for review stating fully his or her position supported by arguments to the petition for review.

(b) *By other participants.* A person who participated in prior proceedings on the contested order may be a participant in the proceedings pursuant to this subpart and may make filings and submittals as determined by the presiding officer.

(c) *By interveners.* A person who was denied the opportunity to participate in prior proceedings on the contested order or who is aggrieved or adversely affected by the contested order may move to intervene in accordance with Rule 214 (intervention). In order that the motion be granted, the movant must show, as appropriate, that denial of participation in prior proceedings was wrongful or why he or she is aggrieved or adversely affected by the contested order. If the presiding officer grants the motion, the person submitting the motion to intervene may make filings and submittals as determined by the presiding officer.

(d) A participant may request interim relief in a proceeding pursuant to this subpart.

(e) The presiding officer may require such other filings by the participants as he or she deems necessary in the conduct of the proceedings.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 422, 50 FR 21600, May 28, 1985]

§385.1006 Request for hearing (Rule 1006).

A participant may file with the Commission and serve on the other participants a request for hearing, which will be deemed granted. Such request must be filed concurrently with participant's first pleading.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 422, 50 FR 21600, May 28, 1985]

§385.1007 Presiding officer (Rule 1007).

(a) The presiding officer will determine the issues to be resolved in the proceeding and will give notice thereof to the participants. The presiding officer may require additional information from the participants and convene a prehearing conference for the purpose of determining the issues to be considered at a hearing, if one is to be held. The presiding officer may also specify the time available for oral argument and determine the nature of the hearing to be held.

(b) The presiding officer may determine, upon request by a participant, whether to permit the participant to raise new facts or issues not raised in prior proceedings on the contested order. Such a request may be granted if the facts or issues are facts or issues that:

(1)(i) Were not known and could not, with the exercise of due care, have been known to the participant at the time they could have been raised in prior proceedings; or

(ii) Are facts or issues that the participant was not permitted to raise in prior proceedings on the contested order due to an adverse procedural ruling alleged to be erroneous; and

(2) Are necessary for a full and true disclosure of the facts.

(c) The petitioner must file a request to raise new facts or issues simultaneously with its petition for review. The Secretary must file such a request simultaneously with its reply to the petition for review. A third party must

make such a request by the filing deadline set by the presiding officer.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 422, 50 FR 21600, May 28, 1985]

§ 385.1008 Hearings (Rule 1008).

As soon as practicable, after receiving any request for hearing and all the pleadings under Rules 1004 (commencement of proceedings) and 1005 (replies), the presiding officer will give notice to the participants as to the time and place of the hearing.

§ 385.1009 Proof (Rule 1009).

(a) A participant seeking relief from the Secretary's denial of a request for adjustment has the burden of demonstrating the participant's entitlement to the relief sought.

(b) Relief will be granted under this subpart if a participant demonstrates, by a preponderance of the evidence, that such relief is warranted.

§ 385.1010 Certification of the record (Rule 1010).

The presiding officer will certify and file with the Office of the Secretary of the Commission, for the Commission, a copy of the record in the proceeding.

[Order 422, 50 FR 21600, May 28, 1985]

§ 385.1011 Final order (Rule 1011).

The Commission will issue a final order, affirming, modifying or vacating the contested order or directing other appropriate relief.

§ 385.1012 Ex parte communications (Rule 1012).

The provisions of Rule 2201 (*ex parte* communications) apply to proceedings pursuant to this subpart, commencing at the time a petitioner files a petition for review under Rule 1004 (commencement of proceedings), as if such proceedings were contested on-the-record proceedings pending before the Commission.

§ 385.1013 Attachments to pleadings (Rule 1013).

(a) Each party will file, as an appendix to each pleading which cites documents in the record developed in the prior proceedings on the adjustment request, one copy of each such document in its entirety and, if such document contains information exempt from public disclosure pursuant to rule 1003, a second copy of such document with such information deleted. The top of the first page of each such document will contain the word ''PUBLIC'' or ''NON-PUBLIC,'' to indicate whether it contains exempt information.

(b) One copy of the PUBLIC and NON-PUBLIC versions must be served on counsel for the petitioner and/or the Secretary, and one copy of the PUBLIC version must be served on counsel for each other participant separately represented unless the conditions of Rule 1003 are met, in which situation such counsel must be served with copies of both versions.

(c) In compiling appendices, the parties will include only documents specifically cited and relied upon in their pleadings. In light of the fact that the Commission always has access to the Secretary's entire administrative record, the parties must not include irrelevant or repetitive documents in the appendices.

[Order 422, 50 FR 21601, May 28, 1985]

Subpart K—Petitions for Adjustments Under the NGPA

§ 385.1101 Applicability (Rule 1101).

(a) *Proceedings to which applicable.* Except as provided in paragraph (b) of this section, this subpart applies to proceedings of the Commission held in accordance with section 502(c) of the NGPA to provide for adjustments of:

(1) Commission rules, and

(2) Commission orders having the applicability and effect of a rule as defined in section 551(4) of title 5 of the United States Code (5 U.S.C. 551(4)) and issued under the NGPA, except orders issued under sections 301, 302, and 303 of the NGPA.

(b) This subpart does not apply to:

(1) Proceedings wherein the Commission by order grants an adjustment on its own motion or;

(2) Proceedings for which the Commission by order waives the provision of this subpart.

(c) *Relationship to other rules.* (1) Where a provision of this subpart is inconsistent with a provision in another subpart of this part, the former provision controls.

(2) When provisions of other subparts of this part require Commission action, such provisions as applied under this subpart shall be deemed to require staff action. This subpart does not require a hearing to which subpart E applies.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 478, 52 FR 28467, July 30, 1987]

§385.1102 Definitions (Rule 1102).

For purposes of this subpart:

(a) *Adjustment* means an order issued by Staff under Rule 1109 (orders):

(1) Granting relief from an order or rule issued by the Commission under the NGPA,

(i) Including exceptions, exemptions, modification, and recisions of rules and orders have the effect of rule as defined in section 551 of title 5 of the United States Code (5 U.S.C. 551(4)) and issued under the NGPA; but

(ii) Excluding requests for just and reasonable rates under sections 104, 106, and 109 of the NGPA; and

(2) Granting an exemption, in whole or in part, for incrementally priced industrial boiler fuel facilities from section 201 of the NGPA, under the authority of section 206(d) of the NGPA and §282.206 (industrial boiler fuel facilities exemption);

(b) *Petitioner* means a person who files a petition for adjustment under paragraph (c) of this section;

(c) *Petition* means a petition for adjustment filed under Rule 1103 (commencement of adjustment proceedings);

(d) *NGPA* means the Natural Gas Policy Act of 1978;

(e) *Party* means, with respect to a particular petition for adjustment, the person making the petition, and intervener, or a person who has moved to intervene but whose motion has not been granted or denied under Rule 1105(b) (intervention in adjustment proceedings).

(f) *Staff* means the Director of the Office of Producer and Pipeline Regulation, or a person who is designated by the Director and who is an employee of the Commission.

§385.1103 Commencement of proceeding (Rule 1103).

A person commences a proceeding for an adjustment by filing a petition for adjustment with the Commission.

§385.1104 Initial petition (Rule 1104).

(a) *Content.* (1) The petition must contain:

(i) A full and complete statement of the relevant facts, including the documentary support pertaining to the circumstances, act or transaction that is the subject of the petition;

(ii) A complete statement of the business reasons why the relief should be granted and the business consequences that will result if the relief is denied; and

(iii) A statement specifying how the denial of relief will cause the applicant to suffer special hardship, inequity, or unfair distribution of burdens.

(2) The petition must contain a complete statement of the legal basis of the relief requested including citations to authorities relied upon to support the petition.

(3) The petition must specify the exact nature of the relief sought.

(4) The certificate of service required under Rule 2010(h) (certificate of service) must indicate the names and addresses of all persons served.

(5) The petition must include a proposed notice of the adjustment proceeding which must state the petitioner's name, the rule or order under the NGPA of which an adjustment is sought, the date of the petition, and a brief summary of the relief requested. The proposed notice must be in the following form:

UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

(Name of Petitioner) _____
Docket No. _____

NOTICE OF PETITION FOR ADJUSTMENT

On (date petition was filed), (name of petitioner) filed with the Federal Energy Regulatory Commission a petition for an adjustment under the rule or order under the NGPA of which an adjustment is sought, wherein (name of petitioner) sought (relief requested).

The procedures applicable to the conduct of this adjustment proceeding are found in subpart K of the Commission's Rules of Practice and Procedure.

Any person desiring to participate in this adjustment proceeding must file a motion to intervene in accordance with the provisions of such subpart K. All motions to intervene must be filed within 15 days after publication of this notice in the FEDERAL REGISTER.

(6) The petition must be accompanied by the fee prescribed in § 381.401 of this chapter or by a petition for waiver pursuant to § 381.106 of this chapter.

(b) *Service.* (1) The petitioner must serve a copy of the petition, or a copy from which confidential information has been deleted in accordance with Rule 1112 (requests for confidential treatment) on each person who is reasonably ascertainable by the petitioner as a person who may suffer direct and measurable economic impact if the relief is granted.

(2) Notwithstanding paragraph (b)(1) of this section, if a petitioner determines that compliance with such paragraph of this section would be impracticable, the petitioner must:

(i) Comply with the requirements of such paragraph with regard to those persons whom it is reasonable and practicable to serve; and

(ii) Include with the petition a description of the persons or class or classes of persons to whom notice was not sent.

(3) Staff may require the petitioner to provide alternate or additional service and will cause notice of the application to be published in the FEDERAL REGISTER.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 394, 49 FR 35365, Sept. 7, 1984]

§ 385.1105 Intervention (Rule 1105).

(a) A motion to intervene in an adjustment proceeding, in conformity with Rule 214 (intervention) must be filed within 15 days after publication in the FEDERAL REGISTER of notice of the petition for adjustment.

(b) A motion to intervene is granted unless it is denied by staff within 75 days after the day on which it was filed.

§ 385.1106 Other filings (Rule 1106).

(a) *Interveners.* Responses to the petition must be filed at the time the motion to intervene is filed.

(b) *Petitioner.* The petitioner may respond to filings of another party within 15 days after service of such filings. Amended pleadings may be filed under Rule 215 (amendments) if the petitioner discovers facts unavailable at the time the initial petition was filed, or if such pleadings are requested or permitted by Staff under Rule 1107 (evaluations).

§ 385.1107 Evaluations (Rule 1107).

(a) Staff will consider the filings made in connection with the petition for adjustment. Staff may also consider information received under paragraph (b) of this section. If Staff obtains information under paragraphs (b)(1) or (b)(3) of this section and relies upon such information, the petitioner will be advised of such information and will be given 15 days to respond to such information.

(b)(1) Staff may initiate an investigation of any statement in a petition and use in its evaluation any relevant fact obtained in such an investigation.

(2) Staff may request additional information from the petitioner.

(3) Staff may solicit and accept submissions from interveners or third persons relevant to the petition.

(4) Staff may consider information obtained in informal conferences held under Rule 1111 (adjustment conferences).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 24–C, 50 FR 21596, May 28, 1985]

§ 385.1108 Criteria (Rule 1108).

(a) Staff will grant a petition where there are sufficient facts to make a determination on the merits and where Staff determines that an adjustment is necessary to prevent or alleviate:

(1) Special hardship;

(2) Inequity; or

(3) An unfair distribution of burdens.

(b) When there are not sufficient facts to make a determination on the merits, the Staff may dismiss the petition without prejudice; except, that when Staff has requested additional material information under Rule 1107

(adjustment evaluations) of this section and the petitioner has failed to provide the requested information, Staff may deny the petition if the requested information was reasonably available to the petitioner.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 24–C, 50 FR 21596, May 28, 1985]

§385.1109 Orders (Rule 1109).

(a) Staff will issue a decision and an order granting or denying the petition in whole or in part. The order will articulate the basis for the decision, noting any dispute with the factual assertions of the petitioner.

(b) In addition to service otherwise required under this subpart, Staff will serve the decision and order on the persons who sought and were denied an opportunity to participate in the proceeding under this subpart.

(c) If Staff fails to issue an order granting or denying the petition for adjustment within the determination period, the petitioner may treat the application as having been denied and may, within 30 days after the close of the determination period, request review thereof as prescribed in Rule 1110(a) (review of denials). For purposes of this paragraph, ''determination period'' means the 150 days commencing with the filing of the petition, unless Staff for good cause extends such period.

(d) An order of Staff issued under paragraph (a) of this section granting an adjustment, in whole or in part, is final 30 days after it is issued, unless, during such 30-day period:

(1) A petition for review is filed under subpart J of this subchapter in accordance with Rule 1110(a) (review of denials) in which case the order is final when the review process under subpart J has been completed; or

(2) The Commission directs that the order be reviewed under subpart J in accordance with Rule 1110(b), in which case the order is final when the review process under subpart J has been completed unless the Commission expressly states that the order shall be effective pending review proceeding.

§385.1110 Review of initial decision and order for adjustment (Rule 1110).

(a) *General rule.* (1) Within 30 days after the issuance by Staff of an order granting or denying, in whole or in part, a petition for adjustment relief under this subpart, a person may file a petition for Commission review of that order in accordance with subpart J of this subchapter, if the person:

(i) Is aggrieved or adversely affected by that order; and

(ii) Participated, or sought and was denied an opportunity to participate, in the proceeding under this subpart.

(2) Except as otherwise provided in this paragraph, the provisions of subpart J other than Rule 1013 (attachments to pleadings) shall apply to Commission review of both grants and denials of adjustment petitions under this subpart.

(i) *Contested order* in subpart J means the order issued by Staff granting or denying, in whole or in part, a petition for adjustment under this subpart.

(ii) ''Staff'' is substituted for ''Secretary'' in subpart J. With respect to review of an order denying a petition for adjustment under this subpart, Staff may participate in the proceeding in the same manner prescribed for the Secretary in Rule 1005 (replies in reviews of adjustment denials). With respect to review of an order granting a petition for adjustment under this subpart, Staff may not participate in the proceeding except to the extent necessary to file the list identifying the documents in the record as prescribed in paragraph (a)(2)(iii). With respect to review of an order granting in part and denying in part a petition for adjustment under this subpart, Staff may participate as prescribed in Rule 1005(a)(1) (replies), only if a petition for review has been filed which specifically seeks review of the portion of the order denying the petition for adjustment.

(iii) Within 15 days of service of the petition for review, Staff must file with the Commission a list identifying each document in the record developed in the prior proceedings on the contested order, who filed the document, and the date it was filed.

(3) A motion to intervene under Rule 1005(c) (interventions in adjustment

proceedings) may be filed only by a person who sought and was denied an opportunity to participate, in the proceeding under this section. A person who did not file a motion to intervene in the Staff proceeding may file a motion for late intervention under Rule 214(d) (grant of late intervention).

(4) There is no exhaustion of administrative remedies until a request for review is filed under subpart J in accordance with this section and the review process under subpart J is completed by the issuance of an order granting or denying, in whole or in part, the relief requested.

(b) *Review initiated by the Commission.* Within 30 days after the issuance by Staff of an order granting, in whole or in part, a petition for adjustment relief under this subpart, the Commission may direct that the order be reviewed in a proceeding which, insofor as practicable, will conform to proceedings under subpart J. The order directing such review will specify the manner in which such proceeding will be conducted and the extent to which subpart J apply.

(c) *Separation of functions.* Any person who participated in the proceeding to review the grant or denial of that adjustment under this Rule as a witness or counsel may not advise the Commission concerning the review of the grant or denial of that adjustment.

[Order 225, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983, as amended by Order 24–C, 50 FR 21596, May 28, 1985]

§ 385.1111 Conferences (Rule 1111).

Staff may direct that a conference be convened. The conference will be conducted by Staff in accordance with procedures Staff determines will most expeditiously further the purpose of the conference. A conference will be convened only after actual notice of the time, place and nature of the conference is provided to the parties. All parties may attend the conference. However, if a party wishes to present confidential information at the conference, Staff may exclude the other parties from that part of the conference when the confidential information is presented.

§ 385.1112 Requests for confidential treatment (Rule 1112).

(a) If a person filing a document under this subpart claims that some or all of the information contained in a document is exempt from the mandatory disclosure requirements of the Freedom of Information Act, or is otherwise exempt by law from public disclosure, that person may request confidential treatment of such information. At the time request is made for confidential treatment, the person must submit a copy of the document which contains the confidential information and two copies of the document which exclude the information for which confidential treatment is requested. The request for confidential treatment must describe the information deleted and specify the grounds for the claim for confidential treatment. The service requirements of Rule 2010 (service) are deemed satisfied if a copy of the document with the confidential information deleted is served.

(b) If a determination to disclose the information is made under part 388 (public information and requests), the person who has requested confidential treatment will be given notice thereof and will be afforded no less than 10 days to respond to such determination before the information is disclosed.

§ 385.1113 Interim relief (Rule 1113).

(a) The petitioner may at any time file a request for interim relief in a proceeding under this subpart, setting forth the legal and factual basis for the request. Service of such request must comply with the service requirements set forth in Rule 1104(b) (initial petition of adjustment request) and must be made on each person described in such rule as well as on any other party to the proceeding.

(b) The grounds for granting interim relief are:

(1)(i) A showing that irreparable injury will result in the event the interim relief is denied; and

(ii) A showing that denial of the interim relief requested will result in a more immediate special hardship or inequity to the person requesting the interim relief than the consequences that would result to other persons if the interim relief were granted; or

(2) A showing that it will be in the public interest to grant the interim relief.

(c) A party may within 10 days after the filing of the request for interim relief file a reply to the request for interim relief.

(d) Staff may request a written statement of the views of a party regarding whether the interim relief should be granted and may convene an expedited conference on the request for interim relief.

(e) If Staff has not granted the request for interim relief within 30 days after it is filed, the request is denied.

(f)(1) Subject to paragraph (f)(2) of this section, Staff will issue an order granting or denying the request for interim relief and will notify the parties. Any grant of interim relief is subject to further modification in the order issued under Rule 1109 (orders).

(2) The Commission may, on its own motion, at any time revoke, modify, rescind, stay or take any other appropriate action concerning the order granting interim relief.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 24–C, 50 FR 21596, May 28, 1985]

§ 385.1114 Motions (Rule 1114).

A party may file a motion at any time. Motions must set forth the ruling or relief requested and must state the grounds therefor and the statutory or other authority relied upon. Staff will rule on all motions.

§ 385.1115 Procedural rulings (Rule 1115).

Staff may make any procedural rule or provide any procedural relief.

§ 385.1116 Appeals (Rule 1116).

All actions under this subpart are taken by Staff, except with respect to requests for public information under part 388. Except as provided in Rule 1110 (review of initial adjustment decision) of this section, there are no appeals to the Commission from Staff action taken under this section.

§ 385.1117 Petition for adjustment treated as request for interpretation (Rule 1117).

(a) Staff may, if appropriate, treat a petition filed under Rule 1103 (petition for adjustment) as a request for an interpretation under section 502(c) of the NGPA, or rule or order issued under that Act.

(b) If the Staff exercises its discretion under paragraph (a) of this section to treat a petition for adjustment as a request for an interpretation, then:

(1) Staff will notify the parties to the proceeding that the petition is being treated as a request for an interpretation under Rule 1901; and

(2) The time limits in this section are stayed pending issuance of the interpretation.

(c) After the interpretation is issued, if the petitioner wishes to reinstate the adjustment proceeding, the petitioner may do so by notifying the Commission in writing that the petition should be reinstated.

Subpart L [Reserved]

Subpart M—Cooperative Procedure with State Commissions

§ 385.1301 Policy (Rule 1301).

(a) The Federal Power and Natural Gas Acts, sections 209 and 17, respectively, authorize cooperation between the Federal Energy Regulatory Commission and the State commissions of the several States in the administration of said Acts, which include authorization for:

(1) Reference of any matter arising in the administration of these Acts to a board to be composed of a member or members from a State or States affected, or to be affected, by the particular matters pending before the Commission;

(2) Conferences with State commissions regarding the relationship between rate structures, costs, accounts, charges, practices, classifications, and regulations of public utilities or natural gas companies subject to the jurisdiction of such State commissions and of the Commission; and

(3) Joint hearings with State commissions in connection with any matter with respect to which the Commission is authorized to act.

(b) The matters that should be the subject of a conference referred to a board, or heard at a joint hearing of State commissions and the Commission, obviously, cannot be determined in advance. It is understood, therefore, that the Commission or any State commission will freely suggest cooperation with respect to any proceeding or matter affecting any public utility or natural gas company subject to the jurisdiction of the Commission and of a State commission, and concerning which it is believed that cooperation will be in the public interest.

§ 385.1302 Notice (Rule 1302).

(a) *By Commission.* (1) Whenever there is instituted before the Commission any proceeding under either the Federal Power Act or the Natural Gas Act, the State commission or commissions of the State or States affected thereby will be given notice thereof immediately by the Commission. As deemed necessary for an understanding of the subject matter, each such notice will be supplemented by copies of applications, complaints, petitions, or orders instituting proceedings. Each such notice given to a State commission will request that the Commission be notified within a reasonable time whether the proceeding is deemed one that should be considered under the cooperative provisions of this subpart, and, if so, to advise the Commission as to the nature of its interest in the matter, and further, to specify whether it desires a conference, the creation of a board, or a joint or concurrent hearing, as defined in this subpart and the reasons for such request.

(2) Any commission suggesting some form of such cooperative procedure should also state whether there is pending, or will be pending before it, a proceeding in which a concurrent hearing might appropriately be held and whether its proposal is for such hearing covering such proceeding and the proceeding pending before the Commission.

(3) A State commission recommending to the Commission reference of a proceeding to a board, under either the Federal Power Act or the Natural Gas Act, should state with fullness the reasons which led it to believe that such reference is desirable and in the public interest.

(4) Upon the receipt from a State commission of a communication suggesting cooperation, the Commission will consider the same, and may confer with the commission making the request and with other interested commissions, if any, in such manner as may be most suitable, and, if cooperation in the manner proposed, or in any other manner, appears to be practicable and desirable, will so advise each interested State commission, and will invite it to participate therein.

(b) *By State commission.* (1) Each State commission should, in like manner, notify the Commission of any proceeding instituted before it the subject matter of which is also subject to the jurisdiction of the Commission, or in which it believes the Commission is interested. Such notice should be supplemented by copies of applications, petitions, complaints, or orders instituting proceedings which may be necessary to an understanding of the subject matter. Such notice should include the suggestions which the State commission may wish to make concerning cooperative procedure.

(2) Upon receipt of such notice, the Commission will consider the same and will promptly notify the State commission whether or not in its opinion cooperation in the manner proposed, or in any other manner, appears to be practicable and desirable. The Commission is free to propose cooperative procedures whether or not such proposal of cooperation has been made by the State commission first giving notice of the proceeding.

(c) *Commission or State commissions to invite participation in cooperative procedure.* In the event that cooperation in a particular proceeding has been determined upon, the Commission or a State commission before which the proceeding is pending will so advise each interested State commission and will invite it to take part therein.

§ 385.1303 Conferences (Rule 1303).

Inasmuch as experience has proved that informal conferences are the means most often used to enable commissions to work together to promote good regulation, affording means whereby common understandings may be reached, and the imposition of inconsistent or conflicting regulations upon companies subject to both Federal and State control may be avoided and means whereby State commissions may secure the assistance in State regulatory work which sections 209 and 17, respectively, of the Federal Power and Natural Gas Acts authorize the Commission to extend, any commission, Federal or State, should always feel free to suggest a conference to another commisison, concerning any matter of regulation subject to the jurisdiction of either, with respect to which it is believed that a cooperative conference may be in the public interest. The commission desiring a conference upon any such matter should notify other interested commissions without delay, and thereupon the Commission or a State commission, as may be agreed, will promptly arrange for a conference in which all interested commissions will be invited to be represented.

§ 385.1304 Procedure governing matters referred to a board (Rule 1304).

(a) It is believed that the statutory provisions of sections 209 and 17, respectively, of the Federal Power and Natural Gas Acts, for the reference of a proceeding to a board constituted as therein provided, were designed for use in unusual cases, and as a means of relief to the Commission when it might find itself unable to hear and determine cases before it, in the usual course, without undue delay.

(b) Whenever the Commission, either upon its own motion or upon the suggestion of a State commission or at the request of any interested party, determines that it is desirable to refer a matter arising in the administration either of the Natural Gas Act or Part II of the Federal Power Act, to a board to be composed of a member or members from the State or States affected or to be affected by such matter, the procedure will be as follows: The Commission will send a request to each interested State commission to nominate a specified number of members to serve on such board. Whenever more than one State is involved, the representation of each State concerned shall be equal, unless one or more of the States affected chooses to waive such right of equal representation. The Commission will specify the functions to be performed by such board in each instance. When the member or members of any board have been nominated and appointed in accordance with the provisions of either section 209 of the Federal Power Act or section 17 of the Natural Gas Act, the Commission will issue an order referring the particular matter to such board, and such order will fix the time and place of hearing, define the ''force and effect'' which an action of the board will have, the manner in which the proceedings will be conducted, and specify the allowances to be made for the expense of the members of the board. As far as applicable, the rules of practice and procedure as from time to time adopted or prescribed by the Commission will govern such board. The board will have authority to adjourn the hearing from day to day, subpoena witnesses, rule on the relevancy, competency, and materiality of evidence, and will, after hearing all interested parties, submit its report to the Commission.

§ 385.1305 Joint and concurrent hearings (Rule 1305).

(a) The term ''joint hearing'' used in sections 209 and 17, respectively, of the Federal Power and Natural Gas Acts is understood to cover any hearing in which members of the Commission and members of one or more State commissions may sit together in a proceeding pending before one such commission, whether or not a proceeding or proceedings involving similar or corresponding issues be pending before any other commission.

(b) Two different types of proceedings have been called ''joint hearings''. One is that type of proceeding where members of one or more State commissions sit with members of the Commission for information or in an advisory capacity. The State commissioners in such case do not develop a record for their respective commissions and may

not, at their own discretion, make a recommendation to the Commission. The other type of joint hearing is often referred to as a ''concurrent hearing''. Under this procedure the Commission and one or more State commissions sit together to hear and jointly make a record upon a matter over which all of the participating commissions have jurisdiction and responsibility for action.

(c) The Commission or any State commission or commissions should feel free to suggest or request a joint or concurrent hearing at any time. It is believed that the concurrent hearing is the type of cooperative hearing which is likely to be most useful and effective.

(d) Whenever a concurrent hearing has been agreed upon by the Commission and one or more State commissions, the procedure will be:

(1) Each commission will designate the representative or representatives of such commission to sit at such concurrent hearing, and will designate the representative who will be the presiding officer for such commission.

(2) It will be understood that participation in such concurrent hearing will in no way affect the complete control by each commission of the proceeding before it. It will be understood, also, that participation in either a joint or concurrent hearing will in no way preclude any commission from causing to be presented in any such case pertinent evidence with respect to matters in issue.

(3) The representative designated by the Commission will be the presiding officer to announce rulings with respect to which there is no disagreement; and such rulings will be considered concurrent rulings. However, the presiding officer for any commission which does not concur in any ruling may announce a divergent ruling and such divergent ruling, whether with respect to the admissibility of evidence or any other matter, will be considered the ruling for his or her commission.

(4) The record of the concurrent hearing will be the record of each commission participating, except that, if divergent rulings are made, the rulings will be reported so as to separate and distinguish clearly the record of the respective participating commissions and the evidence admitted in each record, in accordance with the rulings of the respective commissions. If, in any proceeding, the ruling of one presiding officer has the effect of admitting any voluminous exhibit or testimony which is excluded by the ruling of another presiding officer, the taking of such evidence, whenever possible, will be deferred until after the completion of the proceedings which can be conducted under concurrent rulings. When such testimony is taken, the transcript of such evidence will be made available to the participating commissions, if desired.

(5) In all respects concerning which there is no divergence of ruling, the hearing will be conducted in accordance with the rules of practice and procedure prescribed by the Commission, subject to the express understanding that each participating State commission will control its own record and make its own rulings as to the admissibility of evidence and as to other matters affecting its proceedings, and will make its own separate final decision or order therein.

(e) Before either the Commission or a participating State commission will enter any order or orders in a concurrent proceeding, opportunity will be afforded for conference between the Commission and the State commissions participating.

(f) Whenever a joint hearing other than a concurrent hearing is agreed upon, the commissioners which take part therein will agree upon the procedure to be followed in such hearing in advance of the opening of the same. With respect to any concurrent hearing, a special agreement may be made by the commissions taking part therein for a procedure or action differing from that outlined in this plan.

(g) Cooperation between two or more commissions in a concurrent hearing will preclude either from taking the position of an advocate or a litigant. If a commission wishes to take such a position, it will not be a cooperating participant in that proceeding. In such situatin the appropriate method of procedure will be intervention under Rule 214.

§385.1306 Intervention by State commissions (Rule 1306).

Any interested State commission may intervene in any proceeding before the Federal Energy Regulatory Commission, as provided in Rule 214.

Subpart N—Oil Pipeline Proceedings

AUTHORITY: Administrative Procedure Act, 5 U.S.C. 551–557; Department of Energy Organization Act, 42 U.S.C. 7101–7352, E.O. 12,009, 3 CFR 142 (1978); Interstate Commerce Act, 49 U.S.C. 1, *et seq.*

SOURCE: Sections 385.1404 through 385.1415 issued under Order 276, at 49 FR 21705, May 23, 1984, unless otherwise noted.

§385.1401 Applicability (Rule 1401).

(a) This subpart applies to oil pipeline proceedings.

(b) If any provision of this subpart is inconsistent with any provision of another subpart of this part, the provision of this subpart governs and the provision of the other subpart is inapplicable to the extent of the inconsistency.

[Order 312, 48 FR 29479, June 27, 1983]

§385.1402 Subscriber lists (Rule 1402).

(a) Not later than December 31 of each year, an oil pipeline must request, in writing, each of its subscribers and each person who has been served under any of its tariffs during the preceding twelve months to notify the pipeline as to whether the subscriber or person wishes to be included on the subscriber list for any of the oil pipeline's integrated pipeline systems.

(b) The oil pipeline must immediately add to the specified subscriber list any subscriber or person which responds in writing within 30 days of receipt of the oil pipeline request and which indicates in that response that it wishes to be included on the specified list.

[Order 312, 48 FR 29479, June 27, 1983]

§385.1403 Dates for filing protests and interventions (Rule 1403).

A protest or intervention to an oil pipeline tariff filing must be filed with the Commission:

(a) 12 days before the proposed effective date of the tariff filing, if the tariff filing requires a 30-day notice, or

(b) 5 days before the proposed effective date of the tariff filing, if the tariff filing requires a 10-day notice.

[Order 312, 48 FR 29479, June 27, 1983]

§385.1404 Petitions seeking institution of rulemaking proceedings (Rule 1404).

Any person may file a petition requesting the Commission to institute a proceeding for the purpose of issuing statements, rules, or regulations of general applicability and significance designed to implement or interpret law, or to formulate general policy for future effect. No reply to such a petition may be filed. Whether a proceeding shall be instituted as requested is within the discretion of the Commission and the ruling on the petition will be final. In the event a rulemaking proceeding is instituted by the Commission, the procedure to be employed for the taking of evidence or the receipt of views and comments will be designated by Commission order.

§385.1405 Modified procedure, how initiated (Rule 1405).

The Commission may, in its discretion, order that a proceeding be heard under modified procedure if it appears that substantially all important issues of material fact may be resolved by means of written materials and that the efficient dispositon of the proceeding can be made without oral hearing.

(a) *Commission's initiative or by request.* Modified procedure will be ordered in a proceeding upon the Commission's initiative or upon its approval of a request filed by any party that the modified procedure shall be observed.

(b) *Order directing modified procedure.* An order directing modified procedure will list the names and addresses of the persons who at that time are parties to the proceeding, and direct that they comply with the modified procedure rules. As used in Rules 1409, 1411, and 1413 the term ''complainant'' shall comprehend the party having the initial duty to establish the truth of the

claim or to justify the relief or authorization sought, and the term ''defendant'' shall comprehend the party controverting the truth of the claim or opposing the relief or authorization sought.

§ 385.1406 Modified procedure; effect of order (Rule 1406).

(a) *Relief from answer rule.* Issuance of an order directing modified procedure shall relieve defendant from the obligation of answering as provided in Rule 213.

(b) *Default where failure to comply.* If within any time period provided in the modified procedure rules a party fails to file a pleading required by those rules, or otherwise fails to comply therewith, such party shall be deemed to be in default and to have waived any further hearing. Thereafter the proceeding may be disposed of without further notice to the defaulting party, and without other formal proceedings as to such party.

§ 385.1407 Modified procedure; intervention (Rule 1407).

Persons permitted to intervene under modified procedure shall file and serve pleadings in conformity with the provisions of Rule 1409 below.

§ 385.1408 Modified procedure; joint pleadings (Rule 1408).

Parties having common interests, to the extent practicable, shall arrange for joint preparation of pleadings filed under modified procedure.

§ 385.1409 Modified procedure; content of pleadings (Rule 1409).

(a) *Generally.* A statement filed under the modified procedure after that procedure has been directed shall state separately the facts and arguments and include the exhibits upon which the party relies. Only facts contained in the verified statement of facts can be used in argument. If, pursuant to Rule 1406(a), no answer has been filed, defendant's statement must admit or deny specifically and in detail each material allegation of the complaint. In addition, defendant's statement and complainant's statement in reply shall specify those statement of facts and arguments of the opposite party to which exception is taken, and include a statement of the facts and arguments in support of such exception. Complainant's statement of reply shall be confined to rebuttal of the defendant's statement.

(b) *Exhibit identification.* An exhibit which is part of any pleading filed under modified procedure shall serially be numbered and bear the notation, properly filled out, in the upper right hand corner:

''Complainant (Defendant).....Exhibit No. _____
Witness _____

(c) *Damages.* If an award of damages is sought, the paid freight bills or properly certified copies thereof should accompany the original of complainant's statement when there are not more than 10 shipments, but otherwise the documents should be retained.

§ 385.1410 Modified procedure; verification (Rule 1410).

The facts asserted in any pleading filed under modified procedure must be sworn to by persons having knowledge thereof, which latter fact must affirmatively appear in the affidavit. Except under unusual circumstances, such persons should be those who would appear as witnesses orally to substantiate the facts asserted should hearing become necessary. The original of any pleading filed under modified procedure must show the signature, capacity, and impression seal, if any, of the person administering the oath, and the date thereof.

§ 385.1411 Modified procedure; when pleadings filed and served (Rule 1411).

Within 20 days from the date of service of an order requiring modified procedure, complainant shall serve upon the other parties a statement of all the evidence upon which it relies. Within 30 days thereafter defendant shall serve its statement. Within 20 days thereafter complainant shall serve its statement in reply. No further reply may be made by any party except by permission of the Commission.

§ 385.1412 Modified procedure; copies of pleadings (Rule 1412).

The original and six copies of any statement made pursuant to Rule 1411 shall be filed with the Commission. Subsequent pleadings are subject to Rule 1414.

§ 385.1413 Modified procedure; hearings (Rule 1413).

(a) *Request for cross examination or other hearing.* If cross examination of any witness is desired, the name of the witness and the subject matter of the desired cross examination shall, together with any other request for oral hearing, including the basis therefor, be stated at the end of defendant's statement or complainant's statement in reply as the case may be. Unless material facts are in dispute, oral hearing will not be held for the sole purpose of cross examination.

(b) *Hearing issues limited.* The order setting the proceeding for oral hearing, if hearing is deemed necessary, will specify the matters upon which the parties are not in agreement and respecting which oral evidence is to be introduced.

§ 385.1414 Modified procedure; subsequent procedure (Rule 1414).

Procedure subsequent to that provided in the modified procedure rules shall be the same as that in proceedings not handled under modified procedure.

§ 385.1415 Rule applicable to ex parte communications during oil pipeline proceedings (Rule 1415).

(a) *Ex parte communications.* (1) No person who is a party to, or counsel or agent of a party, or who intercedes in, any on-the-record proceeding, shall submit any ex parte communication concerning the merits of the proceeding to any member of the Commission, hearing officer, or employee of the Commission participating or who may reasonably be expected to participate in the decision in such proceeding.

(2) No member of the Commission, hearing officer, or employee of the Commission participating or who may reasonably be expected to participate in the decision in such proceeding shall invite or knowingly entertain any prohibited ex parte communication, or make any such communication to any party to, or counsel or agent of a party, or any other person who he has reason to know may transmit such communication to a party or party's agent.

(b) The prohibitions of paragraph 1 apply from the time an on-the-record proceeding is noticed for oral hearing or the taking of evidence by modified procedure, at such time as the person responsible for the communication has knowledge that the proceeding will be so noticed, or from such earlier time as the Commission may fix by rule or order in the particular case.

(c) For the purposes hereof:

(1) *On-the-record proceeding* means a proceeding described in sections 556–557 of the Administrative Procedure Act (5 U.S.C. 556–557) or a proceeding required by the Constitution, by statute, by Commission rule, or by order in the particular case, to be decided solely upon the record made in a Commission hearing.

(2) *Person who intercedes in any proceeding* means any individual outside the Commission (whether public or private life), partnership, corporation, or association, other than a party or an agent of a party, who volunteers a communication which he may be expected to know may advance or adversely affect the interest of a particular party or any party's agent.

(3) *Ex parte communication concering the merits* includes both oral and written communications, but the following classes of ex parte communication shall not be prohibited:

(i) Any oral or written communication which all the parties to the proceeding agree, or which the Commission or the hearing officer formally rules, may be made on an ex parte basis.

(ii) Any oral or written communication of facts or contentions with general significance for an industry subject to regulation if the communicator cannot reasonably be expected to know that the facts or contentions are material to a substantive issue in a pending on-the-record proceeding in which he is interested.

(iii) Any communication by means of any news medium which in the ordinary course of business of the publisher

is intended to inform the general public, members of the organization involved, or subscribers to such publications with respect to pending on-the-record proceedings.

(iv) *Any employee of the Commission participating in the decision* includes members of the Oil Pipeline Board, Commissioners and their personal assistants, and any staff acting as a participant, as defined in Rule 385.102(b) in oil pipeline proceedings.

(d) Any member of the Commission, hearing officer, or employee of the Commission, participating or who reasonably may be expected to participate in the decision, who personally receives a written communication which he believes is prohibited at the time received, shall promptly transmit the written communication, or a written summary of the substance of an oral communication, together with a written statement of the circumstances under which the communication was made, if not apparent from the communication itself, to the Secretary of the Commission, who shall place any material so received in the correspondence section of the public docket of the proceeding. Any such person who receives a communication and who is not certain whether such communication is a prohibited ex parte communication may request, and shall be given promptly, a ruling on the question from the Commission's General Counsel. The Chairman of the Commission shall be notified promptly of all reports of ex parte communications, or requests for rulings on possible ex parte communications, transmitted to the Secretary or the General Counsel. He may require that any such communication be placed in the correspondence section of the docket if he concludes that the dictates of fairness require that it be made public, even if it is not prohibited communication, and he may direct the taking of such other or further action as may be appropriate under all circumstances.

(e) The Commission may censure, or suspend or revoke the privilege to practice before the agency, of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication.

(f) To the extent permitted by law, the relief or benefit sought by a party to a proceeding may be denied if the party, or an agent of the party, knowingly and willfully violates the foregoing prohibitions or requirements.

Subpart O—Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act

§ 385.1501 Scope (Rule 1501).

The rules in this subpart apply to and govern proceedings for the assessment of civil penalties pursuant to section 31 of the Federal Power Act, 16 U.S.C. 823b.

§ 385.1502 Persons subject to civil penalties (Rule 1502).

(a) Any licensee or permittee under the Federal Power Act, or exemptee from any requirement of Part I of the Federal Power Act, may be subject to civil penalties; and

(b) Any person who must have a license under, or exemption from, the Federal Power Act, but does not, may be subject to civil penalties.

§ 385.1503 Actions subjecting persons to civil penalties (Rule 1503).

(a) The actions that subject persons to civil penalties are violations of:

(1) Any rule or regulation issued under Part I of the Federal Power Act;

(2) Any term or condition of a license or permit issued under Part I of the Federal Power Act or an exemption issued from any provision of Part I of the Federal Power Act;

(3) Any compliance order issued under section 31(a) of the Federal Power Act; or

(4) Any requirement of Part I of the Federal Power Act.

(b) Only actions occurring on or after October 16, 1986, may subject a person to civil penalties.

§ 385.1504 Maximum civil penalty (Rule 1504).

(a) Except as provided in paragraph (b) of this section, the Commission may assess a civil penalty of up to $10,000 for each day that the violation continues.

(b) No civil penalty may be assessed where a license or exemption is ordered revoked.

§385.1505 Determination of proposed penalty amount (Rule 1505).

(a) In determining the amount of a proposed penalty, the Commission will consider the nature and seriousness of the violation, and the efforts of the licensee, exemptee, permittee or one who should possess appropriate authority but does not, to remedy the violation in a timely manner.

(b) In making its determination under paragraph (a), the Commission will consider the following factors:

(1) Whether the person had actual knowledge of the violation;

(2) Whether the person had constructive knowledge of the violation deemed to be possessed by a reasonable individual acting under similar circumstances;

(3) Whether the person has a history of previous violations;

(4) Whether the violation caused loss of life or injury to persons;

(5) Whether economic benefits were derived because of the violation;

(6) Whether the violation caused damage to property or the environment;

(7) Whether the violation endangered persons, property or the environment;

(8) Whether there were timely remedial efforts;

(9) Whether there were untimely remedial efforts;

(10) Whether there were no remedial efforts; and

(11) Whether there are any other pertinent considerations.

§385.1506 Notice of proposed penalty (Rule 1506).

(a) Before issuing an order assessing a civil penalty under this subpart against any person, the Commission will provide to the person notice of the proposed penalty.

(b) The notice of proposed penalty will:

(1) Include the amount of the proposed penalty;

(2) Include a statement of the material facts constituting the alleged violation; and

(3)(i) Inform the person of the opportunity to elect in writing within 30 days of receipt of the notice to have the procedures of Rule 1509 (in lieu of those of Rule 1508) apply with respect to the assessment, or,

(ii) If a final compliance order is issued under section 31(a) of the Federal Power Act, no notice of election will be provided for a violation of, or a failure or refusal to comply with, the final order.

§385.1507 Election of procedures and answer (Rule 1507).

(a) If the respondent receiving the notice of proposed penalty wishes to have the procedures of Rule 1509 apply, then the respondent must file with the Commission, within 30 days of receipt of the notice, a notification of the election in accordance with subpart T, part 385 of this chapter. The notification may include an answer setting forth factual or legal reasons why the proposed assessment order should not be issued, should be reduced in amount, or should otherwise be modified. If a person fails to file an answer within the 30-day time limit, all material facts stated in the Commission's notice will be deemed admitted.

(b) Any election to have the procedures of Rule 1509 apply may not be revoked after the 30-day election period in paragraph (a) of this section, without the consent of the Commission.

§385.1508 Commission administrative procedures (Rule 1508).

(a) If the respondent is not entitled to an election pursuant to Rule 1506(b)(3)(ii) or does not timely elect to have the procedures of Rule 1509 apply, the Commission will commence a proceeding in accordance with the provisions of subpart E of this chapter.

(b) The Commission's Rules of Practice and Procedure in part 385 of this chapter will apply, as appropriate, to any evidentiary proceeding to assess a civil penalty.

(c) An assessment order under this section shall include the administrative law judge's findings and the basis for such assessment.

§ 385.1509 District court procedures (Rule 1509).

(a) After receipt of the notification of election to apply the provisions of this section pursuant to Rule 1507, the Commission will promptly assess the penalty it deems appropriate, in accordance with Rule 1505.

(b) If the civil penalty is not paid within 60 calendar days after the assessment order is issued under paragraph (a) of this section, the General Counsel, unless otherwise directed by the Commission, will institute an action in the appropriate United States District Court for an order affirming the assessment of the civil penalty.

§ 385.1510 Modification of civil penalty (Rule 1510).

(a) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty (with leave of court if necessary).

(b) In exercising its authority under paragraph (a) of this section, the Commission may consider the nature and seriousness of the violation, and the efforts of the licensee, exemptee, permittee, or one who should possess appropriate authority but does not, to remedy the violation in a timely manner.

(c) The Commission's authority to compromise, modify or remit a civil penalty may be exercised at any time prior to a final decision by the United States Court of Appeals if Rule 1508 procedures are utilized, or prior to a final decision by the United States District Court if Rule 1509 procedures are utilized.

§ 385.1511 Collection of civil penalties (Rule 1511).

If any person fails to pay a civil penalty assessment, the Commission will seek to recover the amount of the penalty plus interest in any appropriate District Court of the United States. Interest will begin to accrue on the date the Commission issues a final order under Rule 1508 or the date on which the appropriate District Court enters final judgment in favor of the Commission under Rule 1509.

[Order 502, 53 FR 32039, Aug. 23, 1988]

Subparts P—R [Reserved]

Subpart S—Miscellaneous

§ 385.1901 Interpretations and interpretative rules under the NGPA (Rule 1901).

(a) *Purpose and applicability*—(1) *Purpose.* The purpose of this section is to provide procedures by which:

(i) A person may seek a written interpretation from the General Counsel construing a provision of the NGPA, or clarifying a rule issued by the Commission under the NGPA; and

(ii) The Commission may publish an interpretative rule that will have general applicability and effect.

(2) *Applicability.* (i) This section applies to requests under section 502(c) of the NGPA for interpretations of the NGPA or of rules or of orders, having the applicability and effect of a rule as defined in 5 U.S.C. 551(4), issued under the NGPA. It does not apply to orders issued under sections 301, 302, and 303 of the NGPA.

(ii) This section applies to requests for interpretations to prospective, existing or completed facts, acts, or transactions. Interpretations based on hypothetical facts, acts, or transactions will not be considered.

(b) *Definitions.* For the purpose of this section, the following definitions apply.

(1) *Direct participant* means any person or legal entity who is, or plans to be an actual party in the act, transaction, or circumstance presented, and who has an immediate or direct financial interest in the act, transaction, or circumstance.

(2) *Interpretation* means a written statement of the General Counsel which applies a particular rule to a particular set of facts, acts, circumstances or transactions. In the discretion of General Counsel, the interpretation may contain a detailed factual and legal analysis, a summary of the facts or the law, or both, or it may be a conclusory statement.

(3) *Interpretative rule* means an offical interpretative statement of general applicability issued by the Commission and published in the FEDERAL REGISTER that applies the NGPA or rules issued thereunder to a specific set of

facts, acts, circumstances and transactions.

(4) *NGPA* means the Natural Gas Policy Act of 1978.

(5) *Request* means a request for an interpretation.

(6) *Rule* means a rule or an order having the effect of a rule as defined in 5 U.S.C. 551(4).

(c) *Persons who may request an interpretation*—(1) Any person who is or will be a direct participant in an act, transaction, or circumstance affected by the NGPA or a rule issued by the Commission under the NGPA may file with the Office of the General Counsel a request for an interpretation.

(2) Requests for interpretations must be addressed to the Office of the General Counsel as follows:

Federal Energy Regulatory Commission, Interpretations Section, Office of the General Counsel, Suite 8000, 825 North Capitol Street, NE., Washington, D.C. 20426.

(3) Requests for interpretation under this paragraph need not be filed with the Secretary.

(d) *Content of request*—(1) *Facts.* A request for interpretation must contain a full and complete statement of the relevant and material facts pertaining to the act, transaction, or circumstance that is the subject of the request for interpretation. When the request pertains to only one step of a larger integrated transaction, the facts, circumstances, and other relevant information pertaining to the entire transaction must be included in the request.

(2) *Statement of the question.* The request must clearly designate the section of the statute, regulation, rule, or part thereof which the person making the request seeks to have interpreted and must set forth clearly and concisely the question for which an interpretation is sought. The request may also set forth a proposed answer to the question.

(3) *Analysis.* If the request proposes a particular answer:

(i) The request must set forth a legal analysis in support of the proposed answer and cite relevant authorities in support thereof.

(ii) The request must set forth the legal and business consequences which will flow from the proposed answer.

(4) *Factual statements.* (i) The request must be accompanied by a statement that to the best of the applicant's personal information, knowledge, and belief there is no untrue statement of a material or relevant fact and there is no omission of a material or relevant fact made in the request.

(ii) Any untrue statement or omission of a material or relevant fact upon which the Office of the General Counsel relied in a request for an interpretation is deemed to be a statement or entry under secton 1001 of Title 18, United States Code.

(5) *Notification of other parties.* (i) A person submitting a request must specify each person who is a direct participant in the circumstance, act or transaction; must notify them in writing of the request for an interpretation; and must send them a copy of such request. Such notification and the addresses of the persons notified must be included in a request to the General Counsel.

(ii) Each person notified pursuant to paragraph (d)(5)(i) of this section may submit information regarding any fact provided in the request of which it has personal knowledge, if such fact is different from the facts presented by the applicant. Such fact must be presented to the Office of the General Counsel as set forth in paragraph (d)(4) of this section.

(6) The request must be accompanied by the fee prescribed in § 381.405 of this chapter or by a petition for waiver pursuant to § 381.106 of this chapter.

(e) *Additional information.* The General Counsel may request additional information, documentation or legal analysis in connection with any request for any interpretation.

(f) *Referral of information.* Information submitted in a request for interpretation may be used by the Commission or its Staff in their official capacity. Any information received will be placed in a public file in the Commission's Office of Public Information.

(g) *The interpretation*—(1) Except as provided in paragraph (g)(2) of this section, the General Counsel will provide a copy of his or her written interpretation of the NGPA or rule as applied to the act, transaction, or circumstance presented upon the person who made

the request for the interpretation and upon persons named in the request as direct participants in the act, transaction, or circumstance.

(2) The General Counsel may determine not to issue an interpretation, in which case the person who made the request and direct participants as specified in the request will be notified in writing of the decision not to issue an interpretation, and the reason for the decision.

(3) Only those persons to whom an interpretation is specifically addressed and other persons who are named in the request, who have been informed by the applicant for an interpretation of the pendency of the request and who are direct participants in the act, transaction or circumstance presented, may rely upon it. The effectiveness of an interpretation depends entirely on the accuracy of the facts presented to the General Counsel. If a material or relevant fact has been misrepresented or omitted or if any material or relevant fact changes after an interpretation is issued or if the action taken differs from the facts presented in the request, the interpretation may not be relied upon by any person.

(4) An interpretation may be rescinded or modified prospectively at any time. A rescission or modification is effected by notifying persons entitled to rely on the interpretation at the address contained in the original request.

(5) Any interpretation based on the NGPA or a rule issued thereunder in effect at the time of issuance may be relied upon only to the extent such law or rule remains in effect.

(6) Except as provided in paragraphs (g)(3), (g)(4) and (g)(5) of this section, the Staff will not recommend any action to the Commission which is inconsistent with the position espoused in the interpretation. The interpretation of the General Counsel is not the interpretation of the Commission. An interpretation provided by the General Counsel is given without prejudice to the Commission's authority to consider the same or like question and to issue a declaratory order to take other action which has the effect of rescinding, revoking, or modifying the interpretation of the General Counsel.

(h) *Appeal.* There is no appeal to the Commission of an interpretation.

(i) *Interpretative rules.* Upon the petition of any person or upon its own motion, the Commission may publish in the FEDERAL REGISTER an interpretative rule regarding any question arising under the NGPA or a rule promulgated thereunder. Any person is entitled to rely upon an interpretative rule.

(j) *Applications for adjustments treated as requests for interpretations.* Except for the notification provisions of paragraph (d)(5) of this section, the provisions of this section apply to any petition for an adjustment which is deemed a request for an interpretation under Rule 1117. Notice to all parties to an adjustment proceeding under subpart K of this part that is deemed to be a request for an interpretation will be given under Rule 1117(d)(1).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 394, 49 FR 35366, Sept. 7, 1984]

§ 385.1902 Appeals from action of staff (Rule 1902).

(a) Any staff action (other than a decision or ruling of presiding officer, as defined in Rule 102(e)(1), made in a proceeding set for hearing under subpart E of this part, or a decision of the Oil Pipeline Board under § 375.306 of this chapter) taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing under Rule 713 (request for rehearing).

(b) Orders issued by the Oil Pipeline Board pursuant to § 375.306 of this chapter are subject to the procedural rules in section 17 of the Interstate Commerce Act, 49 U.S.C. 17. Interested parties may file exceptions to Oil Pipeline Board orders no later than 20 days after the service of such orders. If no exceptions are filed within this 20-day period, interested parties may file requests for rehearing pursuant to Rule 713 no later than 50 days after service of the Oil Pipeline Board's order. Interested parties may also file requests for rehearing, pursuant to Rule 713, of orders issued by the Commission on exceptions to Oil Pipeline Board orders.

The filing of exceptions is not a prerequisite to filing a request for rehearing. The filing of either exceptions or a request for rehearing (but not both) is a prerequisite to filing a petition for review in the court of appeals of any order issued by the Oil Pipeline Board. The filing of a request for rehearing is not a prerequisite to the filing of a petition for review in the court of appeals of any order issued by the Commission pursuant to the Interstate Commerce Act.

(c) All appeals of staff action that were timely filed prior to December 3, 1990 and that had not been acted upon by the Commission on their substantive merits are deemed to be timely filed requests for rehearing of final agency action. All notices issued by the Commission prior to December 3, 1990 stating the Commission's intent to act on appeals of staff action such that they are not deemed denied by the expiration of a 30-day period after the filing of the appeal, are deemed to be orders granting rehearing of final agency action for the sole purpose of further consideration, unless the Commission issued an order on the substantive merits of the appeal prior to December 3, 1990. No later than January 2, 1991, persons who had timely filed appeals of staff action prior to December 3, 1990 which were pending before the Commission on that date may file additional pleadings to update or supplement those appeals.

[Order 530, 55 FR 50682, Dec. 10, 1990]

§385.1903 Notice in rulemaking proceedings (Rule 1903).

Before the adoption of rule of general applicability or the commencement of hearing on such a proposed rulemaking, the Commission will cause general notice to be given by publication in the FEDERAL REGISTER, such notice to be published therein not less than 15 days prior to the date fixed for the consideration of the adoption of a proposed rule or rules or for the commencement of the hearing, if any, on the proposed rulemaking, except where a shorter period is reasonable and good cause exists therefor; *Provided however,* That:

(a) When the Commission, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may proceed with the adoption of rules without notice by incorporating therein a finding to such effect and a concise statement of the reasons therefor;

(b) Except when notice or hearing is required by statute, the Commission may issue at any time rules of organization, procedure or practice, or interpretative rules, or statements of policy, without notice or public proceedings; and

(c) This section is not to be construed as applicable to the extent that there may be involved any military, naval, or foreign affairs function of the United States, or any matter relating to the Commission's management or personnel, or to United States property, loans, grants, benefits, or contracts.

§385.1904 Copies of transcripts (Rule 1904).

The Commission will cause to be made a stenographic record of public hearings and such copies of the transcript thereof as it requires for its own purposes. Participants desiring copies of such transcript may obtain the same from the official reporter upon payment of the fees fixed therefor.

§385.1907 Reports of compliance (Rule 1907).

When any licensee, permittee, or any other person subject to the jurisdiction of the Commission is required to do or perform any act by Commission order, permit, or license provision, there must be filed with the Commission within 30 days following the date when such requirement became effective, a notice, under oath, stating that such requirement has been met or complied with; *Provided, however,* That the Commission, by rule or order, or by making specific provision therefor in a license or permit, may provide otherwise for the giving of such notice of compliance. Five conformed copies of such notice must be filed in lieu of the fourteen conformed copies required by Rule 2004 (copies of filings).

Subpart T—Formal Requirements for Filings in Proceedings Before the Commission

§ 385.2001 Filings (Rule 2001).

(a) *Filings with the Commission.* (1) Except as otherwise provided in this chapter, any document required to be filed with the Commission must comply with Rules 2001 to 2005 and must be submitted to the Secretary by:

(i) Mailing the document to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426; or

(ii) Hand delivering the document to Room 3110, 825 North Capitol Street, NE., Washington, DC.

(2) Any document is considered filed on the date stamped by the Secretary, unless the document is subsequently rejected. Any document received after regular business hours is considered filed on the next regular business day.

(b) *Rejection.* (1) If any filing does not comply with any applicable statute, rule, or order, the filing may be rejected, unless the filing is accompanied by a motion requesting a waiver of the applicable requirement of a rule or order and the motion is granted.

(2) If any filing is rejected, the document is deemed not to have been filed with the Commission.

(3) The Secretary, or the office director to whom the filing has been referred, will return a copy of any document rejected under paragraph (b)(1) of this section, with an indication of the deficiencies in the filing and the reasons for rejection.

(4) If a filing does not comply with any applicable requirement, all or part of the filing may be stricken. Any failure to reject a filing which is not in compliance with an applicable statute, rule, or order does not waive any obligation to comply with the requirements of this chapter.

§ 385.2002 Caption of filings (Rule 2002).

A filing must begin with a caption that sets forth:

(a) The docket designation, if any;

(b) The words ''INTERLOCUTORY APPEAL'' underneath the docket designation if the filing is an appeal under Rule 715(c) of a presiding officer's denial of a motion for an interlocutory appeal;

(c) The title of the proceeding if a proceeding has been initiated;

(d) A heading which describes the filing; and

(e) The name of the participant for whom the filing is made, or a shortened designation for the participant.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 402, 49 FR 39539, Oct. 9, 1984]

§ 385.2003 Specifications (Rule 2003).

(a) *Paper.* (1) Any filing with the Commission must be:

(i) Typewritten, printed, or reproduced, with each copy clearly legible; and

(ii) On letter-size unglazed paper which is 8 to 8½ inches wide and 10½ to 11 inches long.

(2) Any log, graph, map, drawing, or chart submitted as part of a filing will be accepted on paper larger than provided in paragraph (a)(1) of this section, if it cannot be provided legibly on letter-size paper.

(b) *Format.* Any filing with the Commission must:

(1) Have double-spaced print with left margins not less than 1½ inch wide, except that any tariff or rate filing may be single-spaced;

(2) Indent and single-space any quotation which exceeds 50 words;

(3) Be bound or stapled at the left side only, if the filing exceeds one page; and

(4) Be printed in not less than 10 point type with double-leaded text and single-leaded quotations, if the filing is printed.

(c) *Citation form.* Any filing with the Commission should comply with the rules of citation, except Rule 1.1, set forth in the most current edition of *A Uniform System of Citation,* published by The Harvard Law Review Association.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 289, 48 FR 17068, Apr. 21, 1983]

§ 385.2004 Original and copies of filings (Rule 2004).

Any person filing under this chapter must provide an original of the filing and fourteen exact copies, unless otherwise required by statute, rule, or order.

§385.2005 Subscription and verification (Rule 2005).

(a) *Subscription.* (1) Any filing with the Commission must be signed.

(2) The signature on a filing constitutes a certificate that:

(i) The signer has read the filing signed and knows its contents;

(ii) The contents are true as stated, to the best knowledge and belief of the signer; and

(iii) The signer possesses full power and authority to sign the filing.

(3) A filing must be signed by:

(i) The person on behalf of whom the filing is made;

(ii) Any officer of the corporation, trust, association, or other organized group, on behalf of which the filing is made;

(iii) Any officer, agent, or employee of the governmental authority, agency, or instrumentality on behalf of which the filing is made; or

(iv) A representative qualified to practice before the Commission under Rule 2101 who possesses authority to sign.

(4) The signer of any filing may be required to submit evidence of authority to sign the filing.

(b) *Verification.* (1) The facts alleged in any filing need not be verified, unless verification is required by statute, rule, or order.

(2) If verification of any filing is required, the verification must be under oath by a person having knowledge of the matters set forth in the filing. If any vertification is made by a person other than the signer, a statement must be attached to the verification explaining why a person other than the signer provides verification.

§385.2006 Docket system (Rule 2006).

(a) The Secretary will maintain a system for docketing proceedings.

(b) Any public information in any docket is available for inspection and copying by the public during the office hours of the Commission, to the extent that such availability is consistent with the proper discharge of the Commission's duties and in conformity with part 388 of this chapter.

[Order 226, 47 FR 19022, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§385.2007 Time (Rule 2007).

(a) *Computation.* (1) Except as otherwise required by law, any period of time prescribed or allowed by statute or Commission rule or order is computed to exclude the day of the act or event from which the time period begins to run.

(2) The last day of any time period is included in the time period, unless it is a Saturday, Sunday, part-day holiday that affects the Commission, or legal public holiday as designated in section 6103 of title 5, U.S. Code, in which case the period does not end until the close of the Commission business of the next day which is not a Saturday, Sunday, part-day holiday that affects the Commission, or legal public holiday.

(b) *Date of issuance of Commission rules or orders.* (1) Any Commission rule or order is deemed issued when the Secretary does the earliest of the following:

(i) Posts a full-text copy in the Division of Public Information;

(ii) Mails or delivers copies of the order to the parties; or

(iii) Makes such copies public.

(2) Any date of issuance specified in a rule or order need not be the date on which the rule or order is adopted by the Commission.

(c) *Effective date of Commission rules or orders.* (1) Unless otherwise ordered by the Commission, rules or orders are effective on the date of issuance.

(2) Any initial or revised initial decision issued by a presiding officer is effective when the initial or revised initial decision is final under Rule 708(d).

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21316, May 21, 1984; Order 376, 49 FR 21707, May 23, 1984]

§385.2008 Extensions of time (Rule 2008).

(a) Except as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the decisional authority for good cause, upon a motion made before the expiration of the period prescribed or previously extended.

(b) If any motion for extension of time is made after the expiration of a specified time period, the decisional authority may permit performance of

the act required or allowed, if the movant shows extraordinary circumstances sufficient to justify the failure to act in a timely manner.

§ 385.2009 Notice (Rule 2009).

Unless actual notice is given or unless newspaper notice is given as required by law, notice by the Commission is provided by the Secretary only by publication in the FEDERAL REGISTER. Actual notice is usually given by service under Rule 2010.

§ 385.2010 Service (Rule 2010).

(a) *By participants.* (1) Any participant filing a document in a proceeding must serve a copy of the document on:

(i) Each person whose name is on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding; and

(ii) Any other person required to be served under Commission rule or order or under law.

(2) If any person receives a rejection letter or deficiency letter from the Commission, the person must serve a copy of the letter on any person previously served copies of the rejected or deficient filing.

(b) *By the Secretary.* The Secretary will serve, as appropriate:

(1) A copy of any complaint on any person against whom the complaint is directed;

(2) A copy of any notice of tariff or rate examination or order to show cause, on any person to whom the notice or order is issued;

(3) A copy of any rule or any order by a decisional authority in a proceeding on any person included on the official service list, or applicable restricted service list, for the proceeding or phase of the proceeding.

(c) *Official service list.* (1) The official service list for any proceeding will contain:

(i) The names and addresses of any person designated for service in the initial pleading, other than a protest, or in the tariff or rate filing which is filed by any participant; and

(ii) The name of counsel for the staff of the Commission.

(2) Any designation of a person for service may be changed by filing a written notice with the Commission and serving the notice on each person whose name is included on the official service list.

(d) *Restricted service list.* (1) For purposes of eliminating unnecessary expense or improving administrative efficiency, the Secretary, an office director, or the presiding officer may establish, by order, a restricted service list for an entire proceeding, a phase of a proceeding, one or more issues in a proceeding, or one or more cases in a consolidated proceeding.

(2) Any restricted service list will contain the names of each person on the official service list, or the person's representative, who, in the judgment of the decisional authority establishing the list, is an active participant with respect to the proceeding or consolidated proceeding, any phase of the proceeding, or any issue in the proceeding, for which the list is established.

(3) Any restricted service list is maintained in the same manner as, and in addition to, the official service list under paragraph (c) of this section.

(4) Before any restricted service list is established, each person included on the official service list will be given notice of any proposal to establish a restricted service list and an opportunity to show why that person should also be included on the restricted service list or why a restricted service list should not be established.

(5) Any designation of a person for service on a restricted service list may be changed by filing written notice with the Commission and serving that notice on each person whose name is on the applicable restricted service list.

(e) *Interveners.* (1) If any motion to intervene or any notice of intervention is filed within time period prescribed for that motion or notice, the name and address of any person designated for service in the motion or notice are placed on the official service list or any applicable restricted service list. Any person placed on the official service list under this paragraph is entitled to service in accordance with this section. If a motion to intervene is denied, the name and address of each person designated for service pursuant to that motion will be removed from the official service list.

(2) If a motion to intervene is not filed within the period prescribed for that motion, the name and address of any person designated for service in the motion are placed on the official service list, or any applicable restricted service list, only after the motion is granted. Any person who files a late motion to intervene will be served only the documents that are filed after the motion is granted.

(f) *Methods of service.* Service of any document must be made:

(1) By United States mail, first-class or better; or

(2) By delivery in a manner that, and to a place where, the person on whom service is required may reasonably be expected to obtain actual and timely receipt.

(g) *Timing of service.* (1) Service is made under this section when the document served is deposited in the mail or is delivered in another manner.

(2) Service of any document must be made not later than the date of the filing of the document.

(h) *Certification.* (1) At the time any document required to be served is filed with the Commission, the original of a certificate of service must be attached to the document and a copy of the certificate must be attached to each copy of the document filed with the Commission.

(2) The certificate of service must conform to the following format:

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list [or the restricted service list, if applicable] compiled by the Secretary in this proceeding.
Dated at this
day of , 19 .

_____

Name _____

_____

(if applicable)

Address _____

_____

_____

Telephone No. _____

§ 385.2011 Procedures for filing on electronic media (Rule 2011).

(a) FERC Forms subject to the procedures provided in this section include:

(1) FERC Form No. 2, Annual report for major natural gas companies.

(2) FERC Form No. 2–A, Annual report for nonmajor natural gas companies.

(3) FERC Form No. 8, Underground gas storage report.

(4) FERC Form No. 11, Natural gas pipeline monthly statement.

(5) FERC Form No. 14, Annual report for importers and exporters of natural gas.

(6) FERC Form No. 1, Annual report of Major electric utilities, licensees and others.

(b) These procedures also apply to:

(1) Material submitted electronically pursuant to § 154.4 of this chapter.

(2) Certificate and abandonment applications filed under subparts A, E, and F of part 157 of this chapter.

(3) Blanket certificate applications filed under subpart G of part 284 of this chapter.

(4) Discount rate reports filed pursuant to § 284.7 of this chapter.

(5) Non–discriminatory open access transmission tariffs filed pursuant to § 35.28 of this chapter.

(c) *What to file.* (1) Except as provided in paragraph (e) of this section, any filing of a schedule or an update described in paragraphs (a) or (b) of this section must be submitted on electronic media.

(2) Electronic media suitable for Commission filings are listed in the instructions for each form and filings. Additionally, lists of suitable electronic media are available upon request from the Commission.

(3) The electronic media must be accompanied by the traditional prescribed number of paper copies.

(4) The formats for the electronic filing and the paper copy can be obtained at the Federal Energy Regulatory Commission, Public Reference and Files Maintenance Branch, Division of Information Services, Washington, DC 20426.

(5) The subscription required by § 385.2005(a) must state that the paper copies contain the same information as contained on the electronic media, that the signer knows the contents of the paper copies and electronic media, and that the contents as stated in the copies and on the electronic media are true to the best knowledge and belief of the signer.

(d)(1) *Where to file.* The electronic media, the paper copies, and accompanying cover letter must be submitted to: Office of the Secretary, Federal Energy Regulatory Commission, Washington, DC 20426.

(2) EDI data submissions must be made as indicated in the electronic filing instructions and formats for the particular form or filing, and the paper copies and accompanying cover letter must be submitted to: Office of the Secretary, Federal Energy Regulatory Commission, Washington, DC 20426.

(e) *Waiver*—(1) *Filing of petition.* If a natural gas company, electric utility, licensee or other entity does not have and is unable to acquire the computer capability to file the information required to be filed on electronic media, the company may request waiver from the requirement of this part, by filing an original and two copies of a petition. The natural gas company, electric utility, licensee or other entity may renew the waiver if the company can continue to show that it does not have and is unable to acquire the computer capability for electric filing.

(2) *Standard for waiver.* The petition for waiver must show that the natural gas company, electric utility, licensee or other entity does not have the computer capability to file the information required under this section on electronic media and that acquisition of the capability would cause the company severe economic hardship. This waiver may be granted for up to one year.

(3) *Timing.* The petition for waiver must be filed by the date on which the information in the manner affected by the petition is required to be initially filed.

(4) *Decision on petition.* The Commission or its designee will review a petition for waiver and notify the applicant of its grant or denial. Once the petition is decided, the natural gas company, electric utility, licensee or other entity will have 30 days from the date of notification of the decision to submit any information, in the manner specified by the Commission in the decision on the waiver petition, that was required to be filed while the petition was pending.

[53 FR 15032, Apr. 27, 1988, as amended at Order 493–C, 54 FR 21199, May 17, 1989; Order 493–D, 58 FR 7987, Feb. 11, 1993; Order 554, 58 FR 38528, July 19, 1993; Order 574, 60 FR 1718, Jan. 5, 1995; Order 581, 60 FR 53074, Oct. 11, 1995; Order 888, 61 FR 21695, May 10, 1996]

§ 385.2012 Petitions for review of Commission Orders (Rule 2012).

When a petition for review of an order issued by the Commission is filed in a United States Court of Appeals, a copy of the petition which has been stamped by the court with the date of filing must be mailed or hand delivered to the Office of the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426. If within ten days after issuance of the Commission order, the Office of the Secretary has physically received court-stamped copies of petitions for review of the same order, which petitions have been filed in two or more U.S. Courts of Appeals, the Commission will forward copies of those petitions to the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. 2112(a).

[Order 504, 53 FR 37546, Sept. 27, 1988]

§ 385.2013 Videotapes (Rule 2013).

Any person may file a videotape that portrays the site of, or some physical aspect of, an energy project, such as a waterfall or flood waters at the site of an existing or proposed hydroelectric project, or construction activities at the site of a natural gas pipeline. The filing must include a written statement describing the place, date, and time at which the videotape was filmed, who filmed it, what it purports to depict, and the caption and docket number of the proceeding (if any) in which it is to be filed. Any person who files a videotape and who is also a party (either as an applicant or as an intervenor) to a docketed proceeding in which the videotape is filed must file four copies of the videotape with the Commission's Secretary, in VHS format with voice-over or pictorial inclusion of the data contained in the accompanying written statement, serve copies of the videotape on all of the

other parties to the proceeding, and include a certificate of service with the filing.

[Order 573, 59 FR 63247, Dec. 8, 1994]

Subpart U—Appearance and Practice Before the Commission

§385.2101 Appearances (Rule 2101).

(a) A participant may appear in a proceeding in person or by an attorney or other qualified representative. An individual may appear in his or her own behalf, a member of a partnership may represent the partnership, a bonafide officer of a corporation, trust, association or organized group may represent the corporation, trust, association or group, and an officer or employee of a State commisssion, of a department or political subdivision of a State or other governmental authority, may represent the State commission or the department or political subdivision of the State or other governmental authority, in any proceeding.

(b) A person compelled to appear or voluntarily testifying or making a statement before the Commission or the presiding officer, may be accompanied, represented, and advised by an attorney or other qualified representative.

(c) A person appearing before the Commission or the presiding officer must conform to the standards of ethical conduct required of practitioners before the Courts of the United States, and where applicable, to the requirements of Section 12(i) of the Public Utility Holding Company Act of 1935 (15 U.S.C. 791(i)).

§385.2102 Suspension (Rule 2102).

(a) After a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found:

(1) Not to possess the requisite qualifications to represent others, or

(2) To have engaged in unethical or improper professional conduct, or

(3) Otherwise to be not qualified.

(b) Contumacious conduct in a hearing before the Commission or a presiding officer will be grounds for exclusion of any person from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.

§385.2103 Appearance of former employees (Rule 2103).

(a) No person having served as a member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission may practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which such person has handled, investigated, advised, or participated in the consideration of while in the service of the Commission.

(b) No person having been so employed may within 1 year after his or her employment has ceased, practice before or act as attorney, expert witness, or representative in connection with any proceeding or matter before the Commission which was under the official responsibility of such person, as defined in 18 U.S.C. 202, while in the service of the Commission.

(c) Nothing in paragraphs (a) and (b) of this section prevents a former member, officer, expert, administrative law judge, attorney, accountant, engineer, or other employee of the Commission with outstanding scientific or technological qualifications from practicing before or acting as an attorney or representative in connection with a particular matter in a scientific or technological field if the Chairman of the Commission makes a certification in writing, published in the FEDERAL REGISTER, that the national interest would be served by such action or representation.

Subpart V—Ex Parte Communications; Separation of Functions

§385.2201 Ex parte communications (Rule 2201).

In order to avoid all possibilities of prejudice, real or apparent, to the public interest and persons involved in proceedings pending before the Commission:

(a) Except as permitted in paragraph (b) of this section, no person who is a party to, or his or her counsel, agent,

or other person acting on his or her behalf, and no interceder in, any on-the-record proceedings, shall submit ex parte, off-the-record communications to any member of the Commission or of his or her personal staff, to the administrative law judge, or to any other employee of the Commission, regarding any matter pending before the Commission in any contested on-the-record proceeding, and no Commissioner, member of his or her personal staff, Administrative Law Judge, or any other employee of the Commission, shall request or entertain any such ex parte, off-the-record communications. For the purposes of this section, the term ''ex parte communication'' means an oral or written communication relative to the merits of an on-the-record proceeding pending before the Commission which is not on the public record and with respect to which reasonable prior notice to the parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this section; the term ''decisional employee'' means a commissioner or member of his or her personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of the proceeding; the term ''contested on-the-record proceedings'' means a proceeding required by statute, constitution, published Commission rule or regulation or order in a particular case, to be decided on the basis of the record of a Commission hearing, and in which a protest or a petition or notice to intervene in opposition to requested Commission action has been filed; the term ''interceder'' shall include any individual outside the Commission, whether in private or public life, partnership, corporation, association, or other agency, other than a party or an agent of a party, who volunteers a communication.

(b) The prohibitions contained in paragraph (a) of this section do not apply to a communication:

(1) From an interceder who is a local, State, or Federal agency which has no official interest in and whose official duties are not affected by the outcome of the on-the-record proceedings before the Commission to which the communication relates;

(2) From an interceder relating to matters of procedure only;

(3) From a party to, or his or her counsel, agent, or other person acting on his or her behalf, in an on-the-record proceeding, if the communication relates to matters of procedure only and is directed to the Secretary of the Commission, staff counsel, or any other employee in the presence of or with the prior approval of staff counsel;

(4) From any person when otherwise authorized by law;

(5) When the communication is between the staff counsel assigned to the proceeding or, in the presence of or after coordination with such staff counsel, any other employee of the Commission (except a decisional employee) and any party or counsel to any party or parties to the proceeding or, in the presence of or after coordination with such counsel or party, and agent of any such party: *Provided,* That any employee of the Commission who may reasonably be expected to participate in the decisional process may waive such participation by entering a staff appearance in the proceeding: *Provided further,* That non-unanimous settlement offers shall thereafter be served on the participants in the proceeding prior to the submission of such offers to the Commission;

(6) Which the participants agree may be made on an ex parte basis;

(7) Related to routine safety, construction, and operational inspections of project works by the Commission staff not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(8) Related to routine field audits of the accounts or any books or records of a company subject to the Commission's accounting requirements not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(9) Which relates solely to a request for supplemental information or data necessary for an understanding of factual materials contained in documents filed with the Commission in a proceeding covered by this section and

which is made in the presence of or after coordination with counsel, except a communication with a decisional employee, in the absence of waiver of participation;

(10) The Commission may, by rule or order, modify any provision of this subpart, or Rule 1415, as it applies to all or part of a proceeding, to the extent permitted by law. The prohibitions of paragraph (a) of this section do not apply to oil pipeline proceedings which are governed by Rule 1415.

(c) All written communications prohibited by paragraph (a) of this section, sworn statements reciting the substance of all such oral communications, and all written responses and sworn statements reciting the substance of all oral responses to such prohibited communications must be delivered to the Secretary of the Commission who will place the communication in public files associated with the case, but separate from the material upon which the Commission can rely in reaching its decision. The Secretary will serve such communications upon parties to the proceeding. The Secretary will also serve a copy of the sworn statement to the communicator and allow him or her a reasonable opportunity to file a response.

(d) A Commissioner, member of his or her immediate staff, administrative law judge, or any other employee of the Commission who receives an oral offer of any communication prohibited by paragraph (a) of this section shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he or she will not consider the communication. The recipient shall prepare a sworn statement setting forth the substance of the communication and the circumstances thereof within 48 hours and deliver the statement to the Secretary of the Commission for compliance with the procedures established in paragraph (c) of this section.

(e) Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which the Secretary has associated with the record may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. Where the communication contains assertions of fact not a part of the record and of which the Commission cannot take official notice, the Commission in lieu of receiving rebuttal material normally will direct that the alleged factual assertion on any proposed rebuttal be disregarded in arriving at a decision. Nor will the Commission normally permit any rebuttal of ex parte endorsements or oppositions by civic or other organizations by the submission of counter endorsements or oppositions.

(f) Upon receipt of a communication knowingly made in violation of paragraph (a) of this section, the Commission, administrative law judge, or other employee presiding at the hearing may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(g) The prohibitions contained in this section shall apply from the time at which a proceeding is noticed for hearing or the person responsible for such communication has knowledge that it will be noticed for hearing or at the time at which a protest or a motion or notice to intervene in opposition to requested Commission action has been filed, whichever occurs first.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 376, 49 FR 21707, May 23, 1984]

§ 385.2202 Separation of functions of staff (Rule 2202).

In any proceeding in which a Commission adjudication is made after hearing, no officer, employee, or agent assigned to work upon the investigation or trial of the proceeding or to assist in the trial thereof, in that or any factually related proceeding, shall participate or advise as to the findings, conclusion or decision, except as a witness or counsel in public proceedings.