

(b) The detriment cannot be eliminated effectively through the exercise of other authority of the Office.

[53 FR 11014, Apr. 4, 1988, as amended by Amdt. 405-1, 65 FR 56657, Sept. 19, 2000; Amdt. 405-3, 72 FR 17017, Apr. 6, 2007]

PART 406—INVESTIGATIONS, ENFORCEMENT, AND ADMINISTRATIVE REVIEW

Subpart A—Investigations and Enforcement

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Subpart A—Investigations and Enforcement

§ 406.1 Hearings in license, permit, and payload actions.

(a) Pursuant to 49 U.S.C. 70110, the following are entitled to a determination on the record after an opportunity for a hearing in accordance with 5 U.S.C. 554.

(1) An applicant for a license and a proposed transferee of a license regarding any decision to issue or transfer a license with conditions or to deny the issuance or transfer of such license;

(2) An owner or operator of a payload regarding any decision to prevent the launch or reentry of the payload;

(3) A licensee regarding any decision to suspend, modify, or revoke a license or to terminate, prohibit, or suspend any licensed activity;

(4) An applicant for a permit regarding an FAA decision to issue a permit with conditions or to deny the issuance of the permit; and

(5) A permittee regarding any decision to suspend, modify, or revoke a permit or to terminate, prohibit, or suspend any permitted activity.

(b) An administrative law judge will be designated to preside over any hearing held under this part.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended by Amdt. 406-4, 72 FR 17017, Apr. 6, 2007]

§ 406.3

§ 406.3 Submissions; oral presentation in license, permit, and payload actions.

(a) The FAA will make decisions about license, permit, and payload actions under this subpart based on written submissions unless the administrative law judge requires an oral presentation.

(b) Submissions must include a detailed exposition of the evidence or arguments supporting the petition. Where an applicant must demonstrate an equivalent level of safety or fidelity, the applicant must make a clear and convincing demonstration.

(c) Petitions shall be filed as soon as practicable, but in no event more than 30 days after issuance of decision or finding under § 406.1.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended by Amdt. 406-3, 71 FR 50530, Aug. 25, 2006; Amdt. 406-4, 72 FR 17017, Apr. 6, 2007]

§ 406.5 Administrative law judge's recommended decision in license, permit, and payload actions.

(a) The Associate Administrator, who shall make the final decision on the matter at issue, shall review the recommended decision of the administrative law judge. The Associate Administrator shall make such final decision within thirty days of issuance of the recommended decision.

(b) The authority and responsibility to review and decide rests solely with the Associate Administrator and may not be delegated.

§ 406.7 [Reserved]

§ 406.9 Civil penalties.

(a) *Civil penalty liability.* Under 49 U.S.C. 70115(c), a person found by the FAA to have violated a requirement of the Act, a regulation issued under the Act, or any term or condition of a license or permit issued or transferred under the Act, is liable to the United States for a civil penalty of not more than \$100,000 for each violation, as adjusted for inflation. A separate violation occurs for each day the violation continues.

(b) *Delegations.* The authority to impose civil penalties is exercised by an

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agency attorney as described in § 406.105.

(c) *Notice of proposed civil penalty.* A civil penalty action is initiated when the agency attorney advises a person, referred to as the respondent, of the charges or other reasons upon which the FAA bases the proposed action and allows the respondent to answer the charges and to be heard as to why the civil penalty should not be imposed. A notice of proposed civil penalty states the facts alleged; any requirement of the Act, a regulation issued under the Act, or any term or condition of a license or permit issued or transferred under the Act allegedly violated by the respondent; and the amount of the proposed civil penalty. Not later than 30 days after receipt of the notice of proposed civil penalty the respondent may elect to proceed by one or more of the following:

(1) Pay the amount of the proposed civil penalty or an agreed upon amount, in which case the agency attorney will issue either an order imposing civil penalty or a compromise order in that amount.

(2) Submit to the agency attorney one of the following:

(i) Written information, including documents and witnesses statements, demonstrating that a violation did not occur or that a penalty, or the amount of the proposed penalty, is not warranted by the circumstances.

(ii) A written request to reduce the proposed civil penalty, the amount of reduction, and the reasons and any document supporting a reduction of the proposed civil penalty, including records indicating a financial inability to pay or records showing that payment of the proposed civil penalty would prevent the person from continuing in business.

(iii) A written request for an informal conference to discuss the matter with the agency attorney and to submit relevant information.

(3) Request that a final notice of proposed civil penalty be issued so that the respondent may request a hearing in accordance with paragraph (g) of this section.

(d) *Final notice of proposed civil penalty.* A final notice of proposed civil penalty (final notice) provides the last

opportunity for the respondent to request a hearing.

(1) The agency attorney issues a final notice if one of the following occurs:

(i) The respondent fails to respond to the notice of proposed civil penalty not later than 30 days after the date the respondent received the notice of proposed civil penalty.

(ii) The parties have not agreed to a resolution of the action after participating in informal procedures under paragraph (c)(2) of this section.

(iii) The respondent requests the issuance of a final notice in accordance with paragraph (c)(3) of this section.

(2) Not later than 15 days after the date the respondent received the final notice of proposed civil penalty, the respondent shall do one of the following:

(i) Submit the amount of the proposed civil penalty or an agreed-upon amount, in which case the agency attorney issues either an order imposing civil penalty or a compromise order in that amount.

(ii) Request a hearing in accordance with paragraph (g) of this section.

(e) *Order imposing civil penalty.* An order imposing civil penalty is the final order of the Secretary imposing a civil penalty. An order imposing civil penalty is issued for a violation described in paragraph (a) of this section after notice and an opportunity for a hearing.

(1) The agency attorney either issues an order imposing civil penalty, or another document becomes an order imposing civil penalty, as described below.

(i) The agency attorney issues an order imposing civil penalty if, in response to a notice of proposed civil penalty or a final notice of proposed civil penalty, the respondent pays or agrees to pay a civil penalty in the amount proposed or an agreed upon amount (other than an agreement for a compromise order under paragraph (f) of this section).

(ii) Unless the respondent requests a hearing not later than 15 days after the date the respondent received a final notice of proposed civil penalty, the final notice of proposed civil penalty becomes an order imposing civil penalty.

(iii) Unless an appeal is filed with the FAA decisionmaker in accordance with

§ 406.175, if the administrative law judge finds that a violation occurred and determines that a civil penalty, in an amount found appropriate by the administrative law judge, is warranted, an initial decision of an administrative law judge under subpart B of this part becomes an order imposing civil penalty.

(iv) Unless a complaint is filed with a United States district court in accordance with § 406.176, if the FAA decisionmaker finds that a violation occurred and determines that a civil penalty, in an amount found appropriate by the FAA decisionmaker, is warranted, a final decision and order of the FAA decisionmaker under subpart B of this part becomes an order imposing civil penalty. If a person seeks judicial review not later than 60 days after the final decision and order has been served on the respondent, the final decision and order is stayed.

(2) [Reserved]

(f) *Compromise order.* The agency attorney at any time may agree to compromise any civil penalty with no finding of violation. Under such agreement, the agency attorney issues a compromise order stating:

(1) The respondent agrees to pay a civil penalty.

(2) The FAA makes no finding of a violation.

(3) The compromise order may not be used as evidence of a prior violation in any subsequent civil penalty action, license, or permit action.

(g) *Request for hearing.* Any respondent who has been issued a final notice of proposed civil penalty may, not later than 15 days after the date the respondent received the final notice, request a hearing under subpart B of this part.

(1) The respondent must file a written request for hearing with the Federal Docket Management System (U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590) and must serve a copy of the request on the agency attorney. Sections 406.113 and 406.115 state how filing and service must be done.

(2) The request for hearing must be dated and signed.

(h) *Method of payment.* A respondent must pay a civil penalty by check or money order, payable to the Federal Aviation Administration.

(i) *Collection of civil penalties.* If a respondent does not pay a civil penalty imposed by an order imposing civil penalty or a compromise order within 60 days after service of the final order, the FAA may refer the order to the United States Department of Treasury or Department of Justice to collect the civil penalty.

(j) *Exhaustion of administrative remedies.* A respondent may seek judicial review of a final decision and order of the FAA decisionmaker as provided in §406.179. A respondent has not exhausted administrative remedies for purposes of judicial review if the final order is one of the following:

(1) An order imposing civil penalty issued by an agency attorney under paragraph (e)(1)(i) of this section.

(2) A final notice of proposed civil penalty that becomes an order imposing civil penalty under paragraph (e)(1)(ii) of this section.

(3) An initial decision of an administrative law judge that was not appealed to the FAA decisionmaker.

(4) A compromise order under paragraph (f) of this section.

(k) *Compromise.* The FAA may compromise or remit a civil penalty that has been proposed or imposed under this section.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended by Amdt. 406–4, 72 FR 17017, Apr. 6, 2007; 72 FR 68475, Dec. 5, 2007]

§§ 406.10–406.100 [Reserved]

Subpart B—Rules of Practice in FAA Space Transportation Adjudications

§ 406.101 Applicability.

(a) *Adjudications to which these rules apply.* These rules apply to the following adjudications:

(1) A civil penalty action in which the respondent has requested a hearing under § 406.9.

(2) [Reserved]

(b) [Reserved]

§ 406.103 Definitions that apply in part 406.

For the purpose of this part:

Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

Attorney means a person licensed by a state, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that state or territory.

Complainant in a civil penalty action means the proponent of the civil penalty in the FAA.

FAA decisionmaker means the Associate Administrator for Commercial Space Transportation, or the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal; or a person who has been delegated the authority to act for the FAA decisionmaker. As used in this part, the FAA decisionmaker is the official authorized to issue a final decision and order of the Secretary in an action.

Mail means U.S. first class mail, U.S. certified mail, U.S. registered mail, or an express courier service.

Party means the respondent or the complainant.

Personal delivery includes hand-delivery or use of a same-day messenger service. “Personal delivery” does not include the use of Government inter-office mail service.

Properly addressed means using an address contained in agency records; a residential, business, or other address used by a person on any document submitted under this part; or any other address determined by other reasonable and available means.

Respondent means a person who has been charged with a violation.

§ 406.105 Separation of functions for prosecuting civil penalties and advising the FAA decisionmaker.

(a) *Agency attorney.* The authority to prosecute civil penalties within the FAA is exercised by an agency attorney in accordance with § 406.9.

(1) The following officials have the authority to act as the agency attorney under this part: The Deputy Chief Counsel; the Assistant Chief Counsel for Enforcement; the Assistant Chief Counsel for Regulations; the Assistant

Chief Counsel for Europe, Africa, and Middle East Area Office; each Regional Counsel; and each Center Counsel. This authority may be delegated further.

(2) An agency attorney may not include:

(i) The Chief Counsel or the Assistant Chief Counsel for Litigation;

(ii) Any attorney on the staff of the Assistant Chief Counsel for Litigation who advises the FAA decisionmaker regarding an initial decision or any appeal to the FAA decisionmaker; or

(iii) Any attorney who is supervised in a civil penalty action by a person who provides such advice to the FAA decisionmaker in that action or a factually-related action.

(b) *Advisors to the FAA decisionmaker.*

(1) The Chief Counsel, the Assistant Chief Counsel for Litigation or an attorney on the staff of the Assistant Chief Counsel for Litigation, will advise the FAA decisionmaker regarding an initial decision or any appeal of an action to the FAA decisionmaker.

(2) An agency employee engaged in the performance of investigative or prosecutorial functions must not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

§ 406.107 Appearances of parties, and attorneys and representatives.

(a) Any party may appear and be heard in person.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party.

(1) An attorney or representative who represents a party must file a notice of appearance in the action with the Docket Management System and must serve a copy of the notice of appearance on each other party before participating in any proceeding governed by this subpart.

(2) The attorney or representative must include his or her name, address, and telephone number in the notice of appearance.

(3) That attorney or representative in any proceeding governed by this subpart may examine the party.

(4) Service of a document on the party's attorney or representative is considered to be service on the party.

(c) An agency attorney represents the complainant.

§ 406.109 Administrative law judges—powers and limitations.

(a) *Powers of an administrative law judge.* In accordance with the rules of this subpart, an administrative law judge may:

(1) Give notice of, and hold, pre-hearing conferences and hearings;

(2) Administer oaths and affirmations;

(3) Issue subpoenas authorized by law and requested by the parties;

(4) Rule on offers of proof;

(5) Receive relevant and material evidence;

(6) Regulate the course of the hearing in accordance with the rules of this subpart;

(7) Hold conferences to settle or to simplify the issues by consent of the parties;

(8) Dispose of procedural motions and requests; and

(9) Make findings of fact and conclusions of law, and issue an initial decision.

(b) *Duties to maintain the record.*

(1) The administrative law judge must file with the FDMS, or instruct the party to file with the FDMS, a copy of each document that is submitted to the administrative law judge that has not been filed with FDMS, except the portions of those documents that contain confidential information.

(2) The administrative law judge must file with the FDMS a copy of each ruling and order issued by the administrative law judge, except those portions that contain confidential information.

(3) The administrative law judge must file with the FDMS, or instruct the court reporter to file with the FDMS, a copy of each transcript and exhibit, except those portions that contain confidential information.

(4) The administrative law judge must maintain any confidential information filed in accordance with § 406.117 and deliver it to the Assistant Chief Counsel for Litigation when the

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administrative law judge no longer needs it.

(c) *Limitations on the power of the administrative law judge.* The administrative law judge may not issue an order of contempt, award costs to any party, or impose any sanction not specified in this subpart. If the administrative law judge imposes any sanction not specified in this subpart, a party may file an interlocutory appeal of right pursuant to § 406.173(c). This section does not preclude an administrative law judge from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that specific proceeding.

(d) *Disqualification.* The administrative law judge may disqualify himself or herself at any time. A party may file a motion, pursuant to § 406.141(f)(8), requesting that an administrative law judge be disqualified from the proceedings.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68475, Dec. 5, 2007]

§ 406.111 Signing documents.

(a) *Signature required.* The party, or the party’s attorney or representative, must sign each document tendered for filing or served on each party.

(b) *Effect of signing a document.* By signing a document, the party, or the party’s attorney or representative, certifies that he or she has read the document and, based on reasonable inquiry and to the best of that individual’s knowledge, information, and belief, the document is—

(1) Consistent with these rules;

(2) Warranted by existing law or that a good faith argument exists for extension, modification, or reversal of existing law; and

(3) Not unreasonable or unduly burdensome or expensive, not made to harass any person, not made to cause unnecessary delay, not made to cause needless increase in the cost of the proceedings, or for any other improper purpose.

(c) *Sanctions.* If an individual signs a document in violation of this section, the administrative law judge or the FAA decisionmaker must:

(1) Strike the pleading signed in violation of this section;

(2) Strike the request for discovery or the discovery response signed in violation of this section and preclude further discovery by the party;

(3) Deny the motion or request signed in violation of this section;

(4) Exclude the document signed in violation of this section from the record;

(5) Dismiss the interlocutory appeal and preclude further appeal on that issue by the party who filed the appeal until an initial decision has been entered on the record; or

(6) Dismiss the appeal of the administrative law judge’s initial decision to the FAA decisionmaker.

§ 406.113 Filing documents with the Docket Management System (DMS) and sending documents to the administrative law judge and Assistant Chief Counsel for Litigation.

(a) *The Federal Docket Management System (FDMS).* (1) Documents filed in a civil penalty adjudication are kept in the Federal Docket Management System (FDMS), except for documents that contain confidential information in accordance with 406.117. The FDMS is an electronic docket. Documents that are filed are scanned into the electronic docket and an index is made of all documents that have been filed so that any person may view the index and documents as provided in paragraph (f) of this section.

(2) A party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and responses with the Federal Docket Management System or submit them to administrative law judge, except as provided in 406.143.

(b) *Method of filing.* A person filing a document must mail or personally deliver the signed original and one copy of each document to the FDMS at the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. A person must serve a copy of each document on each party in accordance with 406.115.

(c) *Date of filing.* The date of filing is the date of personal delivery, or if mailed, the mailing date shown on any

certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing data shown by other evidence if there is no certificate of service or postmark. The date shown in the FDMS index is not necessarily the date of service. It is the date the FDMS received the document.

(d) *Form*. FDMS scans the document into its electronic docket. To ensure that FDMS can scan the document and correctly identify it in the index, each person filing a document must comply with the following:

(1) Each document must be legible. It may be handwritten, typewritten, or printed from a computer.

(2) Each document must have a caption on its first page, clearly visible, with the following information:

- (i) "FAA Space Adjudication."
- (ii) Case name, such as "In the matter of X Corporation."
- (iii) FAA Case Number and FDMS docket number, if assigned.

(iv) Name of the document being filed, including the party filing the document, such as "Respondent's Motion to Dismiss."

(v) "Confidential information filed with administrative law judge" or "Confidential information filed with Assistant Chief Counsel for Litigation" if the party is filing confidential information under 406.117.

(3) The document must be capable of being scanned and be easy to read both in paper form and as scanned into the electronic docket. A document that meets the following specifications is capable of being scanned using automatic feeders and is easy to read both in paper form and as scanned into the electronic docket. Documents that do not meet these specifications may not be legible.

- (i) On white paper.
- (ii) On paper not larger than 8½ by 11 inches.
- (iii) In black ink.
- (iv) Text double-spaced. Footnotes and long quotes may be single spaced.
- (v) At least 12 point type.
- (vi) Margins at least 1 inch on each side.
- (vii) The original not bound or hole-punched, only held together with removable metal clips or the like. The copy that is filed or sent to the admin-

istrative law judge or Assistant Chief Counsel for Litigation, and the copy served on another party, need not meet this specification.

(viii) The original has no tabs. The copy that is filed or sent to the administrative law judge or Assistant Chief Counsel for Litigation, and the copy served on another party, need not meet this specification.

(e) *Sending documents to the administrative law judge or Assistant Chief Counsel for Litigation*. Sending the document directly to the administrative law judge or to the Assistant Chief Counsel for Litigation is not a substitute for filing the original with the FDMS, except for confidential information under 406.117.

(f) *Viewing and copying the record*. Any person may view and copy the record, except for confidential information, as follows:

(1) During regular business hours at the U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

(2) Through the Internet at <http://www.regulations.gov>.

(3) By requesting it from the FDMS and paying reasonable costs.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68476, Dec. 5, 2007]

§ 406.115 Serving documents on other parties.

(a) *Service required*. A person must serve on each other party at the time of filing a copy of any document filed with the Federal Docket Management System. Service on a party's attorney or representative of record is adequate service on the party.

(b) *Method of service*. A person must serve documents by personal delivery or by mail.

(c) *Certificate of service*. A person may attach a certificate of service to a document filed with the FDMS. Any certificate of service must include a statement, dated and signed by the individual filing the document, that the document was served on each party, the method of service, and the date of service.

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(d) *Date of service.* The date of service is the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark. The date shown in the FDMS index is not necessarily the date of service. It is the date the FDMS received the document.

(e) *Additional time after service by mail.* Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a specified date after service by mail, 5 days is added to the prescribed period.

(f) *Service by the administrative law judge.* The administrative law judge must serve a copy of each document including, but not limited to, notices of pre-hearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail.

(g) *Service made.* A document is deemed served in accordance with this subpart if it was properly addressed; was sent in accordance with this subpart; and was returned, not claimed, or refused. Service is considered valid as of the date and the time that the document was mailed, or personal delivery of the document was refused.

(h) *Presumption of service.* There is a presumption of service where a party or a person, who customarily receives mail, or receives it in the ordinary course of business, at either the person's residence or the person's principal place of business, acknowledges receipt of the document.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68476, Dec. 5, 2007]

§ 406.117 Confidential information.

(a) *Filing confidential information.* If a party wants certain information that the party is filing not made available to the public, the party must do the following:

(1) Place the information in a separate sealed envelope and clearly mark the envelope "CONFIDENTIAL." At least the first page of the document in

the envelope also must be marked "CONFIDENTIAL."

(2) Attach to this envelope a cover document marked "Confidential information filed with administrative law judge" or "Confidential information filed with Assistant Chief Counsel for Litigation." The cover document must include, at the least, a short statement of what is being filed, such as "Respondent's motion for confidentiality order."

(3) Unless such a motion has already been granted, enclose a motion for confidentiality order in accordance with paragraph (c) of this section. The motion must be in the sealed envelope if it contains confidential information; otherwise the motion must be outside of the sealed envelope.

(b) *Marked information not made public.* If a party files a document in a sealed envelope clearly marked "CONFIDENTIAL" the document may not be made available to the public unless and until the administrative law judge or the FAA decisionmaker decides it may be made available to the public in accordance with 49 U.S.C. 70114.

(c) *Motion for confidentiality order.* If a party is filing, is requested to provide in discovery, or intends to offer at the hearing, information that the party does not wish to be available to the public, the party must file a motion for a confidentiality order.

(1) The party must state the specific grounds for withholding the information from the public.

(2) If the party claims that the information is protected under 49 U.S.C. 70114, and if both the complainant and the respondent agree that the information is protected under that section, the administrative law judge must grant the motion. If one party does not agree that the information is protected under 49 U.S.C. 70114 the administrative law judge must decide. Either party may file an interlocutory appeal of right under § 406.173(c).

(3) If the party claims that the information should be protected on grounds other than those provided by 49 U.S.C. 70114 the administrative law judge must grant the motion if, based on the

motion and any response to the motion, the administrative law judge determines that disclosure would be detrimental to safety, disclosure would not be in the public interest, or that the information is not otherwise required to be made available to the public.

(4) If the administrative law judge determines that the information is not necessary to decide the case or would not otherwise lead to the discovery of relevant material, the administrative law judge must preclude any inquiry into the matter by any party.

(5) If the administrative law judge determines that the requested material may be disclosed during discovery, the administrative law judge may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.

(6) If the administrative law judge determines that the requested material is necessary to decide the case, or would otherwise lead to the discovery of relevant material, and that a confidentiality order is warranted, the administrative law judge must—

(i) Provide an opportunity for review of the document by the attorneys of record off the record.

(ii) Provide procedures for excluding the information from the record, or order that portion of the record that includes confidential information be closed.

(iii) Order that the parties must not disclose the information in any manner and the parties must not use the information in any other proceeding.

(7) If an administrative law judge orders a record closed, in whole or in part:

(i) The closed record is not available to the public.

(ii) The closed record is available to the parties' attorneys of record.

(iii) The administrative law judge may determine whether the closed record is available to the parties, the parties' representatives, or other persons such as witnesses for a party.

(iv) No party, attorney of record, representative of record, or person who receives information from such persons, may disclose information that has been protected under this section except to

a person authorized by this section or the administrative law judge to receive it.

(v) If a person other than one authorized by this section desires to view or copy a closed record, the person must file a motion to open the record.

§ 406.119 Computation of time.

(a) This section applies to any period of time prescribed or allowed by this subpart, by notice or order of the administrative law judge or the FAA decisionmaker, or by any applicable statute.

(b) The date of an act, event, or default, after which a designated time period begins to run, is not included in a computation of time under this subpart.

(c) The last day of a time period is included in a computation of time unless it is a Saturday, Sunday, or a legal holiday. If the last day of the time period is a Saturday, Sunday, or legal holiday, the time period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday.

§ 406.121 Extension of time.

Before an appeal is filed with the FAA decisionmaker, the parties may seek an extension of time as follows:

(a) *Extension of time by agreement of the parties.* The parties may agree to extend for a reasonable period of time for filing a document under this subpart with the agreement of the administrative law judge. The party seeking the extension of time must submit a draft order to the administrative law judge for signature, file it with the Federal Docket Management System, and serve it on each party.

(b) *Motion for extension of time.* If the parties do not agree to an extension of time for filing a document, a party desiring an extension may file with the Federal Docket Management System and serve a written motion for an extension of time not later than 7 days before the document is due unless good cause for the late filing is shown. The administrative law judge may grant the extension of time if good cause for the extension is shown.

(c) *Failure to rule.* If the administrative law judge fails to rule on a written motion for an extension of time by the

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date the document is due, the motion for an extension of time is granted for no more than 20 days after the original date the document was to be filed.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68476, Dec. 5, 2007]

§ 406.123 Waivers.

Waivers of any rights provided by statute or regulation must be in writing or by stipulation made at a hearing and entered into the record. The parties must set forth the precise terms of the waiver and any conditions.

§ 406.127 Complaint and answer in civil penalty adjudications.

(a) *Complaint—(1) Filing.* The complainant must file the original and one copy of the complaint with the Federal Docket Management System, or may file a written motion pursuant to 406.141(f)(1) instead of filing a complaint, not later than 20 days after receipt by the complainant of a request for hearing. The complainant should suggest a location for the hearing when filing the complaint.

(2) *Service.* The complainant must personally deliver or mail a copy of the complaint to the respondent, or the respondent's attorney or representative who has filed a notice of appearance in accordance with § 406.107.

(3) *Contents of complaint.* The final notice of proposed civil penalty issued under § 406.9(d) may be filed as the complaint. A complaint must set forth the following in sufficient detail to provide notice:

(i) The facts alleged.

(ii) Any requirement of the Act, a regulation issued under the Act, or any term or condition of a license or permit issued or transferred under the Act allegedly violated by the respondent.

(iii) The proposed civil penalty.

(b) *Answer—(1) Time for filing.* The respondent must file an answer to the complaint, or may file a written motion pursuant to § 406.141(f)(2) instead of filing an answer, not later than 30 days after service of the complaint.

(2) *Form.* The answer must be in writing. The answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. The answer must be legible, and

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may be handwritten, typed, or printed from a computer.

(3) *Filing and service.* A respondent must file the answer with the Federal Docket Management System and serve a copy of the answer on the agency attorney who filed the complaint.

(4) *Contents of answer—(i) Specific denial of allegations required.* The respondent must admit, deny, or state that the respondent is without sufficient knowledge or information to admit or deny, each numbered paragraph of the complaint. Any statement or allegation contained in the complaint that is not specifically denied in the answer constitutes an admission of the truth of that allegation. An administrative law judge shall treat a general denial of the complaint as a failure to file an answer.

(ii) *Affirmative defenses.* The answer must specifically state any affirmative defense that the respondent asserts.

(iii) *Request for relief.* The answer may include a brief statement of any relief requested.

(iv) *Hearing location.* The respondent should suggest a location for the hearing when filing the answer.

(5) *Failure to file answer.* A respondent's failure to file an answer without good cause constitutes an admission of the truth of each allegation contained in the complaint.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended by Amdt. 406-4, 72 FR 17017, Apr. 6, 2007; 72 FR 68476, Dec. 5, 2007]

§ 406.133 Amendment of pleadings.

(a) *Time.* A party must file with the Federal Docket Management System and serve on each other party any amendment to a complaint or an answer as follows:

(1) Not later than 15 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the administrative law judge.

(2) Less than 15 days before the scheduled date of a hearing, the administrative law judge may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

(b) *Responses.* The administrative law judge must allow a reasonable time, but not more than 20 days from the

date of filing, for other parties to respond to an amendment to a complaint or answer.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.135 Withdrawal of complaint or request for hearing.

At any time before or during a hearing, the complainant may withdraw a complaint or a party may withdraw a request for a hearing without the consent of the administrative law judge. If the complainant withdraws the complaint or a party withdraws the request for a hearing and the answer, the administrative law judge must dismiss the proceedings under this subpart with prejudice.

§ 406.137 Intervention.

(a) A person may file with the Federal Docket Management System and serve on each other party a motion for leave to intervene as party in an adjudication. Except for good cause shown, a motion for leave to intervene must be filed not later than 10 days before the hearing.

(b) The administrative law judge may grant a motion for leave to intervene if the administrative law judge finds that—

(1) Intervention will not unduly broaden the issues or delay the proceedings, and

(2) The intervener will be bound by any order or decision entered in the action or the intervener has a property, financial, or other legitimate interest that may not be addressed adequately by the parties.

(c) The administrative law judge may determine the extent to which an intervener may participate in the proceedings.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.139 Joint procedural or discovery schedule.

(a) *General.* The parties may agree to submit a schedule for filing all prehearing motions or for conducting discovery or both.

(b) *Form and content of schedule.* If the parties agree to a joint procedural or

discovery schedule, one of the parties must file with the Federal Docket Management System and serve the joint schedule, setting forth the dates to which the parties have agreed. One of the parties must draft an order establishing a joint schedule for the administrative law judge.

(1) The joint schedule may include, but need not be limited to, times for requests for discovery, any objections to discovery requests, responses to discovery requests, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and lists of witnesses that may be called at the hearing.

(2) Each party must sign the original joint schedule.

(c) *Time.* The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

(d) *Order establishing joint schedule.* The administrative law judge must approve the joint schedule filed by the parties by signing the joint schedule and filing it with the Federal Docket Management System.

(e) *Disputes.* The administrative law judge must resolve any dispute regarding discovery or regarding compliance with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

(f) *Sanctions for failure to comply with joint schedule.* If a party fails to comply with the order establishing a joint schedule, the administrative law judge may direct that party to comply with a motion to compel discovery; or, limited to the extent of the party's failure to comply with a motion or discovery request, the administrative law judge may:

(1) Strike that portion of a party's pleadings;

(2) Preclude prehearing or discovery motions by that party;

(3) Preclude admission of that portion of a party's evidence at the hearing; or

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(4) Preclude that portion of the testimony of that party's witnesses at the hearing.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.141 Motions.

(a) *General.* A party applying for an order or ruling not specifically provided in this subpart must do so by motion. A party must comply with the requirements of this section when filing a motion for consideration by the administrative law judge or the FAA decisionmaker on appeal.

(b) *Contents.* A party must state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party must attach any evidence, including affidavits, to the motion.

(c) *Form and time.* Except for oral motions heard on the record, a motion made prior to the hearing must be in writing. Unless otherwise agreed by the parties or for good cause shown, a party must file any prehearing motion with the Federal Docket Management System and serve each other party not later than 30 days before the hearing.

(d) *Answers to motions.* Any party may file and serve an answer, with affidavits or other evidence in support of the answer, not later than 10 days after service of a written motion on that party. When a motion is made during a hearing, the answer may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the administrative law judge.

(e) *Rulings on motions.* The administrative law judge must rule on all motions as follows:

(1) *Discovery motions.* The administrative law judge must resolve all pending discovery motions not later than 10 days before the hearing.

(2) *Prehearing motions.* The administrative law judge must resolve all pending prehearing motions not later than 7 days before the hearing. If the administrative law judge issues a ruling or order orally, the administrative law judge must serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the ad-

ministrative law judge must issue rulings and orders in writing and must serve a copy of the ruling or order on each party.

(3) *Motions made during the hearing.* The administrative law judge may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

(f) *Specific motions—*(1) *Complainant's motion to dismiss a request for a hearing as prematurely filed.* The complainant may file a motion to dismiss a request for a hearing as prematurely filed instead of filing a complaint. If the motion is not granted, the complainant must file the complaint and must serve a copy of the complaint on each party not later than 10 days after service of the administrative law judge's ruling or order on the motion to dismiss. If the motion to dismiss is granted and the proceedings are terminated without a hearing, the respondent may file an appeal in accordance with § 406.175. If required by the decision on appeal, the complainant must file a complaint and must serve a copy of the complaint on each party not later than 10 days after service of the decision on appeal.

(2) *Respondent's motions instead of an answer.* A respondent may file one or more of the following motions instead of filing an answer. If the administrative law judge denies the motion, the respondent must file an answer not later than 10 days after service of the denial of the motion.

(i) *Respondent's motion to dismiss complaint for failure to state a claim for which a civil penalty may be imposed.* A respondent may file a motion to dismiss the complaint for failure to state a claim for which a civil penalty may be imposed instead of filing an answer. The motion must show that the complaint fails to state a violation of the Act, a regulation issued under the Act, or any term or condition of a license issued or transferred under the Act.

(ii) *Respondent's motion to dismiss allegations or complaint for staleness.* Instead of filing an answer to the complaint, a respondent may move to dismiss the complaint, or that part of the complaint that alleges a violation that occurred more than 5 years before an

agency attorney issued a notice of proposed civil penalty to the respondent, as provided by 28 U.S.C. 2462.

(iii) *Respondent's motion for more definite statement.* A respondent may file a motion requesting a more definite statement of the allegations contained in the complaint instead of filing an answer. The respondent must set forth, in detail, the indefinite or uncertain allegations contained in a complaint or response to any pleading and must submit the details that the party believes would make the allegation or response definite and certain. If the administrative law judge grants the motion, the complainant must supply a more definite statement not later than 15 days after service of the ruling granting the motion. If the complainant fails to supply a more definite statement, the administrative law judge must strike the allegations in the complaint to which the motion is directed. If the administrative law judge denies the motion, the respondent must file an answer and must serve a copy of the answer on each party not later than 10 days after service of the order of denial.

(3) *Other motions to dismiss.* A party may file a motion to dismiss, specifying the grounds for dismissal.

(4) *Complainant's motion for more definite statement.* The complainant may file a motion requesting a more definite statement if an answer fails to respond clearly to the allegations in the complaint. The complainant must set forth, in detail, the indefinite or uncertain allegations contained in the answer and must submit the details that the complainant believes would make the allegation or response definite and certain. If the administrative law judge grants the motion, the respondent must supply a more definite statement not later than 15 days after service of the ruling on the motion. If the respondent fails to supply a more definite statement, the administrative law judge must strike those statements in the answer to which the motion is directed. An administrative law judge shall treat a respondent's failure to supply a more definite statement as an admission of unanswered allegations in the complaint.

(5) *Other motions for more definite statement.* A party may file a motion

for more definite statement of any pleading that requires or permits a response under this subpart. A party must set forth, in detail, each indefinite or uncertain allegation contained in a pleading or response and must submit the details that would make each allegation definite and certain.

(6) *Motion to strike.* Any party may make a motion to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party must file a motion to strike and must serve a copy on each party before a response to that pleading is required under this subpart or, if a response is not required, not later than 10 days after service of the pleading.

(7) *Motion for decision.* A party may make a motion for decision, regarding all or any part of the proceedings, at any time before the administrative law judge has issued an initial decision in the proceedings. The administrative law judge must grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, matters that the administrative law judge has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party making the motion for decision has the burden of showing that there is no genuine issue of material fact disputed by the parties.

(8) *Motion for disqualification.* A party may file a motion for disqualification. A party may file the motion at any time after the administrative law judge has been assigned to the proceedings but must make the motion before the administrative law judge files an initial decision in the proceedings.

(i) *Motion and supporting affidavit.* A party must state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors showing reason for disqualification, in the motion for disqualification. A party must submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.

(ii) *Answer.* A party may respond to the motion for disqualification not later than 5 days after service of the motion for disqualification.

(iii) *Decision on motion for disqualification.* The administrative law judge must issue a decision on the motion for disqualification not later than 15 days after the motion has been filed. If the administrative law judge finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the administrative law judge must withdraw from the proceedings immediately. If the administrative law judge finds that disqualification is not warranted, the administrative law judge must deny the motion and state the grounds for the denial on the record. If the administrative law judge fails to rule on a party's motion for disqualification within 15 days after the motion has been filed, the motion is granted.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.143 Discovery.

(a) *Initiation of discovery.* Any party may initiate discovery described in this section, without the consent or approval of the administrative law judge, at any time after a complaint has been filed.

(b) *Methods of discovery.* The following methods of discovery are permitted under this section: depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A party is not required to file written interrogatories and responses, requests for production of documents or tangible items and responses, and requests for admission and responses with the Federal Docket Management System or submit any of them to the administrative law judge. In the event of a discovery dispute, a party must attach a copy of these documents in support of a motion filed under this section.

(c) *Service on the agency.* A party must serve each discovery request directed to the agency or any agency employee with the agency attorney.

(d) *Time for response to discovery request.* Unless otherwise directed by this subpart or agreed by the parties, a party must respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days after service of the request.

(e) *Scope of discovery.* Subject to the limits on discovery set forth in paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party expects to call to testify at the hearing. A party has no ground to object to a discovery request on the basis that the information sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

(f) *Limiting discovery.* The administrative law judge must limit the frequency and extent of discovery permitted by this section if a party shows that—

(1) The information requested is cumulative or repetitious;

(2) The information requested can be obtained from another less burdensome and more convenient source;

(3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section; or

(4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

(g) *Confidentiality order.* A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development,

may file and serve a motion for a confidentiality order in accordance with § 406.117.

(h) *Protective order.* A party or a person who has received a request for discovery may file a motion for protective order and must serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the administrative law judge may:

(1) Deny the discovery request;

(2) Order that discovery be conducted only on specified terms and conditions, including a designation of the time or place for discovery or a determination of the method of discovery; or

(3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

(i) *Duty to supplement or amend response.* A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

(1) A party must supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.

(2) A party must supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness and the subject matter and substance of that witness' testimony.

(3) A party must supplement or amend any response that was incorrect when made or any response that was correct when made but is no longer correct, accurate, or complete.

(j) *Depositions.* The following rules apply to all depositions taken pursuant to this section:

(1) *Form.* A deposition must be taken on the record and reduced to writing. The person being deposed must sign the deposition unless the parties agree to waive the requirement of a signature.

(2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party must take a

deposition before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. In a foreign country, a party must take a deposition in any manner allowed by the Federal Rules of Civil Procedure.

(3) *Notice of deposition.* A party must serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, must submit the notice to the administrative law judge, and must file the notice with the Federal Docket Management System, and must serve the notice on each party, not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the administrative law judge. If a subpoena duces tecum is to be served on the person to be examined, the party must attach to the notice of deposition a copy of the subpoena duces tecum that describes the materials to be produced at the deposition.

(4) *Use of depositions.* A party may use any part or all of a deposition at a hearing authorized under this subpart only upon a showing of good cause. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

(k) *Interrogatories.* (1) A party may not serve more than 30 interrogatories to each other party. Each subpart of an interrogatory must be counted as a separate interrogatory.

(2) A party must file a motion for leave to serve more than 30 interrogatories on a party before serving additional interrogatories on a party. The administrative law judge must grant the motion only if the party shows good cause for the party's failure to inquire about the information previously and that the information cannot reasonably be obtained using less burdensome discovery methods or be obtained from other sources.

(3) A party must answer each interrogatory separately and completely in writing.

(4) A party, or the party’s attorney or representative of record, must sign the party’s responses to interrogatories.

(5) If a party objects to an interrogatory, the party must state the objection and the reasons for the objection.

(6) An opposing party may offer into evidence any part or all of a party’s responses to interrogatories at a hearing under this subpart to the extent that the response is relevant, material, and not repetitious.

(1) *Requests for admission.* A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party must set forth each request for admission separately. A party must serve a copy of each document referenced in the request for admission unless the document has been provided or is reasonably available for inspection and copying.

(1) *Time.* A party’s failure to respond to a request for admission is not later than 30 days after service of the request constitutes an admission of the truth of the statement or statements contained in the request for admission. The administrative law judge may determine that a failure to respond to a request for admission does not constitute an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party’s attorney or representative.

(2) *Response.* A party may object to a request for admission. The objection must be in writing and signed by the party or the party’s attorney or representative of record, and must state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party must show that the party has made reasonable inquiry into the matter or that the information known to, or readily obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If an administrative law judge determines that a

response does not comply with the requirements of this rule or that the response is insufficient, the matter is admitted.

(3) *Effect of admission.* Any matter admitted or treated as admitted under this section is conclusively established for the purpose of the hearing and appeal.

(m) *Motion to compel discovery.* A party may make a motion to compel discovery if a person refuses to answer a question during a deposition, a party fails or refuses to answer an interrogatory, a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may adjourn the examination before making a motion to compel if a person refuses to answer.

(n) *Failure to comply with a discovery order or order to compel.* If a party fails to comply with a discovery order or an order to compel, the administrative law judge, limited to the extent of the party’s failure to comply with the discovery order or motion to compel, may:

- (1) Strike that portion of a party’s pleadings;
- (2) Preclude prehearing or discovery motions by that party;
- (3) Preclude admission of that portion of a party’s evidence at the hearing; or
- (4) Preclude that portion of the testimony of that party’s witnesses at the hearing.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.147 Notice of hearing.

(a) *Notice.* The administrative law judge must give each party at least 60 days notice of the date, time, and location of the hearing.

(b) *Date, time, and location of the hearing.* The administrative law judge must set a reasonable date, time, and location for the hearing within the United States. The administrative law judge must consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when

determining the hearing date. The administrative law judge must give due regard to the convenience of the parties, the location where the majority of the witnesses reside or work, and whether a scheduled air carrier serves the location.

(c) *Earlier hearing.* With the consent of the administrative law judge, the parties may agree to hold the hearing on an earlier date than the date specified in the notice of hearing.

(d) *Space hearing consolidated with aviation hearing under 14 CFR part 13 subpart G.* With the consent of the administrative law judge, the parties may agree to hold the hearing, or parts of the hearing, together with a hearing under 14 CFR part 13 subpart G if the cases involve some common issues of fact. If the hearings are consolidated, the administrative law judge may issue a consolidated initial decision covering both cases. The Administrator will serve as the FAA decisionmaker on appeal for both cases and will issue a consolidated decision, with the Associate Administrator for Commercial Space Transportation serving as an advisor to the FAA decisionmaker.

§ 406.149 Evidence.

(a) *General.* A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.

(b) *Admissibility.* A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The administrative law judge must admit any oral, documentary, or demonstrative evidence introduced by a party but must exclude irrelevant, immaterial, or unduly repetitious evidence.

(c) *Hearsay evidence.* Hearsay evidence is admissible in proceedings governed by this subpart. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

§ 406.151 Standard of proof.

The administrative law judge must issue an initial decision or must rule in

a party's favor only if the decision or ruling is supported by, and in accordance with, the reliable, probative, and substantial evidence contained in the record. In order to prevail, the party with the burden of proof must prove the party's case or defense by a preponderance of reliable, probative, and substantial evidence.

§ 406.153 Burden of proof.

(a) Except in the case of an affirmative defense, in a civil penalty adjudication the burden of proof is on the complainant.

(b) Except as otherwise provided by statute or rule, the proponent of a motion, request, or order has the burden of proof.

(c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

§ 406.155 Offer of proof.

A party whose evidence has been excluded by a ruling of the administrative law judge may offer the evidence for the record on appeal.

§ 406.157 Expert or opinion witnesses.

An employee of the FAA may not be called as an expert or opinion witness for any party other than the agency, in any proceeding governed by this part. An employee of a respondent may not be called as an expert or opinion witness for the complainant in any proceeding governed by this part to which the respondent is a party.

§ 406.159 Subpoenas.

(a) *Request for subpoena.* A party may obtain from the administrative law judge a subpoena to compel the attendance of a witness at a deposition or hearing or to require the production of documents or tangible items. The administrative law judge must deliver the subpoena, signed by the administrative law judge but otherwise in blank, to the party. The party must complete the subpoena, stating the title of the action and the date and time for the witness' attendance or production of documents or items. The party who obtained the subpoena must serve the subpoena on the witness.

(b) *Motion to quash or modify the subpoena.* A party, or any person upon

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whom a subpoena has been served, may file a motion to quash or modify the subpoena at or before the time specified in the subpoena for compliance. The applicant must describe, in detail, the basis for the motion to quash or modify the subpoena including, but not limited to, a statement that the testimony, document, or tangible evidence is not relevant to the proceeding, that the subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of the subpoena pending a decision by the administrative law judge on the motion.

(c) *Enforcement of subpoena.* Upon a showing that a person has failed or refused to comply with a subpoena, the Secretary may apply to the appropriate district court of the United States to seek enforcement of the subpoena in accordance with 49 U.S.C. 70115(c). A party may request the Secretary to seek such enforcement.

§ 406.161 Witness fees.

(a) *General.* Unless otherwise authorized by the administrative law judge, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, must pay the witness fees described in this section.

(b) *Amount.* Except for an employee of the agency who appears at the direction of the agency, a witness who appears at a deposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

§ 406.163 Record.

(a) *Exclusive record.* The transcript of all testimony in the hearing; all exhibits received into evidence; the complaint, answer, and amendments thereto; all motions, applications, and requests, and responses thereto; and all rulings constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding.

(b) A person may keep the original document, data, or other evidence, with the consent of the administrative

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law judge, by substituting a legible copy for the record.

§ 406.165 Argument before the administrative law judge.

(a) *Argument during the hearing.* During the hearing, the administrative law judge must give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The administrative law judge may request written arguments during the hearing if the administrative law judge finds that submission of written arguments would be reasonable.

(b) *Final oral argument.* At the conclusion of the hearing and before the administrative law judge issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

(c) *Post-hearing briefs.* The administrative law judge may request written post-hearing briefs before the administrative law judge issues an initial decision if the administrative law judge finds that submission of written briefs would be reasonable. If a party files a written post-hearing brief, the party must include proposed findings of fact and conclusions of law, exceptions to rulings of the administrative law judge, and supporting arguments for the findings, conclusions, or exceptions. The administrative law judge must give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

§ 406.167 Initial decision.

(a) *Contents.* The administrative law judge must issue an initial decision at the conclusion of the hearing. In each oral or written decision, the administrative law judge must include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact, the credibility of witnesses, the

applicable law, any exercise of the administrative law judge's discretion, the amount of any civil penalty found appropriate by the administrative law judge, and a discussion of the basis for any order issued in the proceedings. The administrative law judge is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the administrative law judge refers to any previous unreported or unpublished initial decision, the administrative law judge must make copies of that initial decision available to all parties and the FAA decisionmaker.

(b) *Oral decision.* Except as provided in paragraph (c) of this section, at the conclusion of the hearing, the administrative law judge must issue the initial decision and order orally on the record.

(c) *Written decision.* The administrative law judge may issue a written initial decision not later than 30 days after the conclusion of the hearing or submission of the last posthearing brief if the administrative law judge finds that issuing a written initial decision is reasonable. The administrative law judge must serve a copy of any written initial decision on each party.

§ 406.173 Interlocutory appeals.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker on an interlocutory appeal does not constitute a final order of the Secretary for the purposes of judicial review under 5 U.S.C. chapter 7.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the administrative law judge issues a decision on the request. If the administrative law judge grants the request, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. The administrative law judge must grant an interlocutory appeal for cause if a

party shows that delay of the interlocutory appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the administrative law judge of an interlocutory appeal of right, the proceedings are stayed until the FAA decisionmaker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal, without the consent of the administrative law judge, before an initial decision has been entered in the case of:

(1) A ruling or order by the administrative law judge barring a party, or a party's attorney or representative, from the proceedings.

(2) A ruling or order by the administrative law judge allegedly in violation of the limitations on the administrative law judge under § 406.109(c).

(3) Failure of the administrative law judge to grant a motion for a confidentiality order based on 49 U.S.C. 70114, under § 406.117(c)(2).

(4) Failure of the administrative law judge to dismiss the proceedings in accordance with § 406.135.

(d) *Procedure.* A party must file with the Federal Docket Management System and serve each other party a notice of interlocutory appeal, with supporting documents, not later than 10 days after the administrative law judge's decision forming the basis of an interlocutory appeal of right or not later than 10 days after the administrative law judge's decision granting an interlocutory appeal for cause. A party must file with the Federal Docket Management System a reply brief, if any, and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. The FAA decisionmaker must render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) *Rejection of interlocutory appeal.* The FAA decisionmaker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been

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frivolous, repetitive, or dilatory interlocutory appeals.

[Docket No. FAA–2001–8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.175 Appeal from initial decision.

(a) *Notice of appeal.* A party may appeal the initial decision, and any decision not previously appealed pursuant to 406.173, by filing with the Federal Docket Management System and serving on each party a notice of appeal. A party must file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or service of the written initial decision on the parties.

(b) *Issues on appeal.* A party may appeal only the following issues:

(1) Whether each finding of fact is supported by a preponderance of reliable, probative, and substantial evidence;

(2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and

(3) Whether the administrative law judge committed any prejudicial errors during the hearing that support the appeal.

(c) *Perfecting an appeal.* Unless otherwise agreed by the parties, a party must perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for perfecting the appeal with the consent of the FAA decisionmaker, who serves a letter confirming the extension of time on each party.

(2) *Motion for extension.* If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a motion for an extension and must serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(d) *Appeal briefs.* A party must file the appeal brief with the Federal Docket Management System and serve each

(1) A party must set forth, in detail, the party's specific objections to the initial decision or rulings in the appeal brief. A party also must set forth, in detail, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party must specifically refer to the pertinent evidence contained in the record in the appeal brief.

(2) The FAA decisionmaker may dismiss an appeal, on the FAA decisionmaker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief.

(e) *Reply brief.* Unless otherwise agreed by the parties, any party may file a reply brief with the Federal Docket Management System and serve on each other party not later than 35 days after the appeal brief has been served on that party. If the party relies on evidence contained in the record for the reply, the party must specifically refer to the pertinent evidence contained in the record in the reply brief.

(1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a reply brief with the consent of the FAA decisionmaker, who will serve a letter confirming the extension of time on each party.

(2) *Motion for extension.* If the parties do not agree to an extension of time for filing a reply brief, a party desiring an extension of time may file and serve a motion for an extension and must serve a copy of the motion on each party. The FAA decisionmaker may grant an extension if good cause for the extension is shown in the motion.

(f) *Other briefs.* The FAA decisionmaker may allow any person to submit an amicus curiae brief in an appeal of an initial decision. A party may not file more than one appeal brief or reply brief without permission of the FAA decisionmaker. A party may file with the Federal Docket Management System a motion for permission to file an additional brief and must serve a copy of the motion on each other party. The party may not file the additional brief

with the motion. The FAA decisionmaker may grant permission to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The FAA decisionmaker will allow a reasonable time for the party to file the additional brief.

(g) *Number of copies.* A party must file the original brief and two copies of the brief with the Federal Docket Management System and serve one copy on each other party.

(h) *Oral argument.* The FAA decisionmaker has sole discretion to permit oral argument on the appeal. On the FAA decisionmaker's own initiative or upon written motion by any party, the FAA decisionmaker may find that oral argument will contribute substantially to the development of the issues on appeal and may grant the parties an opportunity for oral argument.

(i) *Waiver of objections on appeal.* If a party fails to object to any alleged error regarding the proceedings in an appeal or a reply brief, the party waives any objection to the alleged error. The FAA decisionmaker is not required to consider any objection or argument in a brief if the party does not specifically refer in the brief to the pertinent evidence from the record.

(j) *FAA decisionmaker's decision on appeal.* The FAA decisionmaker will review the record, the briefs on appeal, and the oral argument, if any, to determine if the administrative law judge committed prejudicial error in the proceedings or that the initial decision should be affirmed, modified, or reversed. The FAA decisionmaker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

(1) The FAA decisionmaker may raise any issue, on the FAA decisionmaker's own initiative, that is required for proper disposition of the proceedings. The FAA decisionmaker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the FAA decisionmaker requires the consideration of additional testimony or evidence, the FAA decisionmaker will remand the

case to the administrative law judge for further proceedings and an initial decision related to that issue. If an issue raised by the FAA decisionmaker is solely an issue of law or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, a remand of the case to the administrative law judge for further proceedings is not required but may be provided in the discretion of the FAA decisionmaker.

(2) The FAA decisionmaker will issue the final decision and order of the Administrator on appeal in writing and will serve a copy of the decision and order on each party.

(3) A final decision and order of the FAA decisionmaker is precedent in any other civil penalty action under this part. Any issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.177 Petition to reconsider or modify a final decision and order of the FAA decisionmaker on appeal.

(a) *General.* Any party may petition the FAA decisionmaker to reconsider or modify a final decision and order issued by the FAA decisionmaker on appeal from an initial decision. A party must file a petition to reconsider or modify with the Federal Docket Management System not later than 30 days after service of the FAA decisionmaker's final decision and order on appeal and must serve a copy of the petition on each party. The FAA decisionmaker will not reconsider or modify an initial decision and order issued by an administrative law judge that has not been appealed by any party to the FAA decisionmaker.

(b) *Contents.* A party must state briefly and specifically the alleged errors in the final decision and order on appeal, the relief sought by the party, and the grounds that support, the petition to reconsider or modify.

(1) If the petition is based, in whole or in part, on allegations regarding the

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consequences of the FAA decisionmaker's decision, the party must describe these allegations and must describe, and support, the basis for the allegations.

(2) If the petition is based, in whole or in part, on new material not previously raised in the proceedings, the party must set forth the new material and include affidavits of prospective witnesses and authenticated documents that would be introduced in support of the new material. The party must explain, in detail, why the new material was not discovered through due diligence prior to the hearing.

(c) *Repetitious and frivolous petition.* The FAA decisionmaker will not consider a repetitious or frivolous petition. The FAA decisionmaker may summarily dismiss any repetitious or frivolous petition to reconsider or modify.

(d) *Reply to petition.* Any other party may reply to a petition to reconsider or modify, not later than 10 days after service of the petition on that party, by filing a reply. A party must serve a copy of the reply on each party.

(e) *Effect of filing petition.* Unless otherwise ordered by the FAA decisionmaker, filing a petition under this section stays the effective date of the FAA decisionmaker's final decision and order on appeal, and tolls the time allowed for judicial review.

(f) *FAA decisionmaker's decision on petition.* The FAA decisionmaker may affirm, modify, or reverse the final decision and order on appeal, or may remand the case for any proceedings that the FAA decisionmaker determines may be necessary.

[Docket No. FAA-2001-8607, 66 FR 2180, Jan. 10, 2001, as amended at 72 FR 68477, Dec. 5, 2007]

§ 406.179 Judicial review of a final decision and order.

(a) A person may seek judicial review of a final decision and order of the FAA decisionmaker as provided in 5 U.S.C. chapter 7 and 28 U.S.C. 1331. A party seeking judicial review must file with a United States district court.

(b) In accordance with § 406.9(e)(iv), if a person seeks judicial review not later than 60 days after the final decision and order has been served on the respondent, the final decision and order is stayed.

(c) In accordance with § 406.9(i), if a respondent does not pay a civil penalty and does not file an appeal with the United States district court within 60 days after service of the final decision and order, the FAA may refer the order to the United States Department of Treasury or Department of Justice to collect the civil penalty.