

§ 3.26

16 CFR Ch. I (1–1–11 Edition)

upon a written determination that there is a reasonable possibility of settlement. The certification may be accompanied by a recommendation to the Commission as to the disposition of the motion. The Administrative Law Judge shall make a determination as to whether to certify the motion within 5 days after the filing of the motion. The filing of a motion under paragraph (b) of this section and certification thereof to the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission shall so order. Upon certification of such motion, the Commission in its discretion may issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal.

(d) If the matter is no longer pending before the Administrative Law Judge, the Commission in its discretion may, upon motion filed under paragraph (b) of this section, issue an order withdrawing from adjudication those portions of the matter that the proposal would resolve for the purpose of considering the consent proposal. Such order may issue whether or not the consent proposal is in the form of a consent agreement executed by a respondent, otherwise conforms to § 2.32, or has been executed by complaint counsel.

(e) The Commission will treat those portions of a matter withdrawn from adjudication pursuant to paragraphs (c) or (d) of this section as being in a nonadjudicative status. Portions not so withdrawn shall remain in an adjudicative status.

(f) After some or all of the allegations in a matter have been withdrawn from adjudication, the Commission may accept a proposed consent agreement, reject it and return the matter or affected portions thereof to adjudication for further proceedings, or take such other action as it may deem appropriate. If an agreement is accepted, it will be disposed of as provided in § 2.34 of this chapter, except that if, following the public comment period provided for in § 2.34, the Commission decides, based on comments received or otherwise, to withdraw its acceptance of the agreement, it will so notify the parties and will return to adjudication

any portions of the matter previously withdrawn from adjudication for further proceedings or take such other action it considers appropriate.

(g) This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the Administrative Law Judge on a stipulation of facts and an agreed order.

[74 FR 20208, May 1, 2009]

§ 3.26 Motions following denial of preliminary injunctive relief.

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. If the Commission has filed a request for a stay, injunction, or other emergency relief pending appeal to a court of appeals, the motion must be filed within 14 days after, but no earlier than, the court of appeals has denied the Commission's request. In cases in which the Commission has not sought relief from the court of appeals within 7 days following the denial of a preliminary injunction, the motion must be filed within 14 days after the district court has denied preliminary relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed jointly or separately by each of the respondents in the adjudicative proceeding. Complaint counsel may file a response within 14 days after such motion is filed. The matter will not be withdrawn from adjudication unless the Commission so directs.

(d) *Consideration on the record.* Instead of a motion to withdraw the matter from adjudication, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Complaint counsel may file a response within 14 days after such motion is filed. The filing of a motion to dismiss shall not stay the proceeding unless the Commission so directs.

(e) *Form.* Memoranda in support of or in opposition to such motions shall not exceed 10,000 words. This word count limitation includes headings, footnotes, and quotations, but does not include the cover, table of contents, table of citations or authorities, glossaries, statements with respect to oral argument, any addendums containing statutes, rules or regulations, any certificates of counsel, proposed form of order, and any attachment required by § 3.45(e).

(f) *In camera materials.* If any filing includes materials that are subject to confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *in camera* materials for purposes of this paragraph and the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

(g) *Ruling by Commission.* The Commission shall rule on any motion authorized by this section within 30 days after the filing of the motion and any memoranda in support of or in opposition to the motion.

[74 FR 1823, Jan. 13, 2009]

Subpart D—Discovery; Compulsory Process

§ 3.31 General discovery provisions.

(a) *Discovery methods.* Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or things for inspection and other purposes; and requests for admission. Except as provided in the rules, or unless the Administrative Law Judge orders otherwise, the frequency or sequence of these methods is not limited. The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) *Mandatory initial disclosures.* Complaint counsel and respondent's counsel shall, within 5 days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); and

(2) A copy of, or a description by category and location of, all documents and electronically stored information including declarations, transcripts of investigational hearings and depositions, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are subject to the limitations in § 3.31(c)(2), privileged as defined in § 3.31(c)(4), pertain to hearing preparation as defined in § 3.31(c)(5), pertain to experts as defined in § 3.31A, or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it