

recording in toto. In such event, it shall be considered a part of the transcript or recording if the Secretary decides that the examiner's ruling in excluding the evidence was erroneous. The examiner shall not allow the insertion of such evidence in toto if the taking of such evidence will consume a considerable length of time at the hearing. In the latter event, if the Secretary decides that the examiner erred in excluding the evidence, and that such error was substantial, the hearing shall be reopened to permit the taking of such evidence.

(h) *Oral argument before examiner.* The examiner may permit the parties or their counsel to argue orally at the hearing or at some other time prior to the transmittal of the record to the Secretary as provided in this part. Such argument may be limited by the examiner to any extent that the examiner finds necessary for the expeditious or proper disposition of the proceeding.

(i) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless the examiner finds that recording the hearing verbatim would expedite the proceeding and the examiner orders the hearing to be recorded verbatim.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the examiner determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the examiner shall order the verbatim transcription of the recording as requested by the party.

(3) If a reporter transcribes or records the testimony at a hearing, the reporter shall deliver the original transcript or recording, with exhibits thereto attached, to the examiner, who will retain such copy for the official file and for use in preparing his or her report. The reporter will also deliver to the examiner such other copy or copies as may be ordered by the Department, which copy or copies the examiner will forward to the Hearing Clerk.

(4) Parties to the proceeding, or others, who desire a copy of the transcript or recording of the hearing may place orders at the hearing with the reporter, who will furnish and deliver such copies direct to the purchaser upon payment of the applicable rate.

[10 FR 2213, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946, as amended at 24 FR 10055, Dec. 12, 1959; 27 FR 12398, Dec. 14, 1962; 38 FR 30445, Nov. 5, 1973; 47 FR 21234, May 18, 1982; 60 FR 8460, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.16 Depositions.

(a) *Application for taking deposition.* Upon the application of a party to the proceeding, the examiner as defined in § 47.2(i)(1) may, except as provided in paragraph (b) of this section, at any time after the filing of the moving papers, order, over the facsimile signature of the Secretary, the taking of testimony by deposition. The application shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent; (2) the name and address of the person (referred to herein after in this section as the "officer"), qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made; (3) the proposed time of the deposition which, unless otherwise agreed, shall be at least 30 days after the date of the mailing of the application; (4) the proposed place of the deposition; (5) the proposed manner in which the deposition is to be conducted (telephone, audio-visual telecommunication, or by personal attendance of the individuals who are expected to participate in the deposition); and (6) the reasons for taking the deposition.

(b) *Examiner's order for taking deposition.* (1) If, after examination of the application, the examiner is of the opinion that the deposition should be taken, or if the parties are using depositions in lieu of affidavits pursuant to § 47.20(b)(2), the examiner shall order the taking of the deposition. In no case, except for good cause shown, may the examiner order the taking of a deposition less than 10 days prior to the designated date of deposition. The order shall be filed with the Hearing

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Clerk upon the parties in accordance with §47.4.

(2) The order shall state:

(i) The time of the deposition (which unless otherwise agreed shall not be less than 20 days after the filing of the order);

(ii) The place of the deposition;

(iii) The manner of the deposition (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition);

(iv) The name of the officer before whom the deposition is to be made; and

(v) The name of the deponent.

(3) The deposition shall be conducted in the manner (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition) agreed to by the parties.

(4) If the parties cannot agree on the manner in which the deposition is to be conducted:

(i) The deposition shall be conducted by telephone unless the examiner determines that conducting the deposition by audio-visual telecommunication:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone.

(ii) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the examiner determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(A) Is necessary to prevent prejudice to a party;

(B) Is necessary because of a disability of any individual expected to participate in the deposition; or

(C) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(c) *Qualification of officer.* The deposition shall be made before the examiner or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer au-

thorized by the Secretary to administer oaths.

(d) *Procedure on examination.* (1) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. The testimony of the deponent shall be recorded by the officer or some person under the officer's direction. In lieu of oral examination, parties may transmit written questions to the officer prior to examination and the officer shall propound the written questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination or by written questions. If the place of business of the opposing party is more than 100 miles from the place of the examination, the applicant will be required to conduct the examination by means of written questions, unless the parties otherwise agree or the examiner otherwise orders. If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn by the officer and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy thereof (unless there are more than two parties to a proceeding, in which case there should be another copy for each additional party), in an envelope and mail the same by registered mail to the Hearing Clerk.

(f) *Use of depositions.* A deposition taken in accord with this section or in accord with the provisions of the Rules of Civil Procedure of the Courts of the United States, may be used in a proceeding under the act if the examiner finds that the evidence is otherwise admissible. If a deposition has been taken, and the party upon whose application it was taken refuses to offer it in evidence, the other party may offer

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the deposition, or any part thereof, in evidence.

[10 FR 2209, Feb. 27, 1945, as amended at 56 FR 174, Jan. 3, 1991; 60 FR 8461, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.17 Subpoenas.

(a) *Issuance of subpoenas.* The attendance of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may, by subpoena, be required at any designated place of hearing or at any designated place for the taking of a deposition. Subpoenas may be issued by the Secretary, or by the examiner, over the facsimile signature of the Secretary upon a reasonable showing by the applicant of the grounds, necessity, and reasonable scope thereof. Except for good cause shown, applications for subpoenas shall be filed with the Hearing Clerk at least 30 days prior to the designated date of hearing or deposition. Except for good cause shown, the examiner shall not issue subpoenas less than 20 days prior to the designated date of hearing or deposition.

(b) *Application for subpoena duces tecum.* Subpoenas for the production of documentary evidence shall be issued only upon a verified written application. Such application shall specify, as exactly as possible, the documents desired and shall show their competency, relevancy, materiality, and the necessity for their production.

(c) *Service of subpoenas.* Subpoenas may be served by any person not less than 18 years of age. The party at whose instance a subpoena is issued shall be responsible for service thereof. Subpoenas shall be served as provided in § 47.4.

[10 FR 2209, Feb. 27, 1945; 11 FR 224, Jan. 4, 1946; 19 FR 57, Jan. 6, 1954, as amended at 38 FR 30445, Nov. 5, 1973; 56 FR 175, Jan. 3, 1991; 60 FR 8462, Feb. 14, 1995; 64 FR 38107, July 15, 1999]

§ 47.18 Fees and mileage.

Witnesses who are subpoenaed and who appear in the proceeding, including witnesses whose depositions are taken, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and persons taking depositions shall be enti-

tled to the same fees as are paid for like services in the courts of the United States, to be paid by the party at whose request the deposition is taken. Witness fees and mileage shall be paid by the party at whose instance the witnesses appear, and claims therefor shall be presented to such party.

§ 47.19 Post-hearing procedure before the examiner.

(a) *Certification of transcript or recording.* As soon as practicable after receipt of the transcript or recording, the examiner shall prepare his or her certificate stating that, to the best of his or her knowledge and belief, the transcript or recording is a true, correct, and complete transcript or recording of the testimony given at the hearing, except in such particulars as the examiner shall specify, and that the exhibits transmitted are all the exhibits received in evidence at the hearing, with such exceptions as the examiner shall specify. The original of such certificate shall be attached to the original transcript or recording and a copy of such certificate shall be furnished to each of the parties and to the Hearing Clerk. The examiner shall correct the original copy of the transcript or recording by adding or crossing out (but without obscuring the text) at the appropriate places any words necessary to make the text conform to the correct meaning, as certified by the examiner.

(b) *Proposed findings of fact, conclusions, and order.* The examiner shall decide and shall announce at the hearing whether proposed findings of fact, conclusions, and order may be filed by the parties. If allowed by the examiner, he or she shall announce a definite calendar day as the time within which these documents may be filed. Such findings of fact, conclusions, and order shall be based solely upon the evidence of record. They may be accompanied by supporting briefs and by a statement of objections made to the rulings of the examiner at the hearing.

(c) *Briefs.* If the examiner does not allow proposed findings of fact, conclusions, and order to be filed, the parties shall be given until a definite calendar day to file briefs.

(d) *Claim for award of fees and expenses—(1) Filing.* Prior to the close of