

### § 3.23

### 16 CFR Ch. I (1–1–16 Edition)

Law Judge or the Commission, the opposing party shall answer or shall be deemed to have consented to the granting of the relief asked for in the motion. If an opposing party includes in an answer information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the opposing party shall file 2 versions of the answer in accordance with the procedures set forth in § 3.45(e). The moving party shall have no right to reply, except for dispositive motions or as otherwise permitted by the Administrative Law Judge or the Commission. Reply and surreply briefs to motions other than dispositive motions shall be permitted only in circumstances where the parties wish to draw the Administrative Law Judge's or the Commission's attention to recent important developments or controlling authority that could not have been raised earlier in the party's principal brief. The reply may be conditionally filed with the motion seeking leave to reply. Any reply with respect to a dispositive motion, or any permitted reply to any other motion, shall be filed within 5 days after service of the last answer to that motion.

(e) *Rulings on motions.* Unless otherwise provided by a relevant rule, the Administrative Law Judge shall rule on motions within 14 days after the filing of all motion papers authorized by this section. The Commission, for good cause, may extend the time allowed for a ruling.

(f) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(g) *Statement.* Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agree-

ment the issues raised by the motion and has been unable to reach such an agreement. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference. Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue.

[74 FR 1821, Jan. 13, 2009, as amended at 80 FR 15160, Mar. 23, 2015]

#### § 3.23 Interlocutory appeals.

(a) *Appeals without a determination by the Administrative Law Judge.* (1) The Commission may, in its discretion, entertain interlocutory appeals where a ruling of the Administrative Law Judge:

(i) Requires the disclosure of records of the Commission or another governmental agency or the appearance of an official or employee of the Commission or another governmental agency pursuant to § 3.36, if such appeal is based solely on a claim of privilege: *Provided*, that the Administrative Law Judge shall stay until further order of the Commission the effectiveness of any ruling, whether or not appeal is sought, that requires the disclosure of non-public Commission minutes, Commissioner circulations, or similar documents prepared by the Commission, an individual Commissioner, or the Office of the General Counsel;

(ii) Suspends an attorney from participation in a particular proceeding pursuant to § 3.42(d); or

(iii) Grants or denies an application for intervention pursuant to the provisions of § 3.14.

(2) Appeal from such rulings may be sought by filing with the Commission an application for review within 3 days after notice of the Administrative Law Judge's ruling. An answer may be filed within 3 days after the application for review is filed. The Commission upon its own motion may enter an order staying compliance with a discovery

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demand authorized by the Administrative Law Judge pursuant to § 3.36 or placing the matter on the Commission's docket for review. Any order placing the matter on the Commission's docket for review will set forth the scope of the review and the issues which will be considered and will make provision for the filing of memoranda of law if deemed appropriate by the Commission.

(b) *Other interlocutory appeals.* A party may request the Administrative Law Judge to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy. An answer may be filed within 3 days after the request for determination is filed. The Administrative Law Judge shall issue a ruling on the request for determination within 3 days of the deadline for filing an answer. The party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge has issued the requested determination or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling. An answer may be filed within 3 days after the application for review is filed.

(c) The application for review shall attach the ruling from which appeal is being taken and any other portions of the record on which the moving party relies. Neither the application for review nor the answer shall exceed 2,500 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). The Commission may order additional briefing on the application.

(d) *Ruling on application for review.* Within 3 days after the deadline for fil-

ing an answer, the Commission will determine whether to grant the application for review. The denial of an application shall not constitute a ruling on the merits of the ruling that is the subject of the application.

(e) *Proceedings not stayed.* An application for review and appeal hereunder shall not stay proceedings before the Administrative Law Judge unless the Judge or the Commission shall so order.

[74 FR 1822, Jan. 13, 2009, as amended at 80 FR 15160, Mar. 23, 2015]

### § 3.24 Summary decisions.

(a) *Procedure.* (1) Any party may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Counsel in support of the complaint may so move at any time after 20 days following issuance of the complaint and any respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least 30 days before the date fixed for the hearing.

(2) Any other party may, within 14 days after service of the motion, file opposing affidavits. The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in § 3.24(a)(3). The parties may file memoranda of law in support of, or in opposition to, the motion consistent with § 3.22(c). If a party includes in any such brief or memorandum information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality protections pursuant to a protective order, the party shall file 2 versions of the document in accordance with the procedures set forth in § 3.45(e). If the Commission (or, when appropriate, the Administrative Law Judge) determines that there is no genuine issue as to any material fact regarding liability or relief, it shall issue