

PART 2200—RULES OF PROCEDURE

Subpart A – General Provisions

§ 2200.1 Definitions.

As used ~~herein~~ **in this part**:

(a) *Act* means the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678.

(b) *Commission, person, employer, and employee* have the meanings set forth in section 3 of the Act, 29 U.S.C. 652.

(c) *Secretary* means the Secretary of Labor or ~~his~~ **the Secretary's** duly authorized representative.

(d) *Executive Secretary* means the Executive Secretary of the Commission.

(e) *Affected employee* means an employee of a cited employer who is exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations.

(f) *Judge* means an Administrative Law Judge appointed by the Chairman of the Commission pursuant to section 12(j) of the Act, 29 U.S.C. 661(j), as amended by Pub. L. 95-251, 92 Stat. 183, 184 (1978).

(g) *Authorized employee representative* means a labor organization that has a collective bargaining relationship with the cited employer and that represents affected employees **who are members of the collective bargaining unit**.

(h) *Representative* means any person, including an authorized employee representative, authorized by a party or intervenor to represent ~~him~~ **it** in a proceeding.

(i) *Citation* means a written communication issued by the Secretary to an employer pursuant to section 9(a) of the Act, 29 U.S.C. 658(a).

(j) *Notification of proposed penalty* means a written communication issued by the Secretary to an employer pursuant to section 10(a) or (b) of the Act, 29 U.S.C. 659(a) or (b).

(k) *Day* means a calendar day.

(l) *Working day* means all days except Saturdays, Sundays, or Federal holidays.

(m) *Proceeding* means any proceeding before the Commission or before a Judge.

(n) *Pleadings* are complaints and answers filed under § 2200.34, statements of reasons and ~~contestants'~~**employers'** responses filed under § 2200.38, and petitions for modification of abatement and objecting parties' responses filed under § 2200.37. A motion is not a pleading within the meaning of these rules.

§ 2200.2 Scope of rules; applicability of Federal Rules of Civil Procedure; construction.

(a) *Scope*. These rules shall govern all proceedings before the Commission and its Judges.

(b) *Applicability of Federal Rules of Civil Procedure*. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

(c) *Construction*. These rules shall be construed to secure an expeditious, just, and inexpensive determination of every case.

§ 2200.3 Use of gender and number.

(a) *Number*. Words importing the singular number may extend and be applied to the plural and vice versa.

(b) *Gender*. Words importing the masculine ~~gender may be applied to the~~ or feminine gender **apply equally to all genders**.

§ 2200.4 ~~Computation of~~ **Computing time.**

(a) *Computation*. ~~In~~ **The following rules apply in computing any time period of time prescribed or allowed specified in these rules or by any order that does not specify a method of computing time.**

(1) *Period stated in days or longer unit*. When the period is stated in days or a longer unit of time:

(i) ~~Exclude~~ the day ~~from which~~ of the ~~designated~~ event that triggers the period;

(ii) Count every day, including intermediate Saturdays, Sundays, and Federal holidays; and

~~(iii) begins to run shall not be included. The~~ **Include the** last day of the period ~~so computed shall be included unless it~~, **but if the last day** is a Saturday, Sunday, or Federal holiday, ~~in which event the period runs~~ **continues to run** until the end of the next day ~~which~~ **that** is not a Saturday, Sunday, or Federal holiday. ~~When the period of time prescribed or allowed is less than 11 days,~~

(2) *Period stated in working days.* When the period ~~shall commence on the~~ **is stated in working days**, count every day except intermediate Saturdays, Sundays, and Federal holidays.

(3) *Operating status of receiving Commission office.* Unless the Commission or the Judge orders otherwise, if the receiving Commission office is closed on the last day for filing due to inclement weather or other circumstance, then the time for filing is extended to the **first day** ~~which~~ **the office is open that** is not a Saturday, Sunday, or Federal holiday, ~~and intermediate Saturdays, Sundays, and Federal holidays shall likewise be excluded from the computation.~~

(4) *“Last day” defined.* Unless a different time is set by a rule or order, the last day ends:

(i) For documents filed electronically in the Commission’s E-File System, at 11:59 p.m. in the time zone of the receiving Commission office; and

(ii) For filing by other means, when the receiving Commission office is scheduled to close.

(5) *“Next day” defined.* The “next day” is determined by continuing to count forward when the period is measured after an event and backward when measured before an event. ~~(b) *Service by mail.* Where service of a document, including documents issued by the Commission or Judge, is made by mail pursuant to §2200.7, a separate period of 3 days shall be allowed, in addition to the prescribed period, for the filing of a response. This additional 3-day period shall commence on the calendar day following the day on which service has been made and shall include all calendar days; that is, paragraph (a) of this section shall not apply to the extent it requires the exclusion of Saturdays, Sundays, or Federal holidays. The prescribed period for the responsive filing shall commence on the first day following the expiration of the 3-day period, except when the prescribed period is less than 11 days. Where the period is less than 11 days, it shall commence on the first day following the expiration of the 3-day period that is not a Saturday, Sunday, or Federal holiday.~~

(6) (c) *Exclusion.* Paragraph (b) of this section ***“Federal holiday” defined.*** “Federal holiday” means:

(i) The day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and,

(ii) Any day declared a holiday by the President or Congress.

(b) *Additional time after service by U.S. Mail.* When a party may or must act within a specified time after service and service is made by U.S. Mail under § 2200.7, 3 days are added after the period would otherwise expire under § 2200.4(a). *Provided, however,* that this provision does not apply to petitions for discretionary review. The period of computing the time for filing a petition for discretionary review is governed by § 2200.91(b).

§ 2200.5 Extension of time.

The Commission or the Judge on their own initiative or, upon motion of a party, for good cause shown, may enlarge or shorten any time prescribed by these rules or prescribed by an order. All such motions shall be in writing and shall conform with § 2200.40, but, in exigent circumstances in a case pending before a Judge, an oral request may be made and thereafter shall be followed by a written motion filed with the Judge within ~~3 working days~~ such time as the Judge prescribes. A request for an extension of time should be received in advance of the date on which the pleading or document is due to be filed. However, in exigent circumstances, an extension of time may be granted even though the request was filed after the designated time for filing has expired. In such circumstances, the party requesting the extension must show, in writing, the reasons for the party's failure to make the request before the time prescribed for the filing had expired. The motion may be acted upon before the time for response has expired.

§ 2200.6 Record address.

(a) Every pleading or document filed by any party or intervenor shall contain the name, current address ~~and~~, telephone number, and e-mail address of ~~his~~ the party or intervenor's representative or, if ~~he has~~ there is no representative, ~~his~~ the party or intervenor's own name, current address ~~and~~, telephone number, and e-mail address. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. A party or intervenor who fails to furnish such information shall be deemed to have waived ~~his~~ its right to notice and service under these rules.

(b) Representatives, parties, and intervenors who file case documents electronically in the Commission's E-File System pursuant to § 2200.8(c) are responsible for both maintaining a valid email address associated with the registered account and regularly monitoring that email address.

§ 2200.7 Service and, notice, and posting.

(a) *When service is required.* At the time of filing pleadings or other documents, **the filer shall serve** a copy thereof ~~shall be served by the filing party or intervenor~~ on every other party or intervenor. Every ~~paper~~ **document** relating to discovery required to be served on a party shall be served on all parties and intervenors. Every order required by its terms to be served shall be served ~~upon each of the~~ **on all** parties and intervenors.

(b) *Service on represented parties or intervenors.* Service upon a party or intervenor who has appeared through a representative shall be made only upon such representative **unless the Judge orders service on the party or intervenor.**

(c) *How accomplished.* Unless otherwise ordered, service may be accomplished by **the following methods:**

(1) *Commission's E-File System.* For electronically-filed documents, service shall be deemed accomplished by the simultaneous service of the document by email on all other parties and intervenors in the case, together with proof of service pursuant to paragraph (d) of this section.

(2) *U.S. Mail.* Service shall be deemed accomplished upon depositing the item in the U.S. Mail with first-class or higher class (such as priority mail) **postage pre-paid** ~~first class mail~~ **addressed to the last known recipient's record address,** ~~by electronic transmission,~~ provided pursuant to § 2200.6.

(3) *Commercial or by other personal delivery.* Service shall be deemed accomplished upon delivery ~~(if by personal delivery)~~ **to the recipient's record address** provided pursuant to § 2200.6.

(4) *Facsimile transmission.* Service by facsimile transmission shall be deemed accomplished upon delivery to the receiving facsimile machine. The party serving a document by facsimile is responsible for the successful transmission and legibility of documents ~~and documents sent by an overnight delivery service shall be considered personal delivery.~~ Legibility of documents **intended to be served** by facsimile transmission is the responsibility of the serving party. ~~Documents may be served by electronic transmission only when all parties consent in writing and the.~~

(d) *Proof of service.* Service shall be documented by a written certificate of service ~~of the electronic transmission states such consent and the method of transmission.~~ All parties must be electronically served. Electronic service must be accomplished by following the requirements set forth on the Commission's Web site (<http://www.oshrc.gov>).

~~(d) Proof of service. Proof of service shall be accomplished by a written statement of the same which sets~~ **setting** forth the date and manner of service. ~~Such statement~~ **The certificate of service** shall be filed with the pleading or document.

(e) *Proof of posting.* Where service is accomplished by posting, proof of such posting shall be filed not later than the first working day following the posting.

(f) *Service on represented employees.* Service and notice to employees represented by an authorized employee representative shall be deemed accomplished by serving the representative in ~~the~~ **a** manner prescribed in paragraph (c) of this section.

(g) *Service on unrepresented employees.* In the event ~~that~~ there are ~~any~~ affected employees who are not represented by an authorized employee representative, the employer shall **post**, immediately upon receipt ~~of notice of~~, the docketing ~~of notice~~ **for** the notice of contest or petition for modification of the abatement period, ~~post~~. **The posting shall be at or near** where the citation is required to be posted, ~~a copy~~ **pursuant to section 9(b) of the notice of contest Occupational Safety and Health Act of 1970, 29 U.S.C. 658(b), and 29 CFR § 1903.16. The employer shall post:**

(1) A copy of the notice of contest or petition for modification of the abatement period;

(2) and A notice informing ~~such~~ **the** affected employees of their right to party status; and

(3) A notice informing the affected employees of the availability of all pleadings for inspection and copying at reasonable times.

(4)(i) A notice in the following form shall be deemed to comply with this paragraph:

(Name of employer)

Your employer has been cited by the Secretary of Labor for violation of the Occupational Safety and Health Act of 1970. The citation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION. Affected employees are entitled to participate in this hearing as parties under terms and conditions established by the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION in its Rules of Procedure. Notice of intent to participate must be filed no later than ~~10~~ **14** days before the hearing. Any notice of intent to participate should be sent to: Occupational Safety and Health Review Commission, Office of the Executive Secretary, One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036-3457. All pleadings relevant to this matter may be inspected at: (Place reasonably convenient to employees, preferably at or near workplace.)

(ii) Where appropriate, the second sentence of the above notice will be deleted and the following sentence will be substituted:

The reasonableness of the period prescribed by the Secretary of Labor for abatement of the violation has been contested and will be the subject of a hearing before the OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION.

(h) *Special service requirements; a*Authorized employee representatives. The authorized employee representative, if any, shall be served with the notice set forth in paragraph (g) of this section and with a copy of the notice of contest **or petition for modification of the abatement period.**

(i) *Notice of hearing to unrepresented employees.* Immediately upon receipt, a copy of the notice of the hearing to be held before the Judge shall be served by the employer on affected employees who are not represented by an authorized employee representative by posting a copy of the notice of such hearing at or near the place where the citation is required to be posted **pursuant to section 9(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 658(b), and 29 CFR § 1903.16.**

(j) *Notice of hearing to represented employees.* Immediately upon receipt, ~~a copy of the notice of the hearing to be held before the Judge shall be served by,~~ the employer **shall serve a copy of the notice** on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this section, ~~if the.~~ **The employer has need not been informed that serve the notice of hearing, as stated above, if on or before the date the hearing notice is received,** the authorized employee representative has entered an appearance ~~as of the date such notice is received by the employer~~ **in conformance with §§ 2200.22 and 2200.23.**

(k) *Employee contest; s*Service on other employees.

(1) Where a notice of contest **with respect to the reasonableness of the abatement period** is filed **under § 2200.38** by an affected employee who is not represented by an authorized employee representative and there are other affected employees who are represented by an authorized employee representative, the unrepresented **affected** employee shall, ~~upon receipt of the statement filed in conformance with §2200.38,~~ **serve a copy thereof the following documents** on ~~such~~ **the** authorized employee representative ~~in the manner prescribed in paragraph (c) of this section and shall file proof of such service.:~~

(i) **The notice of contest with respect to the reasonableness of the abatement period; and**

(ii) A copy of the Secretary's statement of reasons, filed in conformance with § 2200.38(b).

(2) Service on the authorized employee representative shall be in the manner prescribed in paragraph (c) of this section. The unrepresented affected employee shall file proof of such service.

(l) *Employee contest; Service on employer.* Where a notice of contest **with respect to the reasonableness of the abatement period** is filed by an affected employee or an authorized employee representative, a copy of the notice of contest and response filed in support ~~thereof~~ **the notice of contest** shall be provided to the employer for posting in the manner prescribed in paragraph (g) of this section.

(m) *Employee contest; Service on other authorized employee representatives.* An authorized employee representative who files a notice of contest **with respect to the reasonableness of the abatement period** shall be responsible for serving any other authorized employee representative whose members are affected employees **in the manner prescribed in paragraph (c) of this section.**

(n) *Duration of posting.* Where posting is required by this section, such posting shall be maintained until the commencement of the hearing or until earlier disposition.

(o) *Service of show cause orders—*

(1) *Service on parties and intervenors using Commission's E-File System.* Service of show cause orders shall be deemed completed by service through the Commission's E-File System on a representative who has entered an appearance for a party or intervenor under § 2200.23 or on a self-represented party or intervenor who has elected service through the Commission's E-File System. *See also* § 2200.101(a).

(2) *Service on self-represented parties or intervenors not using the Commission's E-File System.* In addition to the service methods permitted by § 2200.7(c), the Commission or the Judge shall serve a show cause order on a party or intervenor who is self-represented and is not using the Commission's E-File System by certified mail or by any other method (including commercial delivery service) that provides confirmation of delivery to the addressee's record address provided under § 2200.6.

§ 2200.8 Filing.

(a) *What to file—*

(1) *General.* All ~~papers~~documents required to be served on a party or intervenor, ~~except for those papers associated with part of a discovery request under Rules 52 through 56,~~ shall be filed either before service or within a reasonable time ~~thereafter~~after service.

(2) *Discovery documents.* Discovery documents generated pursuant to §§ 2200.52 through 2200.56 shall not be filed with the Commission or the Judge. Filing and retention of such discovery documents shall comply with § 2200.52(i) and (j).

(b) *Where to file.* Prior to assignment of a case to a Judge, all ~~papers~~documents shall be filed electronically in the Commission's E-File System or with the Executive Secretary at One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036–3457. ~~Subsequent to~~ After the assignment of the case to a Judge, all ~~papers~~documents shall be filed electronically in the Commission's E-File System or with the Judge at the address given in the notice ~~informing of such assignment.~~ Subsequent to After the docketing of the Judge's Judge's report, all ~~papers~~documents shall be filed with the Executive Secretary, except as provided in § 2200.90(b)(~~34~~).

(c) *Electronic filing with the Commission—*

(1) *Mandatory e-filing.* Parties and intervenors who are represented by an attorney or non-attorney representative, as provided in § 2200.22, must file documents electronically in the Commission's E-File System by following the instructions on the Commission's website (www.oshrc.gov), unless the documents are exempt from e-filing under paragraph (c)(5) of this section.

(2) ~~How to file. Unless otherwise ordered, filings~~ *Non-mandatory e-filing.*

(i) Self-represented parties or intervenors, as provided in § 2200.22, ~~may be accomplished~~file documents electronically in the Commission's E-File System by following the instructions on the Commission's website (www.oshrc.gov). Self-represented parties or intervenors who elect e-filing must file all documents electronically, unless excused by the Commission or the Judge or the documents are exempt from e-filing under paragraph (c)(5) of this section.

(ii) Self-represented parties or intervenors who do not elect e-filing must file documents by postage-prepaid first class ~~mail,~~ or higher class U.S. Mail, commercial delivery service, personal delivery, or ~~electronic transmission or facsimile transmission.~~ as described in paragraph (d) of this section.

(3) If technical difficulties prevent the successful submission of electronically filed documents, the e-filer should refer to the instructions for electronic filing on the Commission's website (www.oshrc.gov).

(4) Documents filed electronically in the Commission's E-File System may contain an electronic signature of the filer which will have the same legal effect, validity, and enforceability as if signed manually. The term "electronic signature" means an electronic symbol or process attached to or logically associated with a contact or other record and executed or adopted by a person with the intent to sign the document.

(5) *Confidential and privileged documents.* The following documents must not be filed electronically in the Commission's E-File System:

(i) Documents that may not be released to the public because the information is covered by a protective order or has been placed "under seal" pursuant to § 2200.52(d) and (e).

(ii) Documents submitted for *in camera* inspection by the Commission or the Judge, including material for which a privilege is claimed. Claims regarding privileged information must comply with § 2200.52(d).

(iii) Confidential settlement documents filed with the Judge pursuant to settlement procedures pursuant to § 2200.120.

(iv) Applications for subpoenas made *ex parte* pursuant to § 2200.65.

(6) *Sensitive information.* Unless the Commission or the Judge orders otherwise, all sensitive information in documents filed electronically in the Commission's E-File System must be redacted pursuant to paragraph (d)(5) of this section.

(7) *Date of filing.* The date of filing for documents filed electronically is the day that the complete document is successfully submitted in the Commission's E-File System pursuant to Rule 4(a)(4)(i). Electronic filing shall be completed by following the instructions on the Commission's website (www.oshrc.gov).

(8) *Timeliness.* Representatives and self-represented parties and intervenors bear the sole responsibility for ensuring that a filing is timely made.

(9) *Certificate of service.* Proof of service shall accompany each document filed in the Commission's E-File System. The certificate of service shall certify simultaneous service of the

document by email on all other parties and intervenors in the case. It is the responsibility of the filing party to retain records showing the date of transmission, including receipts.

(d) Documents that are not filed in the Commission's E-File System; alternative filing methods—

~~(1) (d)~~ *How to file.* Documents may be filed by postage-prepaid first class or higher class U.S. Mail, commercial delivery service, personal delivery, electronic transmission, or facsimile transmission.

(2) Number of copies. Unless otherwise ordered or stated in this part, only the original of a document shall be filed.

~~(e)~~ *(3) Filing date.*

~~(4) (i)~~ Except for the documents listed in paragraph ~~(e)(2)(d)(3)(ii)~~ of this section, ~~if filing is effective upon mailing, if by U.S. first class mail (or higher class mail, such as priority mail), then filing is deemed completed upon depositing the material in the U.S. Mail. If filing is by any other means (e.g., personal delivery, commercial delivery service, or facsimile transmission) then filing is deemed completed upon receipt by the Commission, if filing is by personal delivery, overnight delivery service, facsimile transmission or electronic transmission.~~

~~(2) (ii)~~ Filing is ~~effective~~ **completed** upon receipt **by the Commission** for petitions for interlocutory review (§ 2200.73), petitions for discretionary review (§ 2200.91), and EAJA applications (§ 2204.301).

~~(3) (counsel)(iii)~~ **Representatives and the self-represented parties shall have and intervenors bear the sole responsibility for ensuring that the document a filing is timely received by the Commission made.**

~~(f) Facsimile transmissions:~~ **(4)**

~~(1) Any document may be filed with the Commission or its Judges by facsimile transmission. Filing shall be deemed completed at the time that the facsimile transmission is received by the Commission or the Judge. The filed facsimile shall have the same force and effect as an original.~~

~~(2) All facsimile transmissions shall include a facsimile of the appropriate certificate of service.~~

~~(3) It is the responsibility of parties desiring to file documents by the use of facsimile transmission equipment to utilize equipment that is compatible with facsimile transmission equipment operated by the Commission. Legibility of the transmitted documents is the responsibility of the serving party.~~

~~(g) Electronic filing.~~

~~(1) Where all parties consent to electronic service and electronic filing, a document may be filed by electronic transmission with the Commission and its Judges. The certificate of service accompanying the document must state that the other parties consent to filing by electronic transmission. The electronic transmission shall be in the manner specified by the Commission's Web site (<http://www.oshre.gov>).~~

~~(2) A document filed in conformance with these rules constitutes a written document for the purpose of applying these rules, and a copy printed by the Commission and placed in the case file shall have the same force and effect as the original.~~

~~(3) *Certificate of service.* A certificate of service shall accompany each document electronically filed. It is the responsibility of the transmitting party to retain records showing the date of transmission, including receipts filed. The certificate shall set forth the dates and manner of filing and service.~~

~~(4) A party that files a document by an electronic transmission shall utilize equipment and software that is compatible with equipment operated by the Commission and shall be responsible for the legibility of the document.~~ **(5) *Sensitive information.* Unless the Commission or the Judge orders otherwise, in any filing with the Commission, information-**

~~(5) Information that is sensitive but not privileged shall be filed as follows (e.g.,~~

~~(i) If Social Security numbers must be included in a document, only the last four digits of that number shall be used;~~

~~(ii) If names of minor children must be mentioned, only the initials of that child shall be used; If dates of birth must be included, only the year shall be used;~~

~~, driver's license numbers, passport numbers, taxpayer-identification numbers, birthdates, mother's maiden names, names of minors, an individual's physical personal address,~~

~~(iii) If financial account numbers must be filed, only the last four digits of these numbers shall be used;~~

~~) but not privileged shall be redacted.~~

~~(iv) If a personal identifying number, such as a driver's license number must be filed, only the last four digits shall be used. Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.~~

~~(6) A transmittal letter shall not be filed electronically or by other means when a document is transmitted noting:~~

~~(i) The transmittal of a document;~~

~~(ii) The inclusion of an attachment;~~

~~(iii) A request for a return receipt; or~~

~~(iv) A request for additional information concerning the filing.~~

~~(7) The signature line of any document shall include the notation “/s/” followed by the typewritten name or graphical duplicate of the handwritten signature of the party representative filing the document. Such representation of the signature shall be deemed to be the original signature of the representative for all purposes unless the party representative shows that such representation of the signature was unauthorized.~~

~~(8) *Privileged information* shall not be filed electronically. Privileged information or information that is asserted by any party to be. **Claims regarding privileged information shall not be filed electronically.** comply with § 2200.52(d).~~

§ 2200.9 Consolidation.

Cases may be consolidated on the motion of any party **conforming to § 2200.40**, on the ~~Judge's~~**Judge's** own motion, or on the Commission's own motion, where there exist common parties, common questions of law or fact or in such other circumstances as justice or the administration of the Act require.

§ 2200.10 Severance.

Upon its own motion, or upon motion of any party or intervenor **conforming to § 2200.40**, where a showing of good cause has been made by the party or intervenor, the Commission or the Judge may order any proceeding severed with respect to some or all claims or parties.

§ 2200.11 [Reserved]

§ 2200.12 References to cases.

(a) *Citing decisions by Commission and Judges*—.

(1) *Generally*. Parties citing decisions by the Commission should include in the citation the name of the employer, a citation to either the Bureau of National Affairs' Occupational Safety & Health Cases ("BNA OSHC") or Commerce Clearing House's Occupational Safety and Health Decisions ("CCH OSHD"), the OSHRC docket number and, the year of the decision, and a citation to a print or electronic reference source. Citations to Commission and ALJ decisions published on the Commission's website (www.oshrc.gov) are also accepted. For example, *Clement Food Co.*, 11 BNA OSHC 2120 (No. 80-607, 1984).

(i) *Print*:

(A) *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1388 (No. 97-0755, 2003).

(B) *Hackensack Steel Corp.*, 2002-2004 CCH OSHD ¶ 32,690, p. 51,558 (No. 97-0755, 2003).

(ii) *Electronic*:

(A) *Hackensack Steel Corp.*, No. 97-0755, 2003 WL 22232017, at *4 (OSHRC Sept. 25, 2003).

(B) *Hackensack Steel Corp.*, No. 97-0755, 2003 LEXIS 450392, at *2 (OSHRC Sept. 25, 2003).

(iii) *Commission website (www.oshrc.gov)*:

(A) PDF versions of cases should be cited as follows and identify the relevant page number: *Jacobs Field Servs. N. Am.*, No. 10-2659, at 5 (OSHRC 2015).

(B) HTML versions of cases should be cited as follows and identify the relevant paragraph number: *Jacobs Field Servs. N. Am.*, No. 10-2659, at ¶ 9 (OSHRC 2015).

(2) *Parenthetical statements*. When citing the decision of a Judge, the digest of an opinion, or the opinion of a single Commissioner, a parenthetical statement ~~to~~ **identifying** that ~~effect~~ **should** the decision is non-precedential (e.g. "ALJ") **must** be included. For example, *Rust Engineering Co.*, 1984 CCH OSHD ¶27,023 (No.79-2090, 1984) (view of Chairman _____), vacating direction for review of 1980 CCH OSHD ¶24,269 (1980) (ALJ) (digest).

(3) ~~Additional reference to OSAHRC Reports optional. A parallel reference to the Commission's official reporter, OSAHRC Reports, which prints the full text of all Commission and Judges' decisions in microfiche form, may also be included. For example, *Texaco, Inc.*, 80 OSAHRC~~

74/B1, 8 BNA OSHC 1758 (No. 77-3040, 1980). *See generally* 29 C.F.R. §2201.4(e) (on OSAHRC Reports).

(b) *References to court decisions.*

~~(1) Parallel references to BNA and CCH reporters. When citing a court decision, a parallel reference to either the Bureau of National Affairs' Occupational Safety & Health Cases ("BNA OSHC") or Commerce Clearing House's Occupational Safety and Health Decisions ("CCH OSHD") is desirable. For example, *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 12 BNA OSHC 1401 (D.C. Cir. 1985); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094, 1980 CCH OSHD ¶24,991 (5th Cir. 1980).~~

(1) Citation to court decisions should be to the official reporter whenever possible. For example,

(i) *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 608-09 (5th Cir. 2006).

(ii) *Martin v. OSHRC (CF & I Steel Corp.)*, 499 U.S. 144, 150-51 (1991).

(2) *Name of employer to be indicated.* When a court decision is cited in which the first-listed party on each side is either the Secretary of Labor (or the name of a particular Secretary of Labor), the Commission, or a labor union, the citation should include in parenthesis the name of the employer in the Commission proceeding. For example, *Donovan v. Allied Industrial Workers (Archer Daniels Midland Co.)*, 760 F.2d 783, ~~12 BNA OSHC 1310~~ (7th Cir. 1985); *Donovan v. OSHRC (Mobil Oil Corp.)*, 713 F. 2d 918, ~~1983 CCH OSHD ¶26,627~~ (2nd (2d Cir. 1983).

Subpart B – Parties and Representatives

§ 2200.20 Party status.

(a) *Affected employees.*

(1) Affected employees and authorized employee representatives may elect party status concerning any matter in which the Act confers a right to participate. The election shall be accomplished by filing a written notice of election at least ~~10~~14 days before the hearing. A notice of election filed less than ~~10~~14 days prior to the hearing is ineffective unless good cause is shown for not timely filing the notice. ~~A notice of election shall be served on all other parties in accordance with §2200.7.~~

~~(b) Employee contest.~~(2) A notice of election shall be served on all other parties in accordance with § 2200.7.

(b) *Employees no longer employed by cited employer.* An employee of a cited employer who was exposed to or had access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations and who is no longer employed by the cited employer is permitted to participate as a party.

(c) *Employee contest.*

(1) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party status by a notice filed at least 1014 days before the hearing. ~~A notice filed less than 10 days prior to the hearing is ineffective unless good cause is shown for not timely filing the notice.~~

(2) A notice of election shall be served on all other parties in accordance with § 2200.7.

§ 2200.21 Intervention; ~~a~~Appearance by non-parties.

(a) *When allowed.* A petition for leave to intervene may be filed at any time prior to 1014 days before commencement of the hearing. A petition filed less than 1014 days prior to the commencement of the hearing will be denied unless good cause is shown for not timely filing the petition. A petition shall be served on all parties in accordance with § 2200.7.

(b) *Requirements of petition.*

(1) The petition shall set forth the interest of the petitioner in the proceeding and show that the participation of the petitioner will assist in the determination of the issues in question, and that the intervention will not unduly delay the proceeding.

~~(c) Granting of~~(2) If the petitioner is an employee who is not employed by the cited employer but who performed work at the cited worksite, the petition, in addition to the requirements of paragraph (b)(1) of this section, shall set forth material facts sufficient to demonstrate that the petitioner was exposed to or has access to the hazard arising out of the allegedly violative circumstances, conditions, practices, or operations.

(c) *Ruling on ~~The~~petition.*

(1) For petitions filed by an employee, as defined in paragraph (b)(2) of this section, the Commission or the Judge shall grant the petition for intervention.

(2) For all other petitions, the Commission or the Judge may grant a petition for intervention that meets the requirements of paragraph (b)(1) of this section.

(3) ~~to such an~~ An order granting a petition shall specify the extent and ~~upon such terms as the Commission or the Judge shall determine~~ of an intervenor's participation in the proceedings.

§ 2200.22 Representation of parties and intervenors.

(a) *Representation.* Any party or intervenor may appear in person, through an attorney, or through ~~another~~ any non-attorney representative ~~who is not an attorney.~~ A representative must file an appearance in accordance with § 2200.23. In the absence of an appearance by a representative, a party or intervenor will be deemed to appear for ~~himself~~ itself. A corporation or unincorporated association may be represented by an authorized officer or agent.

(b) *Affected employees in collective bargaining unit.* Where an authorized employee representative (see § 2200.1(g)) elects to participate as a party, affected employees who are members of the collective bargaining unit may not separately elect party status. If the authorized employee representative does not elect party status, affected employees who are members of the collective bargaining unit may elect party status in the same manner as affected employees who are not members of the collective bargaining unit. See paragraph (c) of this section.

(c) *Affected employees not in collective bargaining unit.* Affected employees who are not members of a collective bargaining unit may elect party status under § 2200.20(a). If more than one employee so elects, the Judge shall provide for them to be treated as one party.

(d) *Control of proceeding.* A representative of a party or intervenor shall be deemed to control all matters respecting the interest of such party or intervenor in the proceeding.

§ 2200.23 Appearances and withdrawals.

(a) *Entry of appearance*—

(1) *General.* A representative of a party or intervenor shall enter an appearance by signing the first document filed on behalf of the party or intervenor in accordance with paragraph (a)(2) of this section, or ~~thereafter~~ subsequently by filing an entry of appearance in accordance with paragraph (a)(3) of this section.

(2) *Appearance in first document or pleading.* If the first document filed on behalf of a party or intervenor is signed by a representative, ~~he~~ **the representative** shall be recognized as representing that party. No separate entry of appearance by ~~him~~ **the representative** is necessary, provided the document contains the information required by § 2200.6.

(3) *Subsequent appearance.* Where a representative has not previously appeared on behalf of a party or intervenor, ~~he~~ **the representative** shall file an entry of appearance with the Executive Secretary, or Judge if the case has been assigned. The entry of appearance shall be signed by the representative and contain the information required by § 2200.6.

(b) *Withdrawal of counsel.* Any counsel or ~~representative~~ **representatives** of record desiring to withdraw ~~his~~ **their** appearance, or any ~~party~~ **parties** desiring to withdraw the appearance of ~~their~~ **their** counsel or ~~representative~~ **representatives** of record ~~for him~~, must file a motion **conforming with § 2200.40** with the Commission or **the** Judge requesting leave ~~therefor, and to withdraw,~~ showing that prior notice of the motion has been given by ~~him to his~~ **the counsel or representative or party to the** client or counsel or representative, as the case may be, **and providing current contact information for the client, including street address, email address, and phone number.** The motion of counsel to withdraw may, in the discretion of the Commission or **the** Judge, be denied where it is necessary to avoid undue delay or prejudice to the rights of a party or intervenor.

§ 2200.24 Brief of an amicus curiae.

The brief of an amicus curiae may be filed only by leave of the ~~Judge or Commission~~ **or the Judge**. The brief may be conditionally filed with the motion for leave: **conforming to § 2200.40.** A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable. Any amicus curiae shall file its brief within the time allowed the party whose position the amicus will support unless the ~~Judge or Commission~~ **or the Judge**, for good cause shown, grants leave for later filing. In that event, the ~~Judge or Commission~~ **or the Judge** shall ~~or the Judge may~~ specify within what period an opposing party may answer. **The brief of an amicus curiae shall conform to § 2200.74 or § 2200.93.**

Subpart C – Pleadings and Motions

§ 2200.30 General rules.

(a) *Format.* Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, **with typeface of text being no smaller than 12-point and typeface of footnotes being no smaller than 11-point,** on letter size opaque paper (~~approximately~~ **8 ½ inches by 11 inches**). All

margins shall be ~~approximately 1~~ ½ inches. Pleadings and other documents shall be fastened **without the use of staples** at the upper left corner.

(b) *Clarity*. Each allegation or response of a pleading or motion shall be simple, concise, and direct.

(c) *Separation claims*. Each allegation or response shall be made in separate numbered paragraphs. Each paragraph shall be limited as far as practicable to a statement of a single set of circumstances.

(d) *Adoption by reference*. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part ~~thereof~~ **of the pleading** for all purposes.

(e) *Alternative pleading*. A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may state as many separate claims or defenses as ~~he~~ **it** has regardless of ~~their consistency or the grounds on which based~~. All statements shall be made subject to the signature requirements of § 2200.32.

(f) ~~Content~~ **Form of pleadings, motions, and miscellaneous pleadings. Aother documents. Any pleading, motion, or other document** shall contain a caption complying with § 2200.31, **and a signature complying with § 2200.32, and a clear. The form and plain statement content of the relief that is sought together motions shall conform with the grounds therefor. These requirements also apply to any pleading not governed by more specific requirements in this subpart** § 2200.40.

(g) *Burden of persuasion*. The rules of pleading established by this subpart are not determinative in deciding which party bears the burden of persuasion on an issue. By pleading a matter affirmatively, a party does not waive its right to argue that the burden of persuasion on the matter is on another party.

(h) *Enforcement of pleading rules*. The Commission or the Judge may refuse for filing any pleading or motion that does not comply with the requirements of this subpart.

§ 2200.31 Caption; ~~t~~Titles of cases.

(a) *Notice of contest cases*. Cases initiated by a notice of contest shall be titled:

Secretary of Labor,

Complainant,
v.
(Name of ~~Contestant~~Employer),
Respondent.

(b) *Petitions for modification of abatement period.* Cases initiated by a petition for modification of the abatement period shall be titled:

(Name of employer),
Petitioner,
v.
Secretary of Labor,
Respondent.

(c) *Location of title.* The titles listed in paragraphs (a) and (b) of this section shall appear at the left upper portion of the initial page of any pleading or document (other than exhibits) filed.

(d) *Docket number.* The initial page of any pleading or document (other than exhibits) shall show, at the upper right of the page, opposite the title, the docket number, if known, assigned by the Commission.

§ 2200.32 Signing of pleadings and motions.

Pleadings and motions shall be signed by the filing party or by the party's representative. The signature of a representative constitutes a representation by ~~him~~the representative that ~~he~~the representative is authorized to represent the party or parties on whose behalf the pleading is filed. The signature of a representative or party also constitutes a certificate by ~~him~~the representative that ~~he~~the representative has read the pleading, motion, or other ~~paper~~document, that to the best of ~~his~~the representative's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not ~~interposed~~included for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other ~~paper~~document is signed in violation of this rule, such signing party or its representative shall be subject to the sanctions set forth in § 2200.101 or § 2200.104. A signature by a party representative constitutes a representation by ~~him~~the representative that ~~he~~the representative understands that the rules and orders of the Commission and its Judges apply equally to attorney and non-attorney representatives.

§ 2200.33 Notices of contest.

Within 15 working days after receipt of any of the following notices, the Secretary shall notify the Commission of the receipt in writing and shall promptly furnish to the Executive Secretary of the Commission the original of any documents or records filed by the contesting party and copies of all other documents or records relevant to the contest:—

(aa) Notification that the employer intends to contest a citation or proposed penalty under section 10(a) of the Act, 29 U.S.C. 659(a); or

(bb) Notification that the employer wishes to contest a notice of a failure to abate or a proposed penalty under section 10(b) of the Act, 29 U.S.C. 659(b); or

(cc) A notice of contest filed by an employee or representative of employees with respect to the reasonableness of the abatement period under section 10(c) of the Act, 29 U.S.C. 659(c); ~~the Secretary shall notify the Commission of the receipt in writing and shall promptly furnish to the Executive Secretary of the Commission the original of any documents or records filed by the contesting party and copies of all other documents or records relevant to the contest.~~

Note 1 to § 2200.33: Failure to meet the 15-working day deadline to file a notice of contest results in the citation or notification of failure to abate becoming a final order of the Commission. Under extraordinary circumstances, the cited employer, an affected employee, or an authorized employee representative may seek relief from the final order pursuant to Federal Rule of Civil Procedure 60, by promptly filing a request for such relief with the Commission's Executive Secretary, One Lafayette Centre, 1120 20th Street, NW, Suite 980, Washington, DC 20036-3457. See *Brancifort Builders, Inc.*, 9 BNA OSHC 2113, 2116-17 (1981).

§ 2200.34 Employer contests.

(a) *Complaint.*

(1) The Secretary shall file a complaint with the Commission no later than 2021 days after receipt of the notice of contest.

(2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:

(i) The basis for jurisdiction;

(ii) The time, location, place, and circumstances of each such alleged violation; and

(iii) The considerations upon which the period for abatement and the proposed penalty of each such alleged violation are based.

(3) Where the Secretary seeks in ~~his~~the complaint to amend ~~his~~the citation or proposed penalty, ~~he~~the Secretary shall set forth the reasons for amendment and shall state with particularity the change sought.

(b) *Answer.*

(1) Within ~~20~~21 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, “infeasibility,” “unpreventable employee misconduct,” and “greater hazard.”

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

(c) Motions filed in lieu of an answer. A motion filed in lieu of an answer pursuant to this subpart shall be filed no later than 21 days after service of the complaint. The form and content of the motion shall comply with § 2200.40.

§ 2200.35 Disclosure of corporate parents, subsidiaries, and affiliates.

(a) *General.* All answers, petitions for modification of abatement period, or other initial pleadings filed under these rules by a corporation shall be accompanied by a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable.

(b) *Failure to disclose.* The Commission or ~~the~~ Judge in its discretion may refuse to accept for filing an answer or other initial pleading that lacks the disclosure declaration required by this paragraph. A party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should not be held in default. *All show cause orders issued by the Commission or the Judge shall be served in a manner prescribed in § 2200.7(o).*

(c) *Continuing duty to disclose.* A party subject to the disclosure requirement of this paragraph has a continuing duty to notify the Commission or the Judge of any change in the information on the disclosure declaration until the Commission issues a final order disposing of the proceeding.

~~(d) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (b) of this section shall be served upon the affected party by certified mail, return receipt requested.~~

§ 2200.36 [Reserved]

§ 2200.37 Petitions for modification of the abatement period.

(a) *Grounds for modifying abatement date.* An employer may file a petition for modification of abatement date when such employer has made a good faith effort to comply with the abatement requirements of a citation, but such abatement has not been completed because of factors beyond the employer's reasonable control.

(b) *Contents of petition.* A petition for modification of abatement date shall be in writing and shall include the following information:

(1) All steps taken by the employer, and the dates of such action, in an effort to achieve compliance during the prescribed abatement period.

(2) The specific additional abatement time necessary in order to achieve compliance.

(3) The reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date.

(4) All available interim steps being taken to safeguard the employees against the cited hazard during the abatement period.

(c) *When and where filed; ~~p~~Posting requirement; ~~r~~Responses to ~~p~~Petition.* A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later than the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

(1) A copy of such petition shall be posted in a conspicuous place where all affected employees will have notice ~~thereof~~ **of the petition** or near each location where the violation occurred. The petition shall remain posted for a period of 10 **working** days.

(2) Affected employees or the representatives may file an objection in writing to such petition with the aforesaid Area Director. Failure to file such objection within 10 working days of the date of posting of such petition shall constitute a waiver of any further right to object to said petition.

(3) The Secretary or ~~his~~ **the Secretary's** duly authorized agent shall have the authority to approve any uncontested petition for modification of abatement date filed pursuant to paragraphs (b) and (c) of this section. Such uncontested petitions shall become final orders pursuant to sections 10(a) and (c) of the Act, 29 U.S.C. 659(a) and (c).

(4) The Secretary or ~~his~~ **the Secretary's** authorized representative shall not exercise ~~his~~ **the Secretary's** approval power until the expiration of 15 working days from the date the petition was posted pursuant to paragraphs (c)(1) and (2) of this section by the employer.

(d) *Contested petitions.* Where any petition is objected to by the Secretary or affected employees, such petition shall be processed as follows:

(1) The Secretary shall forward the petition, citation, and any objections to the Commission within 10 working days after the expiration of the 15 working day period set out in paragraph (c)(4) of this section.

(2) The Commission shall docket and process such petitions as expedited proceedings as provided for in § 2200.103 of this Part.

(3) An employer petitioning for a modification of the abatement period shall have the burden of proving in accordance with the requirements of section 10(c) of the Act, 29 U.S.C. 659(c), that such employer has made a good faith effort to comply with the abatement requirements of the citation and that abatement has not been completed because of factors beyond the employer's control.

(4) Where the petitioner is a corporation, it shall file a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable, within 10 working days after ~~the receipt~~ **service** of ~~notice of the docketing by~~ the Commission **docketing notice** of the petition for modification of the abatement date. **Service of the filed declaration on the other parties and**

intervenor shall be accomplished in a manner prescribed in § 2200.7(c). The requirements set forth in §- 2200.35(b) through (d) shall apply.

(5) Each objecting party shall file a response setting forth the reasons for opposing the abatement date requested in the petition, within 10 working days after ~~the receipt~~ **service** of ~~notice of the docketing by the Commission~~ **docketing notice** of the petition for modification of the abatement date. **Service of the response on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).**

§ 2200.38 Employee contests.

(a) *Secretary's statement of reasons.* Where an affected employee or authorized employee representative files a notice of contest with respect to the abatement period, the Secretary shall, within ~~10~~ **14** days from ~~his~~ receipt of the notice of contest, file a clear and concise statement of the reasons the abatement period prescribed by ~~him~~ **the Secretary** is not unreasonable.

(b) *Response to ~~Secretary's~~ Secretary's statement.* Not later than ~~10~~ **14** days after ~~receipt~~ **service** of the **Secretary's** statement, referred to in paragraph (a) of this section, the ~~contestant~~ **contesting affected employee or authorized employee representative** shall file a response. **Service of the filed statement on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).**

(c) *Expedited proceedings.* All contests under this section shall be handled as expedited proceedings as provided for in § 2200.103 ~~of this Part.~~

§ 2200.39 Statement of position.

At any time prior to the commencement of the hearing before the Judge, any person entitled to appear as a party, or any person who has been granted leave to intervene, may file a statement of position with respect to any or all issues to be heard. The Judge may order the filing of a statement of position.

§ 2200.40 Motions and requests.

(a) *How to make.* ~~A~~ **An application or** request for an order ~~shall~~ **must** be made by **written** motion. ~~Motions shall be in writing or, unless the Judge directs otherwise, may be made orally during a hearing on the record and shall be included in the transcript. In exigent circumstances in cases pending before Judges, a motion may be made telephonically if it is reduced to writing and filed as soon as possible but no later than 3 working days following the time the motion was made. A motion shall state with particularity the grounds on which it is based and shall set forth the relief~~

~~or order sought.~~ A motion shall not be included in another **pleading or** document, such as a brief or a petition for discretionary review, but shall be made in a separate document. ~~Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.~~ **In exigent circumstances in cases pending before a Judge, an oral motion may be made during an off-the-record telephone conference if the motion is subsequently reduced to writing and filed within such time as the judge prescribes.**

(b) *Form of motions.* All motions shall contain a caption complying with § 2200.31 and a signature complying with § 2200.32. Requests for orders that are presented in any other form, such as by a business letter or by an email, shall not be considered or granted.

(c) *Content of motions.* A motion shall contain a clear and plain statement of the relief sought and state with particularity the grounds for seeking the order. Written memoranda, briefs, affidavits, or other relevant material or documents may be filed in support of the motion or a response.

(d) *Duty to confer.* Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with all other parties and shall state in the motion the efforts undertaken to confer. The motion shall also state if any other party opposes or does not oppose the motion.

(e) *Proposed order for procedural motions.* All procedural motions shall be accompanied by a proposed order that would grant the relief requested in the motion. A procedural motion may be ruled upon prior to the expiration of the time for response.

(f) *Oral motions.* Oral motions may be made during a hearing and shall be included in the transcript, if a transcript is being made.

(g) *When to make.*

(1) A motion filed in lieu of an answer pursuant to § 2200.34~~(b)~~**(c)** shall be filed no later than ~~2021~~ days after the service of the complaint. ~~Any other motion~~

(2) ~~Motions shall be made as soon as the grounds therefor for the motion are known.~~ A party is not required to raise by motion any matter that the party has previously included in any pleading as defined in § 2200.1(n), unless the party seeks a ruling on the previously pleaded matter prior to the hearing on the merits.

~~(e)~~(3) A motion to postpone a hearing shall comply with § 2200.62.

(h) *Responses.* Any party or intervenor upon whom a motion ~~is~~**has been** served shall ~~have 10~~**file a response within 14** days from service of the motion ~~to file a response. A procedural motion may be ruled upon prior to the expiration of the time for response; a.~~

(i) *Reconsideration.* A party adversely affected by ~~the~~**a ruling on any motion** may **file a motion for reconsideration** within ~~57~~**57** days of service of the ruling ~~seek reconsideration.~~

~~(d) Postponement not automatic upon filing of motion. The filing of a motion, including a motion for a postponement, does not automatically postpone a hearing. See §2200.62 with respect to motions for postponement.~~

(j) *Summary judgment motions.* The provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment.

§ 2200.41 [Reserved]

Subpart D – Prehearing Procedures and Discovery

§ 2200.50 [Reserved]

§ 2200.51 Prehearing conferences and orders.

(a) *Scheduling conference.*

(1) The Judge may, upon ~~his or her~~**the Judge's** discretion, consult with ~~all~~**the attorneys, non-attorney party representatives,** and any ~~unrepresented~~**self-represented** parties, by a scheduling conference, telephone, mail, or other suitable means, and within 30 days after the filing of the answer, enter a scheduling order that limits the time:

(i) To join other parties and to amend the pleadings;

(ii) To file and hear motions; and

(iii) To complete discovery.

(2) The scheduling order also may include:

(i) The date or dates for conferences before hearing, a final prehearing conference, and hearing; and

(ii) Any other matters appropriate to the circumstances of the case.

(b) *Prehearing conference.* In addition to the prehearing procedures set forth in Federal Rule of Civil Procedure 16, the Judge may, upon ~~his~~the Judge's own initiative or on the motion of a party, direct the parties to confer among themselves to consider settlement, stipulation of facts, or any other matter that may expedite the hearing.

(c) *Compliance.* Parties must fully prepare for a useful discussion of all procedural and substantive issues involved in prehearing conferences and shall participate in such conferences in good faith. Parties failing to do so may be subject to sanctions under §§ 2200.101 and 2200.104.

§ 2200.52 General provisions governing discovery.

(a) *General*—

(1) *Methods and limitations.* In conformity with these rules, any party may, without leave of the Commission or the Judge, obtain discovery by one or more of the following methods:

(i) Production of documents or things or permission to enter upon land or other property for inspection and other purposes (~~§~~to the extent provided in § 2200.53);

(ii) Requests for admission to the extent provided in § 2200.54; and

(iii) Interrogatories to the extent provided in § 2200.55.

(iv) -Discovery is not available under these rules through depositions except to the extent provided in §2200.56.

(v) In the absence of a specific provision, **discovery** procedures shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to Commission proceedings. **This exception does not preclude any prehearing disclosures (including disclosure of expert testimony and written reports) directed in a scheduling order entered under § 2200.51.**

(2) *Time for discovery.* A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than ~~7~~14 days prior to the date set for hearing, unless the Judge orders otherwise.

(3) *Service of discovery papers-documents.* Every ~~paper~~document relating to discovery required to be served on a party shall be served on all parties.

(4) *Stipulations about discovery procedures.* Unless the Commission or the Judge orders otherwise, the parties may stipulate that:

(i) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(ii) Other procedures governing or limiting discovery may be modified—but a stipulation extending the time for any form of discovery must be approved by the Commission or the Judge if it would interfere with the time set forth for completing discovery, for hearing a motion, or for hearing.

(b) *Scope of discovery.* The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case. ~~It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof and~~ proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(c) *Limitations.* The frequency or extent of the discovery methods provided by these rules may be limited by the Commission or the Judge if it is determined that:

(1) ~~The~~ discovery sought is unreasonably cumulative or duplicative, or it is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) ~~The~~ party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or ~~(3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation.~~

(3) The proposed discovery is outside the scope permitted by paragraph (b) of this section.

(d) *Privilege*—.

(1) *Claims of privilege.* The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the ~~Judge or the~~ Commission **or the Judge**, or in response to a motion to compel, the claim shall: ~~Identify~~**identify** the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or ex parte, that is, without the participation of parties and their representatives. The Judge may enter an order and impose terms and conditions on ~~his or her~~**the Judge's** examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed.

(2) *Upholding or rejecting claims of privilege.* If the Judge upholds the claim of privilege, the Judge may order and impose terms and conditions as justice may require, including a protective order. If the Judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

(3) *Resolving claims of privilege outside of discovery proceedings.* A Judge may utilize the procedures set forth in paragraphs (d) and (e) of this section outside of discovery proceedings, including during the hearing.

(e) *Protective orders.* In connection with any discovery procedures and where a showing of good cause has been made, the Commission or **the** Judge may make any order including, but not limited to, one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Commission or ~~the~~ Judge;

(6) That a deposition after being sealed be opened only by order of the Commission or ~~the~~ Judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or ~~the~~ Judge.

(f) ~~Failure to cooperate; motions to compel; sanctions—~~

(1) *Motions to compel discovery.* A party may ~~apply~~ file a motion conforming to § 2200.40 for an order compelling discovery when another party refuses or obstructs discovery. ~~For purposes of this paragraph,~~ In considering a motion to compel, the Judge shall treat an evasive or incomplete answer ~~is to be treated~~ as a failure to answer.

(2) *Sanctions.* If a Judge ~~enters~~ party fails to comply with an order compelling discovery ~~and there is a failure to comply with that order,~~ the Judge may ~~make such orders with regard~~ enter an order to redress the failure ~~as are just. The orders.~~ Such order may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party: conforming to § 2200.40. The ~~orders~~ order may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:

(~~1~~i) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;

(~~2~~ii) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;

(~~3~~iii) An order striking ~~out~~ pleadings or parts thereof, ~~of pleadings~~ or staying further proceedings until the order is obeyed; and

(~~4~~iv) An order dismissing the action or proceeding or any part thereof, ~~of the action or proceeding~~ or rendering a judgment by default against the disobedient party.

(g) *Unreasonable delays.* None of the discovery procedures set forth in these rules shall be used in a manner or at a time which shall delay or impede the progress of the case toward hearing status or the hearing of the case on the date for which it is scheduled, unless, in the interests of justice, the Judge shall order otherwise. Unreasonable delays in utilizing discovery procedures may result in termination of the party's right to conduct discovery.

(h) *Show cause orders.* All show cause orders issued by the Commission or ~~the~~ Judge under paragraph (f) of this section shall be served ~~upon the affected party by certified mail, return receipt requested.~~ **in a manner prescribed in § 2200.7(o).**

(i) *Supplementation of responses.* A party ~~who~~ **that** has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information ~~thereafter~~ **subsequently** acquired, except as follows:

(1) A party is under a duty ~~seasonably~~ **promptly** supplement the response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the ~~person's~~ **person's** testimony.

(2) A party is under a duty ~~seasonably~~ **promptly** amend a prior response if the party obtains information upon the basis of which:

(i) The party knows that the response was incorrect when made; or

(ii) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

(j) *Filing of discovery.* Requests for production or inspection under § 2200.53, requests for admission under § 2200.54 and responses ~~thereto~~ **requests for admission**, interrogatories under § 2200.55 and the answers ~~thereto~~ **interrogatories**, and depositions under § 2200.56 shall be served upon other counsel or parties, but shall not be filed with the Commission or the Judge.

The party responsible for service of the discovery material shall retain the original and become the custodian.

(k) *Relief from discovery requests.* If relief is sought under §§ 2200.101 or § 2200.52(e), (f), or (g) concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the ~~Judge or~~ Commission **or the Judge** contemporaneously with any motion filed under §§ 2200.101 or § 2200.52(e), (f), or (g).

(l) *Use at hearing.* If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the ~~Judge or the~~ Commission **or the Judge** at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated. **Section 2200.56(f) prescribes additional procedures pertaining to the use of depositions at a hearing.**

(m) *Use on review or appeal.* When documentation of discovery not previously in the record is needed for review or appeal purposes, upon an application and order of the ~~Judge or~~ Commission **or the Judge**, the necessary discovery ~~papers~~ **documents** shall be filed with the Executive Secretary of the Commission.

§ 2200.53 Production of documents and things.

(a) *Scope.* At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on ~~his or her~~ **the party's** behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served;

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation ~~thereon~~ **on the property.**

(b) *Procedure.* The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. It shall specify a

reasonable time, place, and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time. The Commission or the Judge may allow a shorter time or a longer time, should the requesting party deny an extension. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to in whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. To obtain a ruling on an objection by the responding party, the requesting party shall file a motion conforming to § 2200.40 with the Judge and shall annex thereto his request to the motion, together with the response and objections, if any.

§ 2200.54 – Request for admissions.

(a) *Scope. At any and procedure—*

(1) *Scope.* Any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any a party may serve upon on any other party a written requests for admissions request to admit, for purposes of the pending action only, of the genuineness and authenticity of any document described in or attached to the requests, or of the truth of any specified matter of matters within the scope of § 2200.52(b) relating to:

(i) Facts, the application of law to fact, or opinions about either; and

(ii) The genuineness of any described documents.

(2) *Form; copy of a document.* Each matter of which an admission is requested shall must be separately set forth stated. The number of requested admissions shall not exceed 25, including subparts, without an except upon the agreement of the parties or by order of the Commission or the Judge. The party seeking to serve more than 25 requested admissions, including subparts, shall have the burden A request to admit the genuineness of persuasion to establish that the complexity a document must be accompanied by a copy of the ease document unless it is, or the number of citation items necessitates a greater number of requested admissions has been, otherwise furnished or made available for inspection and copying.

(b) *Response* 3) *Time to requests. Each respond; effect of not responding.* A matter is deemed admitted unless, within 30 days after service of the requests or within such shorter or longer time as the Commission or Judge may allow being served, the party to whom the requests are request is directed serves upon on the requesting party a written answer specifically admitting or denying or objection addressed to the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or an

~~objection, stating in detail the reasons therefor. The response shall be made under oath or affirmation and~~ and signed by the party or ~~his~~its representative. A shorter or longer time for responding may be provided by written stipulation of the parties or by order of the Commission or the Judge.

~~(c) Effect of admission. Any~~(4) *Answer.* If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny.

(5) *Objections.* The grounds for objecting to a request must be stated. A party must not object solely on the ground that the request presents a genuine issue for hearing.

(6) *Motion regarding the sufficiency of an answer or objection.* The requesting party may move to determine the sufficiency of an answer or objection. Unless an objection is sustained, the Commission or the Judge must order that an answer be served. On finding that an answer does not comply with this rule, the Commission or the Judge may order either that the matter is admitted or that an amended answer be served. The Commission or the Judge may defer the final decision until a prehearing conference or a specified time before hearing.

~~(b) Effect of admission; withdrawal or modification. A matter admitted under paragraph (a) of this section is conclusively established unless the Judge or Commission or the Judge on motion permits the admission to be withdrawn or amended. The Commission or the Judge may permit withdrawal or modification of the admission. Withdrawal or modification may be permitted when if it would promote the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy if the Commission or the Judge is not persuaded that the withdrawal or modification will it would prejudice him the requesting party in presenting his maintaining or defending the case or defense on the merits. An admission under paragraph (a) of this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.~~

§ 2200.55 Interrogatories.

(a) *General.* At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve interrogatories upon any other party. The number of interrogatories shall not exceed 25 questions, including subparts, ~~without an~~except upon the agreement of the parties or by order of the Commission or the Judge.

The party seeking to serve more than 25 questions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of interrogatories.

(b) *Answers.* All answers shall be made in good faith and as completely as the answering party's information will permit. The answering party is required to make reasonable inquiry and ascertain readily obtainable information. An answering party may not give lack of information or knowledge as an answer or as a reason for failure to answer, unless ~~he~~**the answering party** states that ~~he~~**it** has made reasonable inquiry and that information known or readily obtainable by ~~him~~**it** is insufficient to enable ~~him~~**it** to answer the substance of the interrogatory.

(c) *Procedure.* Each interrogatory shall be answered separately and fully under oath or affirmation. If the interrogatory is objected to, the objection shall be stated in lieu of the answer. The answers are to be signed by the person making them and the objections shall be signed by the party or ~~his~~**its** counsel. The party on whom the interrogatories have been served shall serve a copy of ~~his~~**its** answers or objections upon the propounding party within 30 days after the service of the interrogatories. The Judge may allow a shorter or longer time. The burden shall be on the party submitting the interrogatories to ~~move~~**file a motion conforming to § 2200.40** for an order with respect to any objection or other failure to answer an interrogatory.

§ 2200.56 Depositions.

(a) *General.* Depositions of parties, intervenors, or witnesses shall be allowed only by agreement of all the parties, or on order of the Commission or ~~the~~**the** Judge following the filing of a motion of a party stating good and just reasons. All depositions shall be before an officer authorized to administer oaths and affirmations at the place of examination. The deposition shall be taken in accordance with the Federal Rules of Civil Procedure, particularly Federal Rules of Civil Procedure 30.

(b) *When to file.* A motion to take depositions may be filed after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss.

(c) *Notice of taking.* Any depositions allowed by the Commission or ~~the~~**the** Judge may be taken after ~~14~~**10** days' written notice to the other party or parties. The ~~14~~**10**-day notice requirement may be waived by the parties, **pursuant to § 2200.52(a)(4)(i).**

~~(d) *Expenses.* Expenses for a court reporter and the preparing and serving of depositions shall be borne by the party at whose instance the deposition is taken.~~

(d) *Method of recording and expenses.* The party that notices the deposition must state in the notice the method for recording the testimony. Unless the Commission or the Judge orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. Witnesses whose depositions are taken and the person recording the deposition shall each be paid the same fees that are paid for like services in the federal courts. Any party may arrange to transcribe a deposition. The party noticing the deposition shall pay the recording costs, any witness fees, and mileage expense. Deposition subpoenas shall comply with § 2200.65.

(e) *Use of depositions.* Depositions taken under this rule may be used for discovery, to contradict or impeach the testimony of a deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence and the Federal Rules of Civil Procedure, particularly Federal Rules of Civil Procedure 32. **An audio or audiovisual deposition offered into evidence in whole or in part must be accompanied by a transcription of the deposition. All transcription costs must be borne by the party offering the deposition into evidence.**

(f) *Excerpts from depositions to be offered at hearing.* Except when used for purposes of impeachment, at least ~~5 working~~7 days prior to the hearing, the parties or counsel shall furnish to the Judge and all opposing parties or counsel the **transcribed** excerpts from depositions (by page and line number) which they expect to introduce at the hearing. Four working days ~~thereafter~~**later**, the adverse party or counsel for the adverse party shall furnish to the Judge and all opposing parties or counsel additional **transcribed** excerpts from the depositions (by page and line number) which they expect to be read pursuant to Federal Rules of Civil Procedure 32(a)(4), as well as any objections (by page and line number) to opposing party's or counsel's depositions. With reasonable notice to the Judge and all parties or counsel, other excerpts may be read.

~~(g) Telephone depositions.~~

§ 2200.57 [Reserved]

~~(1) Telephone depositions may be conducted pursuant to Federal Rules of Civil Procedure 30(b)(4).~~

~~(2) If a party objects to a telephone deposition, he shall make known his objections at least 5 days prior to the taking of the deposition. If the objection is not resolved by the parties or the Judge before the scheduled deposition date, the deposition shall be stayed pending resolution of the dispute).~~

~~(h) Video depositions. By indicating in its notice of a deposition that it wishes to record the deposition by videotape (and identifying the proposed videotape operator), a party shall be deemed to have moved for such an order under Federal Rule of Civil Procedure 30(b)(3). Unless an objection is filed and served within 10 days after such notice is received, the Judge shall be deemed to have granted the motion pursuant to the following terms and conditions:~~

~~(1) *Stenographic recording.* The videotaped deposition shall be simultaneously recorded stenographically by a qualified court reporter. The court reporter shall administer the oath or affirmation to the deponents on camera. The written transcript by the court reporter shall constitute the official record of the deposition for purposes of Federal Rule of Civil Procedure 30(e) (submission to witness).~~

~~(2) *Cost.* The noticing party shall bear the expense of both the videotaping and the stenographic recording. Any party may at its own expense obtain a copy of the videotape and the stenographic transcript.~~

~~(3) *Video operator.* The operator(s) of the videotape recording equipment shall be subject to the provisions of Federal Rule of Civil Procedure 28(e). At the commencement of the deposition the operator(s) shall swear or affirm to record the proceedings fairly and accurately.~~

~~(4) *Attendance.* Each witness, attorney, and other person attending the deposition shall be identified on camera at the commencement of the deposition. Thereafter, only the deponent (and demonstrative materials used during the deposition) will be videotaped. Identification on camera of each witness, attorney, and other person attending the deposition may be waived by the attorneys for the parties.~~

~~(5) *Standards.* The deposition will be conducted in a manner to replicate, to the extent feasible, the presentation of evidence at a hearing. Unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with only such lighting as is required for accurate video recording. Lighting, camera angle, lens setting, and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. Sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent. Eating and smoking by deponents or counsel during the deposition will not be permitted.~~

~~(6) *Interruptions.* Videotape recording will be suspended during all "off the record" discussions.~~

~~(7) *Index.* The videotape operator shall use a counter on the recording equipment and after completion of the deposition shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape at which examination by different counsel begins and ends; at which objections are made and examination resumes; at which exhibits are identified; and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure, or otherwise.~~

~~(8) Filing.~~ If a videotaped deposition is used at the hearing, the original of the videotape recording, together with the transcript, the operator's log index, and a certificate of the operator attesting to the accuracy of the tape, shall be filed with the Judge. No part of a videotaped deposition shall be released or made available to any member of the public unless authorized by the Commission or the Judge.

~~(9) Objections.~~ Requests for prehearing rulings on the admissibility of evidence obtained during a videotaped deposition shall be accompanied by appropriate pages of the written transcript. If the objection involves matters peculiar to the videotaping, a copy of the videotape and equipment for viewing the tape shall also be provided to the Commission or Judge.

~~(10) Use at hearing; purged tapes.~~ A party desiring to offer a videotape deposition at the hearing shall be responsible for having available appropriate playback equipment and a trained operator. After the designation by all parties of the portions of a videotape to be used at the hearing, an edited copy of the tape, purged of unnecessary portions (and any portions to which objections have been sustained), must be prepared by the offering party to facilitate continuous playback; but a copy of the edited tape shall be made available to other parties at least 10 days before it is used, and the unedited original of the tape shall also be available at the hearing.

§ 2200.57 Issuance of subpoenas; Petitions to revoke or modify subpoenas; Right to inspect or copy data.

~~(a) Issuance of subpoenas.~~ On behalf of the Commission or any member thereof, the Judge shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including relevant books, records, correspondence, or documents, in his possession or under his control. ~~The party to whom the subpoena is issued shall be responsible for its service.~~ Applications for subpoenas, if filed prior to the assignment of the case to a Judge, shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street N.W., Suite 980, Washington, DC 20036-3457. ~~After the case has been assigned to a Judge, applications shall be filed with the Judge. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.~~

~~(b) Service of Subpoenas.~~ ~~A subpoena may be served by any person who is not a party and is not less than 18 years of age.~~ Service of a subpoena upon a person named therein may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with some person of suitable age and discretion residing therein.

~~(c) *Revocation or modification of subpoenas.* Any person served with a subpoena, whether ad testificandum or duces tecum, shall, within 5 days after the date of service of the subpoena upon him, move in writing to revoke or modify the subpoena if he does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. The Judge or the Commission shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Judge or the Commission, as the case may be, shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke or modify. The motion to revoke or modify, any answer filed thereto, and any ruling thereon shall become a part of the record.~~

~~(d) *Rights of persons compelled to submit data.* Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies of transcripts of the data or evidence submitted by them.~~

~~(e) *Failure to comply with subpoena.* Upon the failure of any person to comply with a subpoena issued upon the request of a party, the Commission by its counsel shall initiate proceedings in the appropriate district court for the enforcement thereof, if in its judgment the enforcement of such subpoena would be consistent with law and with policies of the Act. Neither the Commission nor its counsel shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.~~

Subpart E – Hearings

§ 2200.60 Notice of hearing; ~~L~~ocation.

Except by agreement of the parties, or in an expedited proceeding under § 2200.103, **when a hearing is first set, the Judge shall give the parties and intervenors** notice of the time, place, and nature of the ~~first setting of a hearing shall be given to the parties and intervenors~~**hearing** at least 30 days in advance of the hearing. If a hearing is being rescheduled, or if exigent circumstances are present, at least 10 days' notice shall be given. The Judge will designate a place and time of hearing that involves as little inconvenience and expense to the parties as is practicable.

§ 2200.61 Submission without hearing.

(a) A case may be fully stipulated by the parties and submitted to the Commission or **the** Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof,

the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof.

(b) Motions for summary judgment are ~~covered by Federal Rule of Civil Procedure 56.~~ governed by § 2200.40(j).

§ 2200.62 Postponement of hearing.

(a) *Motion to postpone.* A hearing may be postponed by the Judge on ~~his~~the Judge's own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing. The form and content of such motions shall comply with § 2200.40.

(b) *Grounds for postponement.* A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be ~~filed promptly after notice is given of the hearing, or as soon as the conflict is learned of or the engagement occurs~~ promptly filed.

(c) *When motion must be received.* A motion to postpone a hearing must be received at least 710 days prior to the hearing. A motion for postponement received less than 710 days prior to the hearing will generally be denied unless good cause is shown for late filing.

(d) *Postponement in excess of 60 days.* No postponement in excess of 60 days shall be granted without the concurrence of the Chief Administrative Law Judge. The original of any motion seeking a postponement in excess of 60 days shall be filed with the Judge and a copy sent to the Chief Administrative Law Judge.

§ 2200.63 Stay of proceedings.

(a) *Motion for stay.* Stays are not favored. A party seeking a stay of a case assigned to a Judge shall file a motion for stay conforming to § 2200.40 with the Judge and send a copy to the Chief Administrative Law Judge. A motion for a stay shall state the position of the other parties, either by a joint motion or by the representation of the moving party. The motion shall set forth the reasons a stay is sought and the length of the stay requested.

(b) *Ruling on motion to stay.* The Judge, with the concurrence of the Chief Administrative Law Judge, may grant any motion for stay for the period requested or for such period as is deemed appropriate.

(c) *Periodic reports required.* The parties in a stayed proceeding shall be required to submit periodic reports on such terms and conditions as the Judge may direct. The length of time between the reports shall be no longer than 90 days unless ~~the Commission or the Judge~~ otherwise orders.

§ 2200.64 Failure to appear.

(a) *Attendance at hearing.* The failure of a party to appear **in person or by a duly authorized representative at the hearing** ~~may result in a decision against that party.~~

constitutes a waiver of the right to a hearing. A failure of the Secretary to appear constitutes abandonment of the case. A failure of the Respondent to appear is deemed an admission of the facts alleged and consent to the relief sought in the Complaint (or, in Simplified Proceedings, the citation and notification of proposed penalty). The Judge may default the non-appearing party without further proceeding or notice.

(b) *Requests for reinstatement.* Requests for reinstatement must be made, in the absence of extraordinary circumstances, within ~~5~~**7** days after the scheduled hearing date. See § 2200.90(b)(3).

(c) *Rescheduling hearing.* The Commission or the Judge, upon a showing of good cause, may excuse such failure to appear. In such event, the hearing will be rescheduled as expeditiously as possible from the issuance of the Judge's order.

§ 2200.65 Issuance of subpoenas; petitions to revoke or modify subpoenas; pPayment of witness fees and mileage; right to inspect or copy data.

(a) Issuance of subpoenas. On behalf of the Commission or any Commission member, the Judge shall, on the application of any party, issue to the applying party subpoenas requiring the attendance and testimony of witnesses and/or the production of any evidence, including, but not limited to, relevant books, records, correspondence, or documents, in the witness' possession or under the witness' control, at a deposition or at a hearing before the Commission or the Judge. The party to whom the subpoena is issued shall be responsible for its service. Applications for subpoenas, if filed prior to the assignment of the case to a Judge, shall be filed with the Executive Secretary at One Lafayette Centre, 1120 20th Street NW, Suite 980, Washington, DC 20036-3457. After the case has been assigned to a Judge, applications shall be filed with the Judge. Applications for subpoena(s) may be made ex parte. The subpoena shall show on its face the name and address of the party at whose request the subpoena was issued.

(b) Service of subpoenas. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon the person it names may be made by service on the person named, by certified mail return receipt requested, or by leaving a copy at the person's principal place of business or at the person's residence with a person of suitable age and discretion who resides there. A subpoena may be served at any place in the United States or any Territory or possession of the United States. A subpoena may command a person to attend and produce documents or tangible things, from any place in the United States or any Territory or possession of the United States, at any designated place of hearing or deposition.

(c) Revocation or modification of subpoenas. Any person served with a subpoena, whether requiring attendance and testimony (ad testificandum) or for the production of evidence (duces tecum), shall, within 5 days after the date of service of the subpoena, move in writing to revoke or modify the subpoena if the person does not intend to comply. All motions to revoke or modify shall be served on the party at whose request the subpoena was issued. ~~Fees~~ The Commission or the Judge shall revoke or modify the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence to be produced, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Commission or the Judge shall make a simple statement of procedural or other grounds for the ruling on the motion to revoke, modify, or affirm. The motion to revoke or modify, any answer filed, and any ruling on the motion shall become part of the record.

(d) Rights of persons ~~taking depositions~~ compelled to submit data or other information in documents. Persons compelled to submit data or other information at a public proceeding are entitled to retain documents they submitted that contain the data or information, or to procure a copy of such documents upon their payment of lawfully prescribed costs. If such persons submit the data or other information by testimony, they are entitled to a copy of the transcript of their testimony upon their payment of the lawfully prescribed costs.

(e) Witness fees and mileage. Witnesses summoned to appear for a deposition or to appear before the Commission or the Judge shall be paid the same witness fees and mileage expense that are paid witnesses in the federal courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage expense shall be paid by the party at whose instance the witness appears, and the person taking a deposition shall be paid by the party at whose instance the deposition is taken.

(f) Failure to comply with subpoena. Upon the failure of any person to comply with the subpoena issued upon the request of a party, the Commission by its counsel shall recommend to the U.S. Department of Justice that proceedings be initiated in the appropriate district court for

the enforcement of the subpoena, if in the Commission's judgment the enforcement of the subpoena would be consistent with law and with policies of the Act. In such instances, neither the Commission nor its counsel shall be deemed to have assumed responsibility for the effective prosecution of the subpoena before the court.

§ 2200.66 Transcript of testimony.

(a) *Hearings.* Hearings shall be transcribed verbatim. A copy of the transcript of testimony taken at the hearing, duly certified by the reporter, shall be filed with the Judge before whom the matter was heard.

(b) *Payment for transcript.* The Commission shall bear all expenses for court reporters' fees and for copies of the hearing transcript received by it. Each party is responsible for securing and paying for its copy of the transcript.

(c) *Correction of errors.* Error in the transcript of the hearing may be corrected by the Judge on ~~his~~the Judge's own motion, on joint motion by the parties, or on motion by any party. The motion shall conform to § 2200.40 and shall state the error in the transcript and the correction to be made. ~~Corrections will be made by hand with pen and ink and by the appending of an errata sheet~~ The official transcript shall reflect the corrections.

§ 2200.67 Duties and powers of Judges.

It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues and avoid delay. The Judge shall have authority with respect to cases assigned to ~~him~~the Judge, between the time ~~he~~the Judge is designated and the time ~~he~~the Judge issues ~~his~~a decision, subject to the rules and regulations of the Commission, to:

(a) Administer oaths and affirmations;

(b) Issue authorized subpoenas and rule on petitions to modify, remove, or affirm, in accordance with § 2200.65;

~~(c) Rule upon petitions to revoke subpoenas;~~

(c) Rule on claims of privilege and claims that information is protected and issue protective orders, in accordance with § 2200.52(d) and (e).

(d) Rule upon offers of proof and receive relevant evidence;

(e) Take or cause depositions to be taken whenever the needs of justice would be served;

(f) Regulate the course of the hearing and, if appropriate or necessary, exclude persons or counsel from the hearing for contemptuous conduct and strike all related testimony of witnesses refusing to answer any proper questions;

(g) Hold conferences for the settlement or simplification of the issues;

(h) Dispose of procedural requests or similar matters, including motions referred to the Judge by the Commission and motions to amend pleadings; also to dismiss complaints, or portions thereof of complaints, and to order hearings reopened or, upon motion, consolidated prior to issuance of hisa decision;

(i) Make decisions ~~in conformity with~~that conform to 5 U.S.C. 557 of title 5, United States Code~~the Administrative Procedure Act~~;

(j) Call and examine witnesses and to introduce into the record documentary or other evidence;

~~(k)~~(k) Approve or appoint an interpreter;

(l) Request the parties to state their respective positions concerning any issue in the case or theory in support thereof of their position;

~~(m)~~(m) Adjourn the hearing as the needs of justice and good administration require;

~~(n)~~(n) Take any other action necessary under the foregoing and authorized by the published rules and regulations of the Commission.

§ 2200.68 ~~Disqualification~~Recusal of the Judge.

(a) *Discretionary withdrawal-recusal.* A Judge may ~~withdraw~~recuse himself or herself from a proceeding whenever ~~he~~the Judge deems ~~himself disqualified~~it appropriate.

(b) *Mandatory recusal.* A Judge shall recuse himself or herself under circumstances that would require disqualification of a federal judge under Canon 3(C) of the Code of Conduct for United States Judges, except that the required recusal may be set aside under the conditions specified by Canon 3(D).

(c) *Request for withdrawal-recusal.* Any party may request that the Judge, at any time following his~~the Judge's~~ designation and before the filing of hisa decision, ~~to withdraw on ground of personal bias or disqualification,~~be recused under paragraph (a) or (b) of this section or both by

filing with ~~him~~the Judge, promptly upon the discovery of the alleged facts, an affidavit setting forth in detail the matters alleged to constitute grounds for ~~disqualification~~recusal.

~~(e) Granting~~(d) *Ruling on request.* If, ~~in the opinion of the Judge, the affidavit referred to in paragraph (b) of this section is~~ the Judge finds that a request for recusal has been filed with due diligence and that the material filed in support of the request establishes that recusal either is appropriate under paragraph (a) of this section or is ~~sufficient on its face,~~required under paragraph (b) of this section, the Judge shall ~~forthwith disqualify~~recuse himself and ~~withdraw or herself~~ from the proceeding.

~~(d) Denial of request.~~ If the Judge ~~does not disqualify himself and withdraw from~~denies a request for recusal, the ~~proceedings, he~~Judge shall ~~so rule upon~~issue a ruling on the record, stating the grounds for ~~his ruling~~denying the request, and shall proceed with the hearing, or, if the hearing has closed, ~~he shall~~proceed with the issuance of ~~his~~a decision, and under the provisions of § 2200.90 ~~shall thereupon apply.~~

§ 2200.69 Examination of witnesses.

Witnesses shall be examined orally under oath or affirmation. Opposing parties have the right to cross-examine any witness whose testimony is introduced by an adverse party. All parties shall have the right to cross-examine any witness called by the Judge pursuant to § 2200.67(j).

§ 2200.70 Exhibits.

(a) *Marking exhibits.* All exhibits offered in evidence by a party shall be marked for identification before or during the hearing. Exhibits shall be marked with the case docket number, with a designation identifying the party or intervenor offering the exhibit, and numbered consecutively.

(b) *Removal or substitution of exhibits in evidence.* Unless the Judge finds it impractical, a copy of each exhibit shall be given to the other parties and intervenors. A party may remove an exhibit from the official record during the hearing or at the conclusion of the hearing only upon permission of the Judge. The Judge, in ~~his~~the Judge's discretion, may permit the substitution of a duplicate for any original document offered into evidence.

(c) *Reasons for denial of admitting exhibit.* A Judge may, in ~~his~~the Judge's discretion, deny the admission of any exhibit because of its excessive size, weight, or other characteristic that prohibits its convenient transportation and storage. A party may offer into evidence photographs, models, or other representations of any such exhibit.

(d) *Rejected exhibits.* All exhibits offered but denied admission into evidence, except exhibits referred to in paragraph (c) of this section, shall be placed in a separate file designated for rejected exhibits.

(e) *Return of physical exhibits.* A party may on motion request the return of a physical exhibit within 30 days after expiration of the time for filing a petition for review of a Commission final order in a United States Court of Appeals under section 11 of the Act, 29 U.S.C. 660, or within 30 days after completion of any proceedings initiated ~~thereunder~~ **in a Court of Appeals**. The motion shall be addressed to the Executive Secretary and provide supporting reasons. The exhibit shall be returned if the Executive Secretary determines that it is no longer necessary for use in any Commission proceeding.

(f) *Request for custody of physical exhibit.* Any person may on motion to the Executive Secretary request custody of a physical exhibit for use in any court or tribunal. The motion shall state the reasons for the request and the duration of custody requested. If the exhibit has been admitted in a pending Commission case, the motion shall be served on all parties to the proceeding. Any person granted custody of an exhibit shall inform the Executive Secretary of the status every 6 months of ~~his~~ **the person's** continuing need for the exhibit and return the exhibit after completion of the proceeding.

(g) *Disposal of physical exhibit.* Any physical exhibit may be disposed of by the Commission's Executive Secretary ~~at any time more than 30 days after expiration of~~ **subject to** ~~the time for filing a petition for review of a Commission final order in a United States Court of Appeals under section 11~~ **requirements** ~~of the Act, 29 U.S.C. §660, or 30 days after completion of any proceedings initiated thereunder~~ **National Archives and Records Administration**.

§ 2200.71 Rules of evidence.

The Federal Rules of Evidence are applicable.

§ 2200.72 Objections.

(a) *Statement of objection.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence or a ruling by the Judge, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection, and shall be included in the record. No such objection shall be deemed waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record of the proceeding.

(c) Once the Judge rules definitively on the record—either before or at the hearing—a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

§ 2200.73 Interlocutory review.

(a) *General.* Interlocutory review of a Judge’s ruling is discretionary with the Commission. A petition for interlocutory review may be granted only where the petition asserts and the Commission finds:

(1) ~~That~~ the review involves an important question of law or policy ~~about which there is substantial ground for difference~~ **that controls the outcome of opinion the case**, and that immediate review of the ruling ~~may~~ **will** materially expedite the final disposition of the proceedings **or subsequent review by the Commission may provide an inadequate remedy**; or

(2) ~~T~~hat the ruling will result in a disclosure, before the Commission may review the Judge’s report, of information that is alleged to be privileged.

(b) *Petition for interlocutory review.* Within ~~57~~ days following the ~~receipt~~ **service** of a ~~Judge’s~~ **Judge’s** ruling from which review is sought, a party may file a petition for interlocutory review with the Commission. Responses to the petition, if any, shall be filed within ~~57~~ days following service of the petition. **Service of the filed petition on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c).** A copy of the petition and responses shall be filed with the Judge. The petition is denied unless granted within 30 days of the date of receipt by the Commission’s Executive Secretary. A corporate party that files a petition for interlocutory review or a response to such a petition under this section shall file with the Commission a copy of its declaration of corporate parents, subsidiaries, and affiliates previously filed with the Judge under the requirements of § 2200.35 or § 2200.37(d)(4). In its discretion the Commission may refuse to accept for filing a petition or response that fails to comply with this disclosure requirement. A corporate party filing the declaration required by this paragraph shall have a continuing duty to advise the Executive Secretary of any changes to its declaration until the ~~Commission either denies the petition for interlocutory appeal~~ **is deemed denied** or ~~issues its~~ **a decision is issued** on the merits ~~of the appeal~~.

(c) *Denial without prejudice.* The ~~Commission’s action in denying~~ **Commission’s decision not to grant** a petition for interlocutory review shall not preclude a party from raising an objection to the Judge’s interlocutory ruling in a petition for discretionary review.

(d) *Stay*—

(1) *Trade secret matters.* The filing of a petition for interlocutory review of a Judge's ruling concerning an alleged trade secret shall stay the effect of the ruling until the ~~Commission denies the petition~~ **is deemed denied** or ~~rules on the merits~~ **ruled upon**.

(2) *Other cases.* In all other cases, the filing or granting of a petition for interlocutory review shall not stay a proceeding or the effect of a ruling unless otherwise ordered.

(e) ~~*Judge's*~~ ***Judge's*** *comments.* The Judge may be requested to provide the Commission with his written views on whether the petition is meritorious. ~~The~~ **When the written comments are filed with the Commission, the** Judge shall serve ~~copies of these~~ **the** comments on all parties ~~when he files them with the Commission.~~ **in a manner prescribed in § 2200.7(c).**

(f) *Briefs.* ~~Should~~ **Notice shall be given to the parties if** the Commission ~~desire~~ **decides to request** briefs on the issues raised by an interlocutory review, ~~it shall give notice to the parties.~~ See § 2200.93—Briefs before the Commission.

(g) *When filing effective.* A petition for interlocutory review is deemed to be filed only when received by the Commission, **as specified in § 2200.8(e)(2).**

§ 2200.74 Filing of briefs and proposed findings with the Judge; ~~o~~ Oral argument at the hearing.

(a) *General.* A party is entitled to a reasonable period at the close of the hearing for oral argument, which shall be included in the ~~stenographic report~~ **transcript** of the hearing. Any party shall be entitled, upon request made before the close of hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge. In lieu of briefs, the Judge may permit or direct the parties to file memoranda or statements of authority.

(b) *Time.* Briefs shall be filed simultaneously on a date established by the Judge. A motion for extension of time for filing any brief shall be made at least 3 **working** days prior to the due date and shall recite that the moving party has ~~advised~~ **conferred with** the other parties ~~on~~ the motion. Reply briefs shall not be allowed except by order of the Judge.

(c) *Untimely briefs.* Untimely briefs will not be accepted unless accompanied by a motion setting forth good cause for the delay. **The form and content of motions shall comply with § 2200.40.**

Subpart F – Posthearing Procedures

§ 2200.90 Decisions **and reports of Judges.**

(a) *Judge's decision*—

(1) *Contents of Judge's decision.* The Judge shall prepare a decision that conforms to 5 U.S.C. 557 of the Administrative Procedure Act and constitutes his~~the~~ final disposition of the proceedings. The decision shall be in writing and shall include findings of fact, conclusions of law, and the reasons or bases for them, on all the material issues of fact, law, or discretion presented on the record. The decision shall include an order affirming, modifying, or vacating each contested citation item and each proposed penalty, or directing other appropriate relief. A decision finally disposing of a petition for modification of the abatement period shall contain an order affirming or modifying the abatement period.

~~(b) The judge's report.~~

~~(1) Mailing to parties.~~ (2) *Service of the Judge's decision.* The Judge shall mail or otherwise transmit~~serve~~ a copy of his~~the~~ decision ~~to~~ on each party: in a manner prescribed in § 2200.7(c).

~~(2) Docketing of Judge's~~ (b) *Judge's report by Executive Secretary.*—

(1) *Contents of Judge's report.* The Judge's report shall consist of the entire record, including the Judge's decision.

(2) *Filing of Judge's report.* On the eleventh day after service of the transmittal of his~~the~~ decision ~~to~~ on the parties, the Judge shall file his~~the~~ report with the Executive Secretary for docketing.

~~(3) The report shall consist of the record, including the Judge's decision, any petitions for discretionary review and statements in opposition to such petitions.~~ *Docketing of Judge's report by Executive Secretary.* Promptly upon receipt~~filing~~ of the Judge's~~Judge's~~ report, the Executive Secretary shall docket the report and notify all parties of the docketing date. The date of docketing of the Judge's report is the date that the Judge's report is made for purposes of section 12(j) of the Act, 29 U.S.C. 661(j).

~~(34) Correction of errors; Relief from default.~~ *in Judge's report.*

(i) Until the Judge's~~Judge's~~ report has been directed for review or, in the absence of a direction for review, until the decision has become a final order as described in paragraph (f) of this section, the Judge may correct clerical errors and errors arising through oversight or inadvertence in decisions, orders, or other parts of the record under Federal Rule of Civil Procedure 60(a). If a Judge's~~Judge's~~ report has been directed for review, the decision may be corrected during the pendency of review with leave of the Commission.

(ii) After a Judge's decision has become a final order as described in paragraph (f) of this section, the Commission or the Judge may correct a clerical mistake or a mistake arising from oversight or omission under Federal Rule of Civil Procedure 60(a).

(c) *Relief from default.* Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement under §§ 2200.101(b), § 2200.52(f), or § 2200.64(b).

(d) *Filing documents after the docketing date.* Except for documents filed under paragraph (b)(34)(i) of this section, which shall be filed with the Judge, on or after the date of the docketing of the Judge's report all documents shall be filed with the Executive Secretary.

(e) *Settlement.* Settlement documents shall be filed in the manner prescribed in § 2200.100(c).

(f) *Judge's decision final unless review directed.* If no Commissioner directs review of a report on or before the thirtieth day following the date of docketing of the Judge's report, the decision of the Judge shall become a final order of the Commission.

§ 2200.91 Discretionary review; Petitions for discretionary review; Statements in opposition to petitions.

(a) *Review discretionary.* Review by the Commission is not a right. A Commissioner may, as a matter of discretion, direct review on his the Commissioner's own motion or on the petition of a party.

(b) *Petitions for discretionary review.* A party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a petition for discretionary review. Discretionary review by the Commission may be sought by filing with the Judge a petition for discretionary review within the ten-day period provided by § 2200.90(b)(2). Review by the Commission may also be sought by filing directly with the Executive Secretary a petition for discretionary review. A petition filed directly with the Executive Secretary shall be filed within at any time following the service of the Judge's decision on the parties but no later than 20 days after the date of docketing of the Judge's report. Service of the filed petition on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c). The earlier a petition is filed, the more consideration it can be given. A petition for discretionary review may be conditional, and it may state that review is sought only if a Commissioner were to direct review on the petition of an opposing party.

(c) *Cross-petitions for discretionary review.* Where a petition for discretionary review has been filed by one party, any other party adversely affected or aggrieved by the decision of the Judge may seek review by the Commission by filing a cross-petition for discretionary review. The cross-petition may be conditional. See paragraph (b) of this section. A cross-petition shall be filed ~~with the Judge during the 10 days provided by §2200.90(b) or~~ directly with the Executive Secretary within 27 days after the date of docketing of the Judge's report. The earlier a cross-petition is filed, the more consideration it can be given.

(d) *Contents of the petition.* No particular form is required for a petition for discretionary review. A petition should state why review should be directed, including: ~~Whether~~ **whether** the Judge's decision raises an important question of law, policy, or discretion; whether review by the Commission will resolve a question about which the Commission's Judges have rendered differing opinions; whether the Judge's decision is contrary to law or Commission precedent; whether a finding of material fact is not supported by a preponderance of the evidence; whether a prejudicial error of procedure or an abuse of discretion was committed. A petition should concisely state the portions of the decision for which review is sought and should refer to the citations and citation items (for example, citation 3, item 4a) for which review is sought. A petition shall not incorporate by reference a brief or legal memorandum. Brevity and the inclusion of precise references to the record and legal authorities will facilitate prompt review of the petition.

(e) *When filing effective.* A petition for discretionary review is filed when received. ~~If a petition has been filed with the Judge, another petition need not be filed with the~~ **by the Commission, as specified in § 2200.8(e)(2).**

~~(f) *Failure to file.* The failure of a party adversely affected or aggrieved by the Judge's decision to file a petition for discretionary review may foreclose court review of the objections to the Judge's decision. See *Keystone Roofing Co. v. Dunlop*, 539 F.2d 960 (3d Cir. 1976).~~

(f) *Prerequisite to judicial review; effect of filing.* A petition for review under this section is, under 5 U.S.C. 704, a prerequisite to the seeking of judicial review of the final agency action. The effect of filing a petition for review is to stay the decision of the Judge.

(g) *Statements in opposition to petition.* Statements in opposition to petitions for discretionary review may be filed in the manner specified in this section for the filing of petitions for discretionary review. Statements in opposition shall concisely state why the Judge's decision should not be reviewed with respect to each portion of the petition to which it is addressed.

§ 2200.92 Review by the Commission.

(a) *Jurisdiction of the Commission; Issues on review.* Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission ~~but ordinarily will be those stated in the direction for review, those raised in the petitions for discretionary review, or those stated in any later order.~~

(b) *Review on a Commissioner's motion; Issues on review.* At any time within 30 days after the docketing date of the Judge's report, a Commissioner may, on ~~his~~ **the Commissioner's** own motion, direct that a Judge's decision be reviewed. ~~In the absence of~~ **Factors that may be considered in deciding whether to direct review absent** a petition for discretionary review, a Commissioner will normally ~~include, but are not direct review unless~~ **limited to, whether** the case raises novel questions of law or policy or ~~questions involving~~ **involves a conflict in** ~~between~~ Administrative Law Judges' decisions. When a Commissioner directs review on ~~his~~ **the Commissioner's** own motion, the issues ordinarily will be those specified in the direction for review or any later order.

(c) *Issues not raised before Judge.* The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon. In exercising discretion to review issues that the Judge did not have the opportunity to pass upon, the Commission may consider such factors as whether there was good cause for not raising the issue before the Judge, the degree to which the issue is factual, the degree to which proceedings will be disrupted or delayed by raising the issue on review, whether the ability of an adverse party to press a claim or defense would be impaired, and whether considering the new issue would avoid injustice or ensure that judgment will be rendered in accordance with the law and facts.

§ 2200.93 Briefs before the Commission.

(a) *Requests for briefs.* The Commission ordinarily will request the parties to file briefs on issues before the Commission. After briefs are requested, a party may, instead of filing a brief, file a letter setting forth its arguments, ~~or~~ a letter stating that it will rely on its petition for discretionary review or previous brief, ~~or~~. ~~A party not intending to file a letter stating that it wishes~~ **brief shall notify the case decided without its brief. Commission in writing within the applicable time for filing briefs and shall serve a copy on all other parties.** The provisions of this section apply to the filing of briefs and letters filed in lieu of briefs.

(b) *Filing briefs.* Unless the briefing notice states otherwise:

(1) *Time for filing briefs.* The party required to file the first brief shall do so within 40 days after the date of the briefing notice. All other parties shall file their briefs within 30 days after the first

brief is served. Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served.

(2) *Sequence of filing.*

(i) If one petition for discretionary or interlocutory review has been filed, the petitioning party shall file the first brief.

(ii) If more than one petition has been filed ~~but only one was granted~~, the party whose petition was ~~granted~~ **filed first** shall file the first brief.

(iii) ~~If more than one petition has been filed, and more than one has been granted or none has been granted, the Secretary shall file the first brief.~~

(iv) ~~If no petition has been filed, the Secretary~~ **parties** shall file ~~the first brief~~ **simultaneous briefs**.

(3) *Reply briefs.* The party ~~who~~ **that** filed the first brief may file a reply brief, **or, if briefs are to be filed simultaneously, both parties may file a reply brief.** Additional briefs are otherwise not allowed except by leave of the Commission.

(c) *Motion for extension of time for filing brief.* An extension of time to file a brief will ordinarily not be granted except for good cause shown. A motion for extension of time to file a brief shall be filed at the Commission no later than ~~35~~ **35** days prior to the expiration of the time limit prescribed in paragraph (b) of this section, shall comply with § 2200.40, and shall include the following information: when the brief is due, the number and duration of extensions of time that have been granted to each party, the length of extension being requested, the specific reason for the extension being requested, and an assurance that the brief will be filed within the time extension requested.

(d) *Consequences of failure to timely file brief.* The Commission may decline to accept a brief that is not timely filed. If a petitioning party fails to respond to a briefing notice or expresses no interest in review, the Commission may vacate the direction for review, or it may decide the case without that party's brief. If the non-petitioning party fails to respond to a briefing notice or expresses no interest in review, the Commission may decide the case without that party's brief. If a case was directed for review upon a Commissioner's own motion, and any party fails to respond to the briefing notice, the Commission may either vacate the direction for review or decide the case without briefs.

(e) *Length of brief.* Except by permission of the Commission, a main brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 35 pages of text. A

reply brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 20 pages of text.

(f) *Format.* Briefs shall be typewritten, double spaced, with typeface of text being no smaller than 12-point and typeface of footnotes being no smaller than 11-point, on letter size opaque paper (8 ½ inches by 11 inches). All margins shall be 1 ½ inches.

(g) *Table of contents.* A brief in excess of 15 pages shall include a table of contents.

(~~g~~h) *Failure to meet requirements.* The Commission may return briefs that do not meet the requirements of paragraphs (e) and (f) of this section.

(~~h~~i) *Brief of an amicus curiae.* The Commission may allow a brief of an amicus curiae pursuant to the criteria ~~of §~~ **and time period set forth in § 2200.24-23**. Any brief of an amicus curiae must meet the requirements of paragraphs (b) **through** (~~g~~h) of this section. No reply brief of an amicus curiae will be received.

§ 2200.94 ~~Stay of final order.~~ [Reserved]

(a) *Who may file.* ~~Any party aggrieved by a final order of the Commission may, while the matter is within the jurisdiction of the Commission, file a motion for a stay.~~

(b) *Contents of motion.* ~~Such motion shall set forth the reasons a stay is sought and the length of the stay requested.~~

(c) *Ruling on motion.* ~~The Commission may order such stay for the period requested or for such longer or shorter period as it deems appropriate.~~

§ 2200.95 Oral argument before the Commission.

(a) *When ordered.* Upon motion of any party, or upon its own motion, the Commission may order oral argument. Parties requesting oral argument must demonstrate why oral argument would facilitate resolution of the issues before the Commission. Normally, motions for oral argument shall not be considered until after all briefs have been filed.

(b) *Notice of argument.* The Executive Secretary shall advise all parties whether oral argument is to be heard. Within a reasonable time before the oral argument is scheduled, the Executive Secretary shall inform the parties of the time and place therefor, the issues to be heard, and the time allotted to the parties.

(c) *Postponement.*

(1) Except under extraordinary circumstances, a request for postponement must be filed at least ~~7~~10 days before oral argument is scheduled.

(2) The Executive Secretary shall notify the parties of a postponement in a manner best calculated to avoid unnecessary travel or inconvenience to the parties. The Executive Secretary shall inform all parties of the new time and place for the oral argument.

(d) *Order and content of argument.*

(1) Counsel shall be afforded such time for oral argument as the Commission may provide by order. Requests for enlargement of time may be made by motion filed reasonably in advance of the date fixed for the argument.

(2) The petitioning party shall argue first. If the case is before the Commission on cross-petitions, the Commission will inform the parties in advance of the order of appearance.

~~(3) Counsel are expected to cover all anticipated issues in their arguments in chief. Therefore, rebuttal will normally not be allowed. Should unexpected matters arise, the Commission, in its discretion, may give counsel additional time.~~

(3) Counsel may reserve a portion of the time allowed for rebuttal but in opening argument shall present the case fairly and completely and shall not reserve points of substance for presentation during rebuttal.

(4) Oral argument should undertake to emphasize and clarify the written arguments appearing in the briefs. The Commission will look with disfavor on any oral argument that is read from a previously filed document.

(5) At any time, the Commission may terminate a party's argument or interrupt the party's presentation for questioning by the Commissioners.

(e) *Failure to appear.* Should either party fail to appear for oral argument, the party present may be allowed to proceed with its argument.

(f) *Consolidated cases.* Where two or more consolidated cases are scheduled for oral argument, the consolidated cases shall be considered as one case for the purpose of allotting time to the parties unless the Commission otherwise directs.

(g) *Multiple counsel.* Where more than one counsel argues for a party to the case or for multiple parties on the same side in the case, it is counsels' responsibility to agree upon a fair division of the total time allotted. In the event of a failure to agree, the Commission will allocate the time. The Commission may, in its discretion, limit the number of counsel heard for each party or side in the argument. No later than 35 days prior to the date of scheduled argument, the Commission must be notified of the names of the counsel who will argue.

(h) *Exhibits/visual aids.*

(1) The parties may use ~~models, specimens, samples, charts or~~ exhibits introduced into evidence at the hearing. If a party wishes to use a visual aid not part of the record, written notice of the proposed use shall be given to opposing counsel 15 days prior to the argument. Objections, if any, shall be in writing, served on all adverse parties, and filed not fewer than 57 days before the argument.

(2) No visual aid shall introduce or rely upon facts or evidence not already part of the record.

(3) If visual aids or exhibits other than documents are to be used at the argument, counsel shall arrange with the Executive Secretary to have them placed in the hearing room on the date of the argument before the Commission convenes.

(4) Parties using visual aids not introduced into evidence shall have them removed from the hearing room unless the Commission directs otherwise. If such visual aids are not reclaimed by the party within a reasonable time after notice is given by the Executive Secretary, such visual aids shall be disposed of at the discretion of the Executive Secretary.

(i) *Recording oral argument.*

(1) Unless the Commission directs otherwise, oral arguments shall be electronically recorded and made part of the record. Any other sound recording in the hearing room is prohibited. Oral arguments shall also be transcribed verbatim. A copy of the transcript of the oral argument taken by a qualified court reporter, shall be filed with the Commission. The Commission shall bear all expenses for court reporters' fees and for copies of the hearing transcript received by it.

(2) Persons desiring to listen to the recordings shall make appropriate arrangements with the Executive Secretary. Any party desiring a written copy of the transcript is responsible for securing and paying for its copy.

(3) Error in the transcript of the oral argument may be corrected by the Commission on its own motion, on joint motion by the parties, or on motion by any party. The motion shall state the

error in the transcript and the correction to be made. ~~Corrections will be made by hand with pen and ink and by~~ **The official transcript shall reflect** the ~~appending of an errata sheet~~ corrections.

(j) *Failure to file brief.* A party ~~who~~**that** fails to file a brief shall not be heard at the time of oral argument except by permission of the Commission.

(k) *Participation in oral argument by amicus curiae.*

(1) An amicus curiae will not be permitted to participate in the oral argument without leave of the Commission upon proper motion. **Participation generally will be limited to a portion of the time allotted to the party in whose interest the amicus curiae seeks to participate. In extraordinary circumstances, the amicus curiae may be allotted its own time for oral argument.**

(2) A motion by amicus curiae seeking leave to participate in oral argument shall be filed no later than 14 days prior to the date oral argument is scheduled.

(3) The motion of an amicus curiae for leave to participate at oral argument shall identify the interest of the applicant and shall state the reason(s) why its participation at oral argument is desirable.

(4) Motions in opposition to the motion of an amicus curiae for leave to participate in the oral argument must be filed within ~~7~~**10** days of the date of the motion.

§ 2200.96 Commission receipt ~~pursuant to 28 U.S.C. 2112(a)(1)~~ of copies of petitions for judicial review of Commission orders when petitions for review are filed in two or more courts of appeals with respect to the same order.

The Commission officer and office designated to receive, pursuant to 28 U.S.C. 2112(a)(1), copies of petitions for review of Commission orders, from the persons instituting the review proceedings in a court of appeals, are the Executive Secretary and the Office of the Executive Secretary at the Commission's Office, One Lafayette Centre, 1120 20th Street, N.W., Suite 980, Washington, DC 20036-3457. ~~Five copies of the petition shall be submitted pursuant to this section. Each copy~~ **The petition** shall state that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the persons or person who filed the petition in the court of appeals and shall be stamped by the court with the date of filing. (

~~Note:~~ 28 U.S.C. 2112(a) contains certain applicable requirements.)

Subpart G – Miscellaneous Provisions

§ 2200.100 Settlement.

(a) *Policy.* Settlement is permitted and encouraged by the Commission at any stage of the proceedings.

(b) *Requirements*—~~The Commission does not require that~~

(1) *Notification of Settlement.* ~~If the parties include any particular language~~ have agreed to a partial or full settlement, they shall so notify the Judge in a written joint submission (titled “Notification of Settlement” or “Notification of Partial Settlement,” as appropriate), in which the parties shall:

(i) List the contested items that have been settled and, if only a partial settlement agreement, ~~but does require that the agreement specify the terms of settlement for each contested item, specify any has been reached, also list the contested item or issue~~ items that ~~remains~~ remain to be decided (if any remain), and;

(ii) If posting of the settlement agreement is required by § 2200.7(g), certify that the parties’ settlement agreement has been posted in the manner prescribed by that rule and certify the date of posting;

(iii) If party status has been elected under § 2200.20, certify that the party has been afforded an opportunity to provide input on all matters pertaining to the settlement before the agreement is finalized; and

(iv) If the settlement agreement includes the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period, state whether ~~any~~ such withdrawal is with prejudice.

(2) The parties shall not incorporate the settlement agreement in, or append it to, the joint submission required in paragraph (b)(1) of this section or substitute the settlement agreement for the required joint submission.

(3) *Issuance of order terminating proceeding.* If the requirements of paragraphs (b)(1) and (2) of this section have been met with respect to all contested citation items and no affected employees who have elected party status have raised an objection to the reasonableness of any abatement time. ~~Unless the settlement agreement states otherwise, the withdrawal of a notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period will be with prejudice~~ period, the Judge shall issue an Order acknowledging that the parties have

resolved all contested citation items and agreed to terminate the proceeding before the Commission.

(c) *Filing; sService and notice.* ~~A settlement~~ **A Notification of Settlement** submitted for approval after ~~the Judge's~~ **a Judge's** report has been ~~directed for review~~ **issued** shall be filed with the Executive Secretary. ~~When a settlement agreement is filed with the Judge or the Executive Secretary, proof~~ **Proof** of service shall be filed with the ~~settlement agreement~~ **Notification of Settlement**, showing service upon all parties and authorized employee representatives in the manner prescribed by § 2200.7(c) and **(d)** and the posting of notice to non-party affected employees in the manner prescribed by § 2200.7(g). The parties shall also file a ~~final consent~~ **draft** order **terminating the proceedings** for adoption by the Judge. If the time has not expired under these rules for electing party status, ~~or if party status has been elected,~~ an order ~~terminating the litigation~~ **acknowledging the termination of the proceedings** before the Commission because of the settlement shall not be issued until at least ~~10~~ **14** days after service or posting to consider any affected employee's or authorized employee representative's objection to the reasonableness of any abatement time. The affected employee or authorized employee representative shall file any such objection within this time. If such objection is filed ~~or stated in the settlement agreement,~~ the Commission or the Judge shall provide an opportunity for the affected employees or authorized employee representative to be heard and present evidence on the objection, which shall be limited to the reasonableness of the abatement ~~time~~ **period**.

~~(d) Form of settlement document. It is preferred that settlement documents be typewritten in conformance with §2200.30(a). However, a settlement document that is handwritten or printed in ink and is legible shall be acceptable for filing.~~

§ 2200.101 Failure to obey rules.

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or **the** Judge, ~~he~~ **the party** may be declared to be in default either on the initiative of the Commission or **the** Judge, after having been afforded an opportunity to show cause why ~~he~~ **the party** should not be declared to be in default, or on the motion of a party. ~~Thereafter~~ **Subsequently**, the Commission or **the** Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

(b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or **the** Judge and upon motion **conforming to § 2200.40** expeditiously made, the Commission or **the** Judge may set aside a sanction imposed under paragraph (a) of this section. See § 2200.90~~(b)~~**(3c)**.

(c) *Discovery sanctions- and failure to appear.* This section does not apply to sanctions for failure to comply with orders compelling discovery, which are governed by ~~§2200.52(f)~~ 2200.52(f), or to a default for failure to appear, which is governed by § 2200.64(a).

(d) *Show cause orders.* All show cause orders issued by the Commission or ~~the~~ Judge under paragraph (a) of this section shall be served ~~upon the affected party by certified mail, return receipt requested.~~ in a manner prescribed in § 2200.7(o).

§ 2200.102 Withdrawal.

A party may withdraw its notice of contest, citation, notification of proposed penalty, or petition for modification of abatement period at any stage of a proceeding. The notice of withdrawal shall be served in accordance with § 2200.7(c) upon all parties and authorized employee representatives that are eligible to elect, but have not elected, party status. It shall also be posted in the manner prescribed in § 2200.7(g) for the benefit of any affected employees not represented by an authorized employee representative who are eligible to elect, but have not elected, party status. Proof of service shall accompany the notice of withdrawal: ~~in accordance with~~ § 2200.7(d).

§ 2200.103 Expedited proceeding.

(a) *When ordered.* Upon application of any party or intervenor or upon its own motion, the Commission may order an expedited proceeding. When an expedited proceeding is ordered by the Commission, the Executive Secretary shall notify all parties and intervenors.

(b) *Automatic expedition.* Cases initiated by employee contests and petitions for modification of abatement period shall be expedited. See §§ 2200.37(d)(2) and 2200.38(c).

(c) *Effect of ordering expedited proceeding.* When an expedited proceeding is required by these rules or ordered by the Commission, it shall take precedence on the docket of the Judge to whom it is assigned, or on the Commission's review docket, as applicable, over all other classes of cases, and shall be set for hearing or for the submission of briefs at the earliest practicable date.

(d) *Time sequence set by Judge.* The assigned Judge shall make rulings with respect to time for filing of pleadings and with respect to all other matters, without reference to times set forth in these rules, ~~may order daily transcripts of the hearing,~~ and shall do all other things appropriate to complete the proceeding in the minimum time consistent with fairness.

§ 2200.104 Standards of conduct.

(a) *General.* All representatives appearing before the Commission and its Judges shall comply with the letter and spirit of the Model Rules of Professional Conduct of the American Bar Association.

(b) *Misbehavior before a Judge*—

(1) *Exclusion from a proceeding.* A Judge may exclude from participation in a proceeding any person, including a party or its representative, who engages in disruptive behavior, refuses to comply with orders or rules of procedure, continuously uses dilatory tactics, refuses to adhere to standards of orderly or ethical conduct, or fails to act in good faith. The cause for the exclusion shall be stated in writing, or may be stated in the record if the exclusion occurs during the course of the hearing. Where the person removed is a party's attorney or other representative, the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney or other representative.

(2) *Appeal rights if excluded.* Any attorney or other representative excluded from a proceeding by a Judge may, within 57 days of the exclusion, appeal to the Commission for reinstatement. No proceeding shall be delayed or suspended pending disposition of the appeal.

(c) *Disciplinary action by the Commission.* If an attorney or other representative practicing before the Commission engages in unethical or unprofessional conduct or fails to comply with any rule or order of the Commission or its Judges, the Commission may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action, including suspension or disbarment from practice before the Commission.

(d) *Show cause orders.* All show cause orders issued by the Commission under paragraph (c) of this section shall be served upon the affected party by certified mail, return receipt requested, in a manner prescribed in § 2200.7(o).

§ 2200.105 Ex parte communication.

(a) *General.* Except as permitted by § 2200.120 or as otherwise authorized by law, there shall be no ex parte communication with respect to the merits of any case not concluded, between any Commissioner, Judge, employee, or agent of the Commission who is employed in the decisional process and any of the parties or intervenors, representatives, or other interested persons.

(b) *Disciplinary action.* In the event an ex parte communication occurs, the Commission or the Judge may make such orders or take such actions as fairness requires. The exclusion of a person

by a Judge from a proceeding shall be governed by § 2200.104(b). Any disciplinary action by the Commission, including suspension or disbarment, shall be governed by § 2200.104(c).

(c) *Placement on public record.* All ex parte communications in violation of this section shall be placed on the public record of the proceeding.

§ 2200.106 Amendment to rules.

The Commission may at any time upon its own motion or initiative, or upon written suggestion of any interested person setting forth reasonable grounds therefor, amend or revoke any of the rules contained ~~herein~~ **in this Part**. The Commission invites suggestions from interested parties to amend or revoke rules of procedure. Such suggestions should be **sent by email to rules.suggestions@oshrc.gov** or addressed to the Executive Secretary of the Commission at One Lafayette Centre, 1120 20th Street, NW., Suite 980, Washington, DC 20036–3457.

§ 2200.107 Special circumstances; ~~waiver~~ **waiver of rules.**

In special circumstances not contemplated by the provisions of these rules and for good cause shown, the Commission or **the** Judge may, upon application by any party or intervenor or on their own motion, after 3 working ~~days~~ **days'** notice to all parties and intervenors, waive any rule or make such orders as justice or the administration of the Act requires.

§ 2200.108 Official Seal of the Occupational Safety and Health Review Commission.

The seal of the Commission shall consist of: A gold eagle outspread, head facing dexter, a shield with 13 vertical stripes superimposed on its breast, holding an olive branch in its claws, the whole superimposed over a plain solid white Greek cross with a green background, encircled by a white band edged in black and inscribed “Occupational Safety and Health Review Commission” in black letters.

Subpart H – Settlement Part

§ 2200.120 Settlement procedure.

(a) *Voluntary settlement* ~~—~~.

(1) *Applicability and duration.*

(i) ~~This section~~ **Voluntary settlement** applies only to notices of contests by employers, and to applications for fees under the Equal Access to Justice Act and 29 CFR Part 2204.

(ii) Upon motion of any party conforming to § 2200.40 after the docketing of the notice of contest, or otherwise with the consent of the parties at any time in the proceedings, the Chief Administrative Law Judge may assign a case to a Settlement Judge for proceedings under this section. In the event either the Secretary or the employer objects to the use of a Settlement Judge procedure, such procedure shall not be imposed.

(2) *Length of voluntary settlement procedures.* The Voluntary settlement procedures under this section shall be for a period not to exceed 4575 days, unless extended with the concurrence of the Chief Administrative Law Judge.

(b) *Mandatory settlement*—

(1) *Applicability.* This section Mandatory settlement applies only to notices of contest by employers in which the aggregate amount of the penalties sought by the Secretary is \$100,000 or greater. 185,000 or greater. Periodically, the aggregate amount of penalties for case referral to Mandatory Settlement Proceedings may be adjusted proportionately upon consideration of the penalty increases required by the Inflation Adjustment Act of 2015. The adjusted aggregate penalty amount for case referral to Mandatory Settlement will be posted on the Commission's website (www.oshrc.gov).

(2) *Proceedings under this part.*

(2) *Assignment of case and appointment of Settlement Judge.* Notwithstanding any other provisions of these rules, upon the docketing of the notice of contest, the Chief Administrative Law Judge shall assign to the Settlement Part any case which satisfies the criteria set forth in paragraph (b)(1) of this section. The Chief Administrative Law Judge shall appoint a Settlement Judge, who shall be a Judge other than the one assigned to hear and decide the case, except as provided in paragraph (f)(2) of this section.

(ii) *Discovery proceedings to be followed by* (3) *Mandatory settlement proceedings.*

(i) The Settlement Judge shall issue a discovery scheduling order and supervise discovery proceedings. At the conclusion of discovery attorneys, non-attorney representatives, and self-represented parties by any suitable means to schedule the Settlement Conference and to facilitate preparation for the conference.

(ii) The Settlement Judge will conduct may issue a preconference scheduling order addressing procedural matters, including but not limited to, formal pleadings, settlement proceedings status

conference calls, ex parte caucus calls, and allowing, limiting, or suspending discovery during the settlement proceedings.

(iii) The Settlement Conference shall be conducted as soon as practicable, taking into consideration the case size, the complexity of the issues, and the time needed to complete preconference preparation.

(iv) Mandatory settlement procedures under this section shall be for a period not to exceed ~~60~~120 days, unless extended with the concurrence of the Chief Administrative Law Judge.

(v) If, at the conclusion of the settlement proceedings the case has not been settled, the Settlement Judge shall promptly ~~notify~~inform the Chief Administrative Law Judge in accordance with ~~paragraph § 2200.120(f) of this section.~~(2).

(c) *Powers and duties of Settlement Judges.*

(1) The Settlement Judge shall confer with the parties ~~on subjects and issues of~~regarding the whole or partial settlement of the case and seek resolution of as many ~~of the~~issues as is feasible.

(2) The Settlement Judge may require the parties to provide statements of the issues in controversy and the factual predicate for each party's position on each issue and may enter other orders as appropriate to facilitate the proceedings.

(3) ~~In voluntary settlement proceedings the~~The Settlement Judge may allow or suspend discovery during the settlement proceedings.

~~(4) The~~(4) The Settlement Judge has the discretion to engage in ex parte communications throughout the course of settlement proceedings. The Settlement Judge may suggest privately to each attorney or other representative of a party what concessions ~~his or her~~the client should consider and assess privately with each attorney or other representative the reasonableness of the party's case or settlement position.

(5) The Settlement Judge may, with the consent of the parties, conduct such other settlement proceedings as may aid in the settlement of the case.

(d) *Settlement conference—*.

(1) *General.* The Settlement Judge shall convene and preside over conferences between the parties. Settlement conferences may be conducted telephonically or in person. The Settlement Judge shall designate a **conference** place and time ~~of conference~~.

(2) *Participation in conference.* The Settlement Judge may require that any attorney or other representative who is expected to try the case for each party be present. The Settlement Judge may also require that the party's representative be accompanied by an official of the party having full settlement authority on behalf of the party. The parties and their representatives or attorneys are expected to be completely candid with the Settlement Judge so that ~~he~~ **the Settlement Judge** may properly guide settlement discussions. The failure to be present at a settlement conference or otherwise to comply with the orders of the Settlement Judge or the refusal to cooperate fully within the spirit of this rule may result in **default or** the imposition of sanctions under § 2200.101.

(3) *Confidentiality of settlement proceedings.*

(i) All statements made and all information presented during the course of settlement proceedings under this section shall be regarded as confidential and shall not be divulged outside of these proceedings except with the consent of the parties. The Settlement Judge shall issue appropriate orders to protect **the** confidentiality of settlement proceedings.

(ii) The Settlement Judge shall not divulge any statements or information presented during private negotiations with a party or ~~his~~ **the party's** representative during settlement proceedings except with the consent of that party. ~~No~~

(iii) **The following shall not be admissible in any subsequent hearing, except by stipulation of the parties:**

(A) ~~E~~vidence of statements or conduct in settlement proceedings under this section within the scope of Federal Rule of Evidence 408, ~~no~~

(B) ~~N~~otes or other material prepared by or maintained by the Settlement Judge in connection with settlement proceedings, and ~~no~~

(C) ~~C~~ommunications between the Settlement Judge and the Chief Administrative Law Judge in connection with settlement proceedings including the report of the Settlement Judge under paragraph (f) of this section, ~~will be admissible in any subsequent hearing except by stipulation of the parties.~~ **Documents.**

(iv) **Documents and factual information** disclosed in the settlement proceeding may not be used in litigation unless obtained through appropriate discovery or subpoena.

(v) With respect to the Settlement Judge's participation in settlement proceedings, the Settlement Judge shall not discuss the merits of the case with any other person, nor appear as a witness in any hearing of the case.

(vi) The requirements of paragraph (d)(3) of this section apply unless disclosure is required by any applicable law or public policy.

(e) *Record of settlement proceedings.* No material of any form required to be held confidential under paragraph (d)(3) of this section shall be considered part of the official case record required to be maintained under 29 U.S.C. 661(g), nor shall any such material be open to public inspection as required by section 661(g), unless the parties otherwise stipulate. With the exception of an order approving the terms of any partial settlement agreed to between the parties as set forth in paragraph (f)(1) of this section, the Settlement Judge shall not file or cause to be filed in the official case record any material in ~~his~~the Settlement Judge's possession relating to these settlement proceedings, including but not limited to communications with the Chief Administrative Law Judge and ~~his~~the Settlement Judge's report under paragraph (f) of this section, unless the parties otherwise stipulate.

(f) *Report of Settlement Judge.*

(1) The Settlement Judge shall promptly notify the Chief Administrative Law Judge in writing of the status of the case at the conclusion of the settlement period or such time that ~~he~~the Settlement Judge determines further negotiations would be fruitless. If the Settlement Judge has made such a determination and a settlement agreement is not achieved within ~~45~~75 days ~~for~~of the case being assigned to voluntary settlement proceedings or ~~60~~within 120 days of being assigned for mandatory settlement proceedings, the Settlement Judge shall then advise the Chief Administrative Law Judge in writing. The Chief Administrative Law Judge may then in ~~his~~the Chief Administrative Law Judge's discretion allow an additional period of time, ~~not to exceed 30 days,~~ for further proceedings under this section. If at the expiration of the period allotted under this paragraph the Settlement Judge has not approved a full settlement, ~~he~~the Settlement Judge shall furnish to the Chief Administrative Law Judge copies of any written stipulations and orders embodying the terms of any partial settlement the parties have reached.

(2) At the termination of the settlement period without a full settlement, the Chief Administrative Law Judge shall promptly assign the case to an Administrative Law Judge other than the Settlement Judge or Chief Administrative Law Judge for appropriate action on the remaining issues. If all the parties, the Settlement Judge, and the Chief Administrative Law Judge agree, the Settlement Judge may be retained as the Hearing Judge.

(g) *Non-reviewability.* Notwithstanding the provisions of § 2200.73 regarding interlocutory review, any decision concerning the assignment of any Judge and any decision by the Settlement Judge to terminate settlement proceedings under this section is not subject to review, appeal, or rehearing.

Subpart I-L [Reserved]

Subpart M – Simplified Proceedings

§ 2200.200 Purpose.

(a) The purpose of the Simplified Proceedings subpart is to provide simplified procedures for resolving contests under the Occupational Safety and Health Act of 1970, so that parties before the Commission may reduce the time and expense of litigation while being assured due process and a hearing that meets the requirements of the Administrative Procedure Act, 5 U.S.C. 554. These procedural rules will be applied to accomplish this purpose.

(b) Procedures under this subpart are simplified in a number of ways. The major differences between these procedures and those provided in subparts A through G of the Commission’s rules of procedure are as follows.

(1) Complaints and answers are not required.

(2) Pleadings generally are not required. Early discussions among the parties and the ~~Administrative Law~~ Judge are required to narrow and define the disputes between the parties.

(3) The Secretary is required to provide the employer with certain informational documents early in the proceeding.

(4) Discovery is not permitted except as ordered by the ~~Administrative Law~~ Judge.

(5) Interlocutory appeals are not permitted.

(6) Hearings are less formal. The **admission of evidence is not controlled by the Federal Rules of Evidence do not apply. Instead of briefs, except as provided for in § 2200.209(c). The Judge may allow the parties will to argue their case orally before the Judge at the conclusion of the hearing. In many instances, the Judge will, and may allow or require post-hearing briefs or statements of position. The judge may render his or her a decision from the bench.**

§ 2200.201 Application.

The rules in this subpart will govern proceedings before a Judge in a case chosen for Simplified Proceedings under § 2200.203.

§ 2200.202 Eligibility for Simplified Proceedings.

(a) Those cases selected for Simplified Proceedings will be those that do not involve complex issues of law or fact. Cases appropriate for Simplified Proceedings ~~would~~ will generally include those with one or more of the following characteristics:

- (1) ~~R~~elatively few citation items,
- (2) ~~A~~n aggregate proposed penalty of not more than \$20,000,
- (3) ~~N~~o allegation of willfulness or a repeat violation,
- (4) ~~N~~ot involving a fatality,
- (5) ~~A~~a hearing that is expected to take less than 2 days, or
- (6) ~~A~~a small employer whether appearing pro se or represented by counsel.

(b) Those cases with an aggregate proposed penalty of more than \$20,000, but not more than \$30,000, if otherwise appropriate, may be selected for Simplified Proceedings at the discretion of the Chief Administrative Law Judge.

§ 2200.203 Commencing Simplified Proceedings.

(a) *Selection.* Upon receipt of a Notice of Contest, the Chief Administrative Law Judge may, at ~~his or her~~ the Chief Administrative Law Judge's discretion, assign an appropriate case for Simplified Proceedings.

(b) *Party request.* Within ~~20~~21 days of the notice of docketing, any party may request that the case be assigned for Simplified Proceedings. The request must be in writing. For example, "I request Simplified Proceedings" will suffice. The request must be sent to the Executive Secretary. Copies must be sent to each of the other parties.

(c) ~~Judge's~~ *Judge's ruling on request.* The Chief Administrative Law Judge or the Judge assigned to the case may grant a ~~party's~~ party's request and assign a case for Simplified

Proceedings at ~~his or her~~ the Judge's discretion. Such request shall be acted upon within ~~15~~14 days of its receipt by the Judge.

(d) *Time for filing complaint or answer under § 2200.34.* If a party has requested Simplified Proceedings or the Judge has assigned the case for Simplified Proceedings, the times for filing a complaint or answer will not run. If a request for Simplified Proceedings is denied, the period for filing a complaint or answer will begin to run upon issuance of the notice denying Simplified Proceedings.

§ 2200.204 Discontinuance of Simplified Proceedings.

(a) *Procedure.* If it becomes apparent at any time that a case is not appropriate for Simplified Proceedings, the Judge assigned to the case may, upon motion by any party or upon the Judge's own motion, discontinue Simplified Proceedings and order the case to continue under conventional rules. Before discontinuing Simplified Proceedings, the Judge will consult with the Chief Administrative Law Judge.

(b) *Party ~~Motion~~ motion.* At any time during the proceedings any party may request that the Simplified Proceedings be discontinued and that the matter continue under conventional procedures. A motion to discontinue must ~~be in writing~~ conform to § 2200.40 and explain why the case is inappropriate for Simplified Proceedings. ~~All other parties will have 7 days from the filing of the motion to state their agreement or disagreement and their reasons.~~ Responses to such motions shall be filed within the time specified by § 2200.40. Joint motions to return a case to conventional proceedings shall be granted by the Judge and do not require a showing of good cause, ~~except that the Judge may deny such a motion that is filed less than 30 days before a scheduled hearing date.~~

(c) *Ruling.* If Simplified Proceedings are discontinued, the Judge may issue such orders as are necessary for an orderly continuation under conventional rules.

§ 2200.205 Filing of pleadings.

(a) *Complaint and answer.* Once a case is designated for Simplified Proceedings, the complaint and answer requirements are suspended. If the Secretary has filed a complaint under § 2200.34(a), a response to a petition under § 2200.37(d)(5), or a response to an employee contest under § 2200.38(a), and if Simplified Proceedings has been ordered, no response to these documents will be required.

(b) *Motions.* ~~A primary purpose of~~ Limited, if any, motion practice is contemplated in Simplified Proceedings ~~is to eliminate, as much as possible, motions and similar documents. A motion will~~

not be viewed favorably if the subject of the, but all motion has not been first discussed among the parties practice shall conform with § 2200.40.

§ 2200.206 Disclosure of Information information.

(a) *Disclosure to employer.*

(1) Within ~~12 working~~21 days after a case is designated for Simplified Proceedings, the Secretary shall provide the employer, free of charge, copies of the narrative (Form OSHA 1-A) and the worksheet (Form OSHA 1-B~~7~~) or their equivalents.

(2) Within ~~30 calendar~~ days after a case is designated for Simplified Proceedings, the Secretary shall provide the employer with reproductions of any photographs or videotapes that the Secretary anticipates using at the hearing.

(3) Within ~~30 calendar~~ days after a case is designated for Simplified Proceedings, the Secretary shall provide to the employer any exculpatory evidence in the ~~Secretary's~~Secretary's possession.

(4) The Judge shall act expeditiously on any claim by the employer that the Secretary improperly withheld or redacted any portion of the documents, photographs, or videotapes on the grounds of confidentiality or privilege.

(b) *Disclosure to the Secretary.* ~~Where~~ When the employer raises an affirmative defense, pursuant to § 2200.207(b), the ~~presiding~~ Judge shall order the employer to disclose to the Secretary such documents relevant to the affirmative defense as the Judge deems appropriate.

§ 2200.207 Pre-hearing conference.

(a) *When held.* As early as practicable after the employer has received the documents set forth in § 2200.206(a)(1), the ~~presiding~~ Judge ~~will order and~~may conduct a pre-hearing conference. ~~At the discretion of,~~ which the Judge, the pre-hearing conference may be held ~~may hold~~ in person, or by telephone or electronic means.

(b) *Content.* At the pre-hearing conference, the parties ~~will~~may discuss the following: settlement of the case; the narrowing of issues; an agreed statement of issues and facts; all defenses; witnesses and exhibits; motions; and any other pertinent matter. Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later. At the conclusion of the conference, the Judge will issue an order ~~setting~~that may set forth any agreements reached by the parties and ~~will~~that may specify ~~in the order~~ the issues to be addressed by the parties at the hearing.

§ 2200.208 Discovery.

Discovery, including requests for admissions, will only be allowed under the conditions and time limits set by the Judge.

§ 2200.209 Hearing.

(a) *Procedures.* As soon as practicable after the conclusion of the pre-hearing conference, the Judge will hold a hearing on any issue that remains in dispute. The hearing will be in accordance with ~~Subpart~~**subpart** E of these rules, except for ~~§§2200.60, § 2200.73, and 2200.74~~ which will not apply.

(b) *Agreements.* At the beginning of the hearing, the Judge will enter into the record all agreements reached by the parties as well as defenses raised during the pre-hearing conference. The parties and the Judge then will attempt to resolve or narrow the remaining issues. The Judge will enter into the record any further agreements reached by the parties.

~~(c) Evidence.~~**(c) Evidence.** Except as to matters that are protected by evidentiary privilege, the admission of evidence is not controlled by the Federal Rules of Evidence, but the Judge may accept a written stipulation of the parties that the Federal Rules of Evidence shall apply in whole or, as specified, in part. The Judge will receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious, or unreliable. Testimony will be given under oath or affirmation. ~~The Federal Rules of Evidence do not apply.~~

(d) *Reporter.* A reporter will be present at the hearing. An official verbatim transcript of the hearing will be prepared and filed with the Judge. Parties may purchase copies of the transcript from the reporter.

(e) *Oral and written argument.* Each party may present **an** oral argument at the close of the hearing. ~~Post~~ **The Judge may allow or require post-hearing briefs** ~~will not be allowed except by order~~ **or statements of position upon the Judge's request of either party or on the Judge's own motion.** The form of any post-hearing briefs shall conform to § 2200.74 unless the Judge specifies otherwise.

(f) ~~Judge's~~**Judge's decision**—Where practicable, the

(1) Bench decision. The Judge ~~will~~**may** render ~~his or her~~**a** decision from the bench. In rendering ~~his or her~~**a** decision from the bench, the Judge shall state the issues in the case and make clear both ~~his or her~~**the Judge's** findings of fact and conclusions of law on the record. The Judge shall

reduce ~~his or her order~~ the bench decision in the matter to writing and ~~transmit~~ serve it ~~to~~ on the parties as soon as practicable, but no later than 45 days after the hearing. ~~All relevant~~ If additional time is needed, approval of the Chief Administrative Law Judge is required. The decision shall be prepared in accordance with § 2200.90(a). The written decision shall include, as an appendix, the bench decision as set forth in the transcript ~~paragraphs and pages shall be excerpted and included in the decision. Alternatively, within 45 days of the hearing.~~

(2) *Written decision.* If the Judge does not render a decision from the bench, the Judge will issue a written decision ~~within 60 days of the close of the record.~~ The record will ordinarily be deemed closed upon the ~~latter of the filing of the hearing transcript, or the completion of any permitted post-hearing briefing.~~ The decision will be in accordance with § 2200.90 ~~(a).~~ If additional time is needed, approval of the Chief Administrative Law Judge is required.

(g) *Filing of ~~Judge's~~ Judge's decision with the Executive Secretary.* When the Judge issues a written decision, ~~its~~ service, filing, and docketing of the Judge's written decision shall be filed simultaneously with the Commission and the parties. Once the Judge's order is transmitted to the Executive Secretary, §2200.90(b) applies, ~~in accordance with the exception of the 11-day period provided for in rule §§ 2200.90(b)(2).~~

§ 2200.210 Review of Judge's decision.

Any party may petition for Commission review of the Judge's decision as provided in § 2200.91. After the issuance of the ~~Judge's~~ Judge's written decision ~~or order~~, the parties may pursue the case following the rules in Subpart F ~~of this part.~~

§ 2200.211 Applicability of ~~s~~Subparts A through G.

The provisions of ~~S~~subpart D ~~(except for §§ 2200.5750-2200.56)~~ and §§ 2200.34, 2200.37(d) ~~(5)~~, 2200.38, 2200.71, ~~2200.73~~ and 2200.74 ~~73~~ will not apply to Simplified Proceedings. All other rules contained in ~~s~~Subparts A through G of the Commission's rules of procedure will apply when consistent with the rules in this subpart governing Simplified Proceedings.