Dated: February 9, 2012.

Jared Blumenfeld,

Regional Administrator, Region IX.

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FEDERAL MARITIME COMMISSION

46 CFR Part 502

[Docket No. 11–05]

RIN 3072–AC43

Amendments to Commission's Rules of Practice and Procedure—Subparts E and L

AGENCY: Federal Maritime Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Maritime Commission proposes to amend Subpart E (Proceedings; Pleadings; Motions; Replies) and Subpart L (Depositions, Written Interrogatories, and Discovery) of its Rules of Practice and Procedure to update and clarify the rules and to reduce the burden on parties to proceedings before the Commission.

DATES: Comments or suggestions due on or before April 30, 2012.

ADDRESSES: Address all comments concerning this proposed rule to: Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, Phone: (202) 523–5725, Email: *secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION:

Submit Comments: Submit an original and five (5) copies in paper form, and if possible, send a PDF of the document by email to *secretary@fmc.gov.* Include in the subject line: Docket No. 11–05, and [Company/Individual Name].

Background

The Commission's Rules of Practice and Procedure, 46 CFR part 502, govern procedures before the Commission. 46 CFR 502.1-.991. The rules are in place to secure just, speedy, and inexpensive resolution of proceedings before the Commission. The Commission has determined to amend Part 502 of Title 46 of the Code of Federal Regulations to update and improve the Commission's Rules of Practice and Procedure and to reduce the burden on parties to proceedings before the Commission.

As a first step in updating and improving its procedural rules, the Commission already issued a Final Rule with respect to certain rules in Subparts A, H, I, S, and T of its Rules of Practice and Procedure. 76 FR 10258 (February 24, 2011). The Commission also issued an Advance Notice of Proposed Rulemaking (ANPR) to seek comments on further amendments to improve its rules. 76 FR 19022 (April 6, 2011).

In continuance of its efforts to modernize its rules, the Commission proposes to amend Subpart E (Proceedings; Pleadings; Motions; Replies) and Subpart L (Disclosures and Discovery) of its Rules of Practice and Procedure.

Comments in Response to ANPR

In response to the ANPR, the Commission received comments from Nathan Barillo, student at Villanova University School of Law (Barillo), and the Law Firm of Rodriguez O'Donnell Gonzalez & Williams, P.C., Washington DC (ROGW). Barillo's comments focused on electronic delivery systems that the Commission should consider in connection with its filing and docket requirements. Based on experience with various systems, he advocates the use of a cloud computing system in which documents can be filed giving multiple users ability to access information from a remote location and server. Such a system would permit the Commission to receive documents electronically and allow Commission personnel and public users to access the documents at any time and from any location. He names several commercial systems as viable options for an online submission system, and also suggests that a government created system could alleviate security concerns. Barillo believes that cloud computing would streamline efficiency and reduce staff labor in dealing with paper, but nevertheless acknowledges that the Commission must also consider the needs of a small segment of the population that may not have access to a computer.

ROGW's attorneys frequently appear before the Commission in adjudications, rulemakings, and various other regulatory matters. ROGW commends the recent amendments to the Commission's rules addressing electronic filing in PDF format as well as paper. ROGW recommends adoption of a filing system similar to the Public Access to Court Electronic Records (PACER) system currently used in the federal courts. Through PACER, the federal judiciary allows and in most cases, requires, electronic filing of documents and public access to filings through a centralized system. ROGW believes that if funding permits, adoption of such a system would permit Commission personnel and private practitioners to obtain access to formal and informal proceedings and public docket information via the Internet.

With respect to the substance of certain rules, ROGW states that the applicability of the Federal Rules of Civil Procedure (FRCP) in Commission proceedings is not always clear and that the federal rules should be applied whenever possible. Specifically, ROGW suggests that adoption of FRCP 56 procedures for summary judgment would allow for more expeditious litigation. Similarly, ROGW recommends that the FRCP 41 procedures for voluntary and involuntary dismissals be included in the Commission's rules. ROGW explains that under the Commission's rules, after reaching a settlement in a case, the litigants cannot simply file a notice dismissing the complaint, but rather must file a motion for approval of the settlement. ROGW asserts that this requirement results in unnecessary expense of resources for the Commission and the parties and believes that the better approach is provided by the federal rule. Finally, ROGW supports adoption of the discovery rules in the FRCP, in particular the requirements for initial disclosures, identification of expert witnesses, procedures for claiming privilege and protection of trial preparation materials, limitations on depositions and interrogatories, and the 30-day response period for production of documents and interrogatories. Based on its experience, ROGW submits that mandatory disclosures would reduce the need to file motions to compel. However, ROGW believes that in considering adoption of these federal rules, due regard should be given to the differences in the nature of proceedings and practice in the federal courts and before the Commission.

Subpart E—Proceedings; Pleadings; Motions; Replies

The revisions to Subpart E are intended both to streamline the current rules for ease of use by the public and to provide parties to Commission proceedings with greater clarity as to the requirements pertaining to the conduct of proceedings, specifically motions, intervention and dismissals. Also as described below, this proposed amendment sets out a new procedure for the conduct of Commission initiated enforcement proceedings. Minor changes are also proposed to reorder sections and enhance clarity generally.

Rule 62—Private Party Complaints for Formal Adjudication

Rule 62, 46 CFR 502.62, governs the filing of private party complaints for formal adjudication and has been revised for clarification and modernized

to request email addresses for parties to proceedings. Rules related to the filing of answers to complaints (currently found at 46 CFR 502.64) and statutes of limitations (currently found at 46 CFR 502.63) have been consolidated into Rule 62. Proposed Rule 62 explains more fully what is required in an answer and also provides for the filing of counterclaims, cross-claims, and third party complaints. Commission rules have not previously addressed these types of claims, though they have been filed and adjudicated. Proposed Rule 62 references decisions on default for failure to answer a complaint, counterclaim, cross-claim, or third-party complaint. Administrative Law Judges (ALJs) have adjudicated decisions on default in the past in various fashions, but the proposed rule better defines when an initial decision on default may be issued. The new default rule is discussed in greater detail below.

Exhibit 1 to Subpart E currently contains a complaint form and a checklist of information required when filing a complaint. The proposed rule would remove this form from the rules as the Commission plans to publish a revision of this form on its Web site along with other forms and further helpful information for complaint filers, with information oriented particularly to pro se filers.

Rule 63—Commission Enforcement Action

Proposed Rule 63 provides a new procedure at the initial stages of Commission enforcement proceedings designed to more efficiently utilize Commission resources, provide for expeditious resolution of cases where a respondent defaults or otherwise chooses not to appear, and ensures due process to respondents. Under current procedure, the Commission issues an Order of Investigation and Hearing that advises respondents of the issues under investigation, designates the Commission's Bureau of Enforcement (BOE) as a party to the proceeding to prosecute the case, and assigns the matter to the Office of Administrative Law Judges to conduct the proceeding and issue an initial decision. There is no requirement in the current procedural rules that a respondent answer or otherwise respond to the Order. Typically, the presiding officer issues an initial order to the parties followed by a scheduling order setting forth dates by which certain aspects of the case must be completed and generally setting a schedule for the proceeding. It is not uncommon, however, for a respondent to fail to appear or to initially appear and then cease participating in the case. Under these procedures, there are no Commission rules to address a respondent's failure to appear or comply with procedural requirements. Instead, the presiding officer is required to undertake a number of sequential procedural steps just to put the case in a posture where an initial decision can be issued. Unfortunately, these necessary procedural steps can consume several months. For example, a motion to compel responses to discovery must be filed after the responses were due; followed by a time period for respondent to reply to the motion; followed by a time period for the ALJ to issue an order; followed by another time period for respondent's compliance; followed by BOE's motion for sanctions for failure to comply with the ALJ's order; followed by a period of time for respondent's reply; followed by issuance of the ALJ's order. Obviously, this process is time consuming and wasteful of limited resources in prosecuting a case which may well turn out to be an uncontested or a default case. The new rule for default is discussed in greater detail below.

Under the proposed procedure, an enforcement action would continue to be instituted upon the Commission's issuance of an Order of Investigation and Hearing. The Order of Investigation and Hearing would set forth specific facts alleged by BOE supporting an assertion that the respondent has violated the Shipping Act, require an answer from the respondent, and identify the consequences of failure to answer or otherwise respond to the Order. Such a procedure is employed by various other federal agencies in conducting investigative adjudications including the Federal Trade Commission, Commodity Futures Trading Commission, Department of Housing and Urban Development, and the new Consumer Financial Protection Bureau (interim final rules). The Order of Investigation and Hearing would also identify the name and address of each respondent subject to the Order; recite the legal authority and jurisdiction for instituting the proceeding including designation of the statutory provisions and/or Commission regulations alleged to have been violated; include a clear and concise statement of facts sufficient to inform the respondent of the acts or practices alleged to constitute a violation of the law; include a statement of the civil penalties, cease and desist order, and any other appropriate penalty that may be imposed; specify the date or time period by or in which respondent must file an answer with the Commission and serve BOE; and a statement of the consequences for failure to file an answer.

The new rule contains a separate provision addressing the contents of an answer to an Order of Investigation and Hearing. The Rule would require that a respondent must file an answer with the Commission and serve the answer on BOE within 25 days after being served with the Order. The rule further provides that the answer must contain a concise statement of the facts upon which each ground of defense is based and an admission, denial, or explanation of each fact alleged in the Order, or, if the respondent does not have sufficient knowledge of the facts to prepare a response, a statement to that effect. Factual allegations in the Order not answered or addressed would be deemed to be admitted.

Rule 64—Alternative Dispute Resolution

The Commission has long held the policy of using alternative means of dispute resolution to the fullest extent compatible with the law and the agency's mission and resources. The Commission's policy statement requires parties to consider the use of alternative dispute resolution to resolve disputes at an early stage. 46 CFR 502.401. Recently, in Fact Finding 27, Potentially Unlawful, Unfair or Deceptive Ocean Transportation Practices Related to the Movement of Household Goods or Personal Property in U.S.-Foreign Oceanborne Trades, the Fact Finding Officer recommended that the Commission adjust its ADR requirements by requiring a mandatory mediation period in formal proceedings involving household goods. The Commission subsequently adopted this recommendation.

Accordingly, the Commission has determined to modify its rules to require a preliminary dispute resolution conference in all formal proceedings. Under the new section 502.64, parties will be required to participate in a preliminary conference to determine whether the matter in dispute may be resolved through the use of mediation or other means of voluntary alternative dispute resolution. Following the conference, the parties would determine whether to proceed with alternative dispute resolution.

Rule 65—Decision on Default

The Commission is proposing new procedural rules on default which should clarify the process that will occur when a party fails to participate or respond in a Commission proceeding. The proposed rule states in pertinent part that ''[w]hen a party is found to be

in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record.''

The default rule is modeled on that of other agencies that employ a similar enforcement procedure. A defaulting respondent may petition the Commission to set aside a decision on default, which may be granted to prevent injustice upon a showing of good cause. While the federal rules do not set a time limit for the filing of such a motion, it is believed that a finite period should be set. The proposed rule requires that a motion be filed within 22 days after service of the decision on default to coincide with the current time period for the filing of exceptions to an initial decision.

Rule 68—Motion for Leave To Intervene

Proposed Rule 68, addresses motions for leave to intervene previously found in Rule 72, 46 CFR 502.72 Petitions for leave to intervene. This section has been modernized to reflect intervention of right and permissive intervention as provided in the FRCP. The proposed rule requires that parties seek leave to intervene in proceedings by motion, rather than by petition. The proposed standard recognizes the existing standard of the Commission's rule as well as that in FRCP 24 governing intervention.

The proposed rule allows for permissive intervention by a federal or state government department or agency or the Commission's Bureau of Enforcement. The federal or state government or agency or the Commission's Bureau of Enforcement is required to show that its expertise is relevant to one or more issues involved in the proceeding and may assist in the consideration of those issues.

Rule 69—Motions

Proposed Rule 69 reorders the subparts from current Rule 73 into a more logical fashion and adds two new paragraphs. Paragraph (f) clarifies when responses to written motions are permitted. Paragraph (g) defines dispositive motions, because dispositive and non-dispositive motions are treated differently pursuant to proposed rules 70 and 71.

Rule 70—Procedure for Dispositive Motions

Proposed Rule 70 addresses dispositive motions. Because these motions may dispose of all or part of a proceeding, they are handled differently from non-dispositive motions. Dispositive motions must include specific information. Non-moving parties must file responses within 15 days. The moving party may file a reply within 7 days thereafter. No further reply may be filed unless requested by the presiding officer or upon a showing of extraordinary circumstances. Because these motions may be dispositive, the presiding officer may request additional briefing to ensure a full record. Previously, additional time and briefs were permitted on a case by case basis.

Rule 71—Procedures for Non-Dispositive Motions

Proposed Rule 71 addresses non-dispositive motions. These are frequently motions regarding discovery disputes or requesting an extension of a deadline. They do not tend to be as complex and do not require as much time to address as dispositive motions. Therefore, proposed Rule 71 requires the parties to attempt to confer to try to resolve the dispute before filing the motion. If a motion is still required (e.g. to extend a date) the motion will state whether it is opposed. If the motion is opposed, the non-moving party must file a response within 7 days. A reply is only permitted upon a showing of extraordinary circumstances. This will allow non-dispositive motions to be resolved more quickly and efficiently.

Rule 72—Dismissals

Proposed Rule 72 clarifies the process for seeking voluntary and involuntary dismissals. Without such a rule, parties were not always certain how to present these dismissals. The rule is similar to FRCP 41.

Subpart L—Disclosures and Discovery

The Commission proposes to revise its discovery rules found in 46 CFR Subpart L to modernize and more closely conform them to the current version of the FRCP and to encourage focused and expeditious use and completion of discovery. The Shipping Act of 1984 provides: ''In an investigation or adjudicatory proceeding under this part—* * * (2) a party may use depositions, written interrogatories, and discovery procedures under regulations prescribed by the Commission that, to the extent practicable, shall conform to the Federal Rules of Civil Procedure (28 App. U.S.C.).'' 46 U.S.C. 41303(a). In 1984, the Commission promulgated discovery rules based on the federal rules as they then existed. The Commission promulgated minor amendments to Rule 203 in 1993 and Rule 201 in 1999, but in all other respects the rules are unchanged since 1984. The FRCP on discovery, on the other hand, has been extensively revised since 1984.

As a general matter, to ensure that FMC proceedings are conducted as efficiently as possible, the Commission does not propose to adopt the various deadlines from the FRCP. To ensure parties are present in the case, proposed deadlines would run from the date of the filing of the answer, as opposed to the complaint, including the deadline for filing initial disclosures (§ 502.201(b)), completion of discovery (§ 502.201(g)), and initial duty to confer (§ 502.201(h)). The Commission is not proposing to adopt many of those rules that pertain to trials, as trial-type hearings are currently the exception in Commission proceedings. The Commission is at this time incorporating references to electronically stored documents and proposing to treat those as the FRCP does in the context of discovery.

Rule 201—Duty To Disclose; General Provisions Governing Discovery

Proposed Rule 201 governs discovery generally, defines the scope of discovery and its limits, and provides for limited initial disclosures to be made by all parties to any Commission proceeding within seven days of receipt of respondent's answer. The proposed requirement to make initial disclosures would be a new requirement in Commission proceedings. FRCP 26 requires initial disclosures in federal courts, and the procedural rules of other federal agencies, such as the Federal Trade Commission, require initial disclosure in proceedings. Proposed Rule 201 would require the parties to confer within 14 days of receipt of respondent's answer, to complete discovery within 120 days of the answer and to require supplementation of responses to discovery. Currently, discovery must be completed within 120 days of notice of the complaint filing. This limitation has proven to be unrealistic, particularly because the actual date of receipt of an answer can vary greatly. Proposed Rule 201 would adopt the federal rule on the scope of discovery as it currently exists in FRCP 26(b)(1).

Proposed Rule 201 also requires the disclosure of expert witnesses. The substance of the requirement tracks the federal rule, except with respect to the time for disclosures to be provided. The federal rule requires disclosure of experts and their reports no later than 90 days before trial. This deadline is not suitable in view of the Commission's 120 day discovery period. Therefore, parties are required to address expert disclosures and discovery as part of the

''duty to confer'' requirement and, if experts will be used, schedule disclosure and exchange of reports in their proposed schedule.

Rule 202—Persons Before Whom Depositions May Be Taken

Rule 203—Depositions by Oral Examination

Proposed Rules 202 and 203 would modernize Commission rules on depositions to conform with current FRCP 28, 29, and 30. While the Commission's rules have followed the FRCP in other respects, there are currently no limitations on the number of depositions. The proposed rule would limit the number of depositions that may be taken without stipulation or leave of the presiding officer to 20.

Rule 204—Depositions by Written Questions

Rule 205—Interrogatories to Parties

Proposed Rules 204 and 205 pertain to interrogatories and also conform to FRCP 31 and 33. A party would be permitted to serve no more than 50 written interrogatories without stipulation or leave of the presiding officer. The Commission seeks comments specifically on the issue of whether the limitations described in this paragraph are appropriate in Commission proceedings.

Rule 206—Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Proposed Rule 206 would continue to echo FRCP 34, but would incorporate reference to production of electronically stored information and establishes that responses to requests are due within 30 days, whereas the current rule does not specify a deadline for such a response.

Rule 207—Requests for Admission

Rule 208—Use of Discovery Procedures Directed to Commission Staff Personnel

Proposed Rule 207 generally follows FRCP 36, although it does not allow the award of expenses if a party fails to admit a matter that is later proven true. Proposed Rule 208 remains unchanged but is reprinted in the proposed rule for ease of reference.

Rule 209—Use of Depositions at Hearings

Proposed Rule 209 continues to follow FRCP 32, but does not reference that rule in its entirety as certain provisions, such as FRCP 32(a)(5) (Limitations on use) are not typically relevant in Commission proceedings. References to the Federal Rules of Evidence are removed as they do not generally apply to administrative proceedings.

Rule 210—Motions To Compel Initial Disclosure or Compliance With Discovery Requests; Failure To Comply With Order To Make Disclosure or Answer or Produce Documents; Sanctions; Enforcement

Proposed Rule 210 is revised to more closely conform to FRCP 37(b)(2)(A), and makes the failure to make initial disclosures subject to a motion to compel and sanctions. The proposed rule also changes the response period to 7 days in accordance with the general rule applicable to responses to motions.

Although this rulemaking affects only the Commission's Rules of Practice and Procedure, and is therefore not subject to notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(b)(A), the Commission believes that the views of the public, especially practitioners who frequently appear before it, should be considered. Therefore, through this Notice of Proposed Rulemaking, the Commission again encourages the public to submit views on these proposed changes to its procedural rules.

This proposed rule is not a ''major rule'' under 5 U.S.C. 804(2).

List of Subjects in 46 CFR Part 502

Administrative practice and procedure, Claims, Equal access to justice, Investigations, Lawyers, Maritime carriers, Penalties, Reporting and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend subparts E and L of 46 CFR Part 502 as follows.

PART 502—RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 502 continues to read as follows:

Authority: 5 U.S.C. 504, 551, 552, 553, 556(c), 559, 561–569, 571–596; 12 U.S.C. 1141j(a); 18 U.S.C. 207; 26 U.S.C. 501(c)(3); 28 U.S.C. 2112(a); 31 U.S.C. 9701; 46 U.S.C. 305, 40103–40104, 40304, 40306, 40501–40503, 40701–40706, 41101–41109, 41301–41309, 44101–44106; E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR 1964–1965 Comp. p. 306; 21 U.S.C. 853a.

2. Revise subpart E to read as follows:

Subpart E—Proceedings; Pleadings; Motions; Replies

§ 502.61 Proceedings.

(a) Any person may commence a proceeding by filing a complaint (Rule 62) for a formal adjudication under normal or shortened procedures (subpart K) or by filing a claim for the informal adjudication of small claims (subpart S). A person may also file a petition for a rulemaking (Rule 51), for an exemption (Rule 74), for a declaratory order (Rule 75), or for other appropriate relief (Rule 76), which becomes a proceeding when the Commission assigns a formal docket number to the petition. The Commission may commence a proceeding for a rulemaking, for an adjudication (including Commission enforcement action under § 502.63), or a non-adjudicatory investigation upon petition or on its own initiative by issuing an appropriate order.

(b) In the order instituting a proceeding or in the notice of filing of complaint and assignment, the Commission must establish dates by which the initial decision and the final Commission decision will be issued. These dates may be extended by order of the Commission for good cause shown. [Rule 61.]

§ 502.62 Private party complaints for formal adjudication.

(a) *Filing a complaint for formal adjudication.* (1) A person may file a sworn complaint alleging violation of the Shipping Act of 1984, 46 U.S.C. 40101 *et seq.*

(2) *Form.* Complaints should be drafted in accordance with the rules in this section.

(3) *Content of complaint.* The complaint must be verified and must contain the following:

(i) The name, street address, and email address of each complainant, and the name, address, and email address of each complainant's attorney or representative, the name, address, and, if known, email address of each person against whom complaint is made;

(ii) A recitation of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(iii) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts or practices alleged to be in violation of the law; and

(iv) A request for the relief and other affirmative action sought.

(v) *Shipping Act violation must be alleged.* If the complaint fails to indicate the sections of the Act alleged to have been violated or clearly to state facts which support the allegations, the Commission may, on its own initiative, require the complaint to be amended to

supply such further particulars as it deems necessary.

(4) *Complaints seeking reparation; statute of limitations.* A complaint may seek reparation (money damages) for injury caused by violation of the Shipping Act of 1984. (See subpart O of this part.)

(i) Where reparation is sought, the complaint must set forth the injury caused by the alleged violation and the amount of alleged damages.

(ii) Except under unusual circumstances and for good cause shown, reparation will not be awarded upon a complaint in which it is not specifically requested, nor upon a new complaint by or for the same complainant which is based upon a finding in the original proceeding.

(iii) A complaint seeking reparation must be filed within three years after the claim accrues. Notification to the Commission that a complaint may or will be filed for the recovery of reparation will not constitute a filing within the applicable statutory period.

(iv) Civil penalties must not be requested and will not be awarded in complaint proceedings.

(5) *Oral hearing.* The complaint should designate whether an oral hearing is requested and the desired place for any oral hearing. The presiding officer will determine whether an oral hearing is necessary.

(6) *Filing fee.* The complaint must be accompanied by remittance of a $221 filing fee.

(7) A complaint is deemed filed on the date it is received by the Commission.

(b) *Answer to a complaint.* (1) *Time for filing.* A respondent must file with the Commission an answer to the complaint and must serve the answer on complainant as provided in subpart H of this part within 25 days after the date of service of the complaint by the Commission unless this period has been extended under § 502.67 or § 502.102, or reduced under § 502.103, or unless motion is filed to withdraw or dismiss the complaint, in which latter case, answer must be filed within 10 days after service of an order denying such motion. For good cause shown, the presiding officer may extend the time for filing an answer.

(2) *Contents of answer.* The answer must be verified and must contain the following:

(i) The name, address, and email address of each respondent, and the name, address, and email address of each respondent's attorney or representative;

(ii) Admission or denial of each alleged violation of the Shipping Act;

(iii) A clear and concise statement of each ground of defense and specific admission, denial, or explanation of facts alleged in the complaint, or, if respondent is without knowledge or information thereof, a statement to that effect;

(iv) Any affirmative defenses, including allegations of any additional facts on which the affirmative defenses are based; and

(3) *Oral hearing.* The answer should designate whether an oral hearing is requested and the desired place for such hearing. The presiding officer will determine whether an oral hearing is necessary.

(4) *Counterclaims, crossclaims, and third-party complaints.* In addition to filing an answer to a complaint, a respondent may include in the answer a counterclaim against the complainant, a crossclaim against another respondent, or a third-party complaint. A counterclaim, a crossclaim, or a third-party complaint must allege and be limited to violations of the Shipping Act within the jurisdiction of the Commission. The service and filing of a counterclaim, a crossclaim, or a third-party complaint and answers or replies thereto are governed by the rules and requirements of this section for the filing of complaints and answers.

(5) A reply to an answer may not be filed unless ordered by the presiding officer.

(6) *Effect of failure to file answer.*

(i) Failure of a party to file an answer to a complaint, counterclaim, crossclaim, or third-party complaint within the time provided will be deemed to constitute a waiver of that party's right to appear and contest the allegations of the complaint, counterclaim, crossclaim, or third-party complaint to which it has not filed an answer and to authorize the presiding officer to enter an initial decision on default as provided for in 46 CFR 502.65. Well pled factual allegations in the complaint not answered or addressed will be deemed to be admitted.

(ii) A party may make a motion for initial decision on default. [Rule 62.]

§ 502.63 Commission enforcement action.

(a) The Commission may issue an Order of Investigation and Hearing commencing an adjudicatory investigation against one or more respondents alleging one or more violations of the statutes that it administers.

(b) *Contents of Order of Investigation and Hearing.* The Order of Investigation and Hearing must contain the following:

(1) The name, street address, and, if known, email address of each person against whom violations are alleged;

(2) A recitation of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(3) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the acts and practices alleged to be in violation of the law;

(4) Notice of penalties, cease and desist order, or other affirmative action sought; and

(5) Notice of the requirement to file an answer and a statement of the consequences of failure to file an answer.

(c) *Answer to Order of Investigation and Hearing.* (1) *Time for filing.* A respondent must file with the Commission an answer to the Order of Investigation and Hearing and serve a copy of the answer on the Bureau of Enforcement within 25 days after being served with the Order of Investigation and Hearing unless this period has been extended under § 502.67 or § 502.102, or reduced under § 502.103, or unless motion is filed to withdraw or dismiss the Order of Investigation and Hearing, in which latter case, answer must be filed within 10 days after service of an order denying such motion. For good cause shown, the presiding officer may extend the time for filing an answer.

(2) *Contents of answer.* The answer must be verified and must contain the following:

(i) The name, address, and email address of each respondent, and the name, address, and email address of each respondent's attorney or representative;

(ii) Admission or denial of each alleged violation of the Shipping Act;

(iii) A clear and concise statement of each ground of defense and specific admission, denial, or explanation of facts alleged in the complaint, or, if respondent is without knowledge or information thereof, a statement to that effect; and

(iv) Any affirmative defenses, including allegations of any additional facts on which the affirmative defenses are based.

(3) *Oral hearing.* The answer must indicate whether an oral hearing is requested and the desired place for such hearing.The presiding officer will determine whether an oral hearing is necessary.

(4) *Effect of failure to file answer.*

(i) Failure of a respondent to file an answer to an Order of Investigation and Hearing within the time provided will

be deemed to constitute a waiver of the respondent's right to appear and contest the allegations in the Order of Investigation and Hearing and to authorize the presiding officer to enter a decision on default as provided for in 46 CFR 502.65. Well plead factual allegations in the Order of Investigation and Hearing not answered or addressed will be deemed to be admitted.

(ii) The Bureau of Enforcement may make a motion for decision on default. [Rule 63.]

§ 502.64 Alternative dispute resolution.

(a) *Mandatory Preliminary Conference.* (1) *Participation.* Subsequent to service of a complaint or Order of Investigation and Hearing, parties must participate in a preliminary conference with the Commission's Office of Consumer Affairs and Dispute Resolution Services (CADRS) to determine whether the matter may be resolved through the use of alternative dispute resolution pursuant to Subpart U of this Part. The preliminary conference may be conducted either in person or via telephone, video conference, or other forum.

(2) *Timing.* The Director of CADRS will appoint a neutral to convene the conference within thirty (30) days of the filing of an answer. The neutral, within his or her discretion, may confer with each party separately at any time.

(b) *Continued Availability of Dispute Resolution Services to Resolve Procedural and other Disputes.* Termination of a dispute resolution proceeding does not preclude the parties from seeking dispute resolution services at a later time to explore resolution of procedural or substantive issues.

(c) *Proceeding Not Stayed During Dispute Resolution Process.* Unless otherwise ordered by the presiding officer, a mediation proceeding does not stay or delay the procedural time requirements set forth by rule or order of the presiding officer.

(d) *Confidentiality.* All dispute resolution proceedings are subject to the confidentiality provisions set forth in § 502.405 of this part. [Rule 64.]

§ 502.65 Decision on default.

(a) A party to a proceeding may be deemed to be in default if that party fails:

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) To answer, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) To cure a deficient filing within the time specified by the Commission or the presiding officer.

(b) When a party is found to be in default, the Commission or the presiding officer may issue a decision on default upon consideration of the record, including the complaint or Order of Investigation and Hearing.

(c) The presiding officer may require additional information or clarification when needed to issue a decision on default, including a determination of the amount of reparations or civil penalties where applicable.

(d) A respondent who has defaulted may file with the Commission a petition to set aside a decision on default. Such a petition must be made within 22 days of the service date of the decision, state in detail the reasons for failure to appear or defend, and specify the nature of the proposed defense. In order to prevent injustice, the Commission may for good cause shown set aside a decision on default. [Rule 65.]

§ 502.66 Amendments or supplements to pleadings.

(a) Amendments or supplements to any pleading (complaint, Order of Investigation and Hearing, counterclaim, crossclaim, third-party complaint, and answers thereto) will be permitted or rejected, either in the discretion of the Commission or presiding officer. After a case is assigned for hearing, no amendment must be allowed which would broaden the issues, without opportunity to reply to such amended pleading and to prepare for the broadened issues. The presiding officer may direct a party to state its case more fully and in more detail by way of amendment.

(b) A response to an amended pleading must be filed and served in conformity with the requirements of subpart H of this part and § 502.69, unless the Commission or the presiding officer directs otherwise. Amendments or supplements allowed prior to hearing will be served in the same manner as the original pleading, except that the presiding officer may authorize the service of amended complaints directly by the parties rather than by the Secretary of the Commission.

(c) Whenever by the rules in this part a pleading is required to be verified, the amendment or supplement must also be verified. [Rule 66.]

§ 502.67 Motion for more definite statement.

If a pleading (including a complaint, counterclaim, crossclaim, or third-party complaint filed pursuant to § 502.62) to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably prepare a response, the party may move for a more definite statement before filing a responsive pleading. The motion must be filed within 15 days of the pleading and must point out the defects complained of and the details desired. If the motion is granted and the order of the presiding officer is not obeyed within 10 days after service of the order or within such time as the presiding officer sets, the presiding officer may strike the pleading to which the motion was directed or issue any other appropriate order. If the motion is denied, the time for responding to the pleading must be extended to a date 10 days after service of the notice of denial. [Rule 67.]

§ 502.68 Motion for leave to intervene.

(a) A motion for leave to intervene may be filed in any proceeding.

(b) *Procedure for intervention.* (1) Upon request, the Commission will furnish a service list to any member of the public pursuant to part 503 of this chapter.

(2) The motion must:

(i) Comply with all applicable provisions of subpart A of this part;

(ii) Indicate the type of intervention sought;

(iii) Describe the interest and position of the person seeking intervention, and address the grounds for intervention set forth in paragraph (c) of this section;

(iv) Describe the nature and extent of its proposed participation, including the use of discovery, presentation of evidence, and examination of witnesses;

(v) State the basis for affirmative relief, if affirmative relief is sought; and

(vi) Be served on existing parties by the person seeking intervention pursuant to subpart H of this part.

(3) A response to a motion to intervene must be served and filed within 15 days after the date of service of the motion.

(c)(1) *Intervention of right.* The presiding officer or Commission must permit anyone to intervene who claims an interest relating to the property or transaction that is subject of the proceeding, and is so situated that disposition of the proceeding may as a practical matter impair or impede the ability of such person to protect its interest, unless existing parties adequately represent that interest.

(2) *Permissive intervention.*

(i) *In general.* The presiding officer or Commission may permit anyone to intervene who shows that a common issue of law or fact exists between such person's interest and the subject matter of the proceeding; that intervention

would not unduly delay or broaden the scope of the proceeding, prejudice the adjudication of the rights, or be duplicative of the positions of any existing party; and that such person's participation may reasonably be expected to assist in the development of a sound record.

(ii) *By a government department, agency, or the Commission's Bureau of Enforcement.* The presiding officer or Commission may permit intervention by a federal or state government department or agency or the Commission's Bureau of Enforcement upon a showing that its expertise is relevant to one or more issues involved in the proceeding and may assist in the consideration of those issues.

(3) The timeliness of the motion will also be considered in determining whether a motion will be granted under paragraph (b)(2) of this section and should be filed no later than 30 days after publication in the **Federal Register** of the Commission's order instituting the proceeding or the notice of the filing of the complaint. Motions filed after that date must show good cause for the failure to file within the 30-day period.

(d) *Use of discovery by an intervenor.* (1) Absent good cause shown, an intervenor desiring to utilize the discovery procedures provided in subpart L must commence doing so no more than 15 days after its motion for leave to intervene has been granted.

(2) The Commission or presiding officer may impose reasonable limitations on an intervenor's participation in order to: (i) Restrict irrelevant or duplicative discovery, evidence, or argument; (ii) have common interests represented by a spokesperson; and (iii) retain authority to determine priorities and control the course of the proceeding.

(3) The use of discovery procedures by an intervenor whose motion was filed more than 30 days after publication in the **Federal Register** of the Commission's order instituting the proceeding or the notice of the filing of the complaint will not be allowed if the presiding officer determines that the use of the discovery by the intervenor will unduly delay the proceeding. [Rule 68.]

§ 502.69 Motions.

(a) In any adjudication, an application or request for an order or ruling not otherwise specifically provided for in this part must be by motion. After the assignment of a presiding officer to a proceeding and before the issuance of his or her recommended or initial decision, all motions must be addressed to and ruled upon by the presiding officer unless the subject matter of the motion is beyond his or her authority, in which event the matter must be referred to the Commission. If the proceeding is not before the presiding officer, motions must be designated as *petitions* and must be addressed to and ruled upon by the Commission.

(b) Motions must be in writing, except that a motion made at a hearing may be sufficient if stated orally upon the record.

(c) Oral argument upon a written motion may be permitted at the discretion of the presiding officer or the Commission.

(d) A repetitious motion will not be entertained.

(e) All written motions must state clearly and concisely the purpose of and the relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds supporting the relief requested; and must conform with the requirements of subpart H of this part.

(f) Any party may file and serve a response to any written motion, pleading, petition, application, etc., permitted under this part except as otherwise provided respecting answers (§ 502.62), shortened procedure (subpart K of this part), briefs (§ 502.221), exceptions (§ 502.227), and reply to petitions for attorney fees under the Equal Access to Justice Act (§ 502.503(b)(1)).

(g) *Dispositive and non-dispositive motions defined.* For the purpose of these rules, *dispositive motion* means a motion for decision on the pleadings; motion for summary decision or partial summary decision; motion to dismiss all or part of a proceeding or party to a proceeding; motion for involuntary dismissal; motion for initial decision on default; or any other motion for a final determination of all or part of a proceeding. All other motions, including all motions related to discovery, are non-dispositive motions. [Rule 69.]

§ 502.70 Procedure for dispositive motions.

(a) A dispositive motion as defined in § 502.69(g) of this subpart must include a concise statement of the legal basis of the motion with citation to legal authority and a statement of material facts with exhibits as appropriate.

(b) A response to a dispositive motion must be served and filed within 15 days after the date of service of the motion. The response must include a concise statement of the legal basis of the response with citation to legal authority and specific responses to any statements of material facts with exhibits as appropriate.

(c) A reply to the response to a dispositive motion may be filed within 7 days after the date of service of the response to the motion. A reply may not raise new grounds for relief or present matters that do not relate to the response and must not reargue points made in the opening motion.

(d) The non-moving party may not file any further reply unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances.

(e) *Page limits.* Neither the motion nor the response may exceed 30 pages, excluding exhibits or appendices, without leave of the presiding officer. A reply may not exceed 15 pages. [Rule 70.]

§ 502.71 Procedure for non-dispositive motions.

(a) *Duty to confer.* Before filing a non-dispositive motion as defined in § 502.69(g) of this subpart, the parties must attempt to discuss the anticipated motion with each other in a good faith effort to determine whether there is any opposition to the relief sought and, if there is opposition, to narrow the areas of disagreement. The moving party must state within the body of the motion what attempt was made or that the discussion occurred and whether the motion is opposed.

(b) A response to a non-dispositive motion must be served and filed within 7 days after the date of service of the motion.

(c) The moving party may not file a reply to a response to a non-dispositive motion unless requested by the Commission or presiding officer, or upon a showing of extraordinary circumstances.

(d) *Page limits.* Neither the motion nor the response may exceed 10 pages, excluding exhibits or appendices, without leave of the presiding officer. [Rule 71.]

§ 502.72 Dismissals.

(a) *Voluntary dismissal*—(1) *By the complainant.* The complainant may dismiss an action without an order from the presiding officer by filing a notice of dismissal before the opposing party serves either an answer, a motion to dismiss, or a motion for summary decision; or a stipulation of dismissal signed by all parties who have appeared. Unless the notice or stipulation states otherwise, the dismissal is without prejudice.

(2) *By order of the presiding officer.* Except as provided in paragraph (a)(1) of this section, an action may be

dismissed at the complainant's request only by order of the presiding officer or the Commission, on terms the presiding officer considers proper. If a respondent has pleaded a counterclaim before being served with the complainant's motion to dismiss, the action may be dismissed over the respondent's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

(b) *Involuntary dismissal; effect.* If the complainant fails to prosecute or to comply with these rules or an order in the proceeding, a respondent may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subpart, except one for lack of jurisdiction or failure to join a party, operates as an adjudication on the merits. [Rule 72.]

§ 502.73 Order to show cause.

The Commission may institute a proceeding by order to show cause. The order must be served upon all persons named therein, must include the information specified in § 502.143, must require the person named therein to answer, and may require such person to appear at a specified time and place and present evidence upon the matters specified. [Rule 73.]

§ 502.74 Exemption procedures—General.

(a) *Authority.* The Commission, upon application or on its own motion, may by order or regulation exempt for the future any class of agreements between persons subject to the Shipping Act of 1984 or any specified activity of those persons from any requirement of the Act if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce. The Commission may attach conditions to any exemption and may, by order, revoke any exemption.

(b) *Application for exemption.* Any person may petition the Commission for an exemption or revocation of an exemption of any class of agreements or an individual agreement or any specified activity pursuant to section 16 of the Shipping Act of 1984 (46 U.S.C. 40103). A petition for exemption must state the particular requirement of the Shipping Act of 1984 for which exemption is sought. The petition must also include a statement of the reasons why an exemption should be granted or revoked, must provide information relevant to any finding required by the Act and must comply with § 502.76. Where a petition for exemption of an individual agreement is made, the application must include a copy of the agreement. Unless a petition specifically requests an exemption by regulation, the Commission must evaluate the petition as a request for an exemption by order.

(c) *Participation by interested persons.* No order or regulation of exemption or revocation of exemption may be issued unless opportunity for hearing has been afforded interested persons and departments and agencies of the United States.

(d) ***Federal Register*** *notice.* Notice of any proposed exemption or revocation of exemption, whether upon petition or the Commission's own motion, must be published in the **Federal Register**. The notice must include when applicable:

(1) A short title for the proposed exemption or the title of the existing exemption;

(2) The identity of the party proposing the exemption or seeking revocation;

(3) A concise summary of the agreement or class of agreements or specified activity for which exemption is sought, or the exemption which is to be revoked;

(4) A statement that the petition and any accompanying information are available for inspection in the Commission's offices in Washington, DC; and

(5) The final date for filing comments regarding the proposal. [Rule 74.]

§ 502.75 Declaratory orders and fee.

(a)(1) The Commission may, in its discretion, issue a declaratory order to terminate a controversy or to remove uncertainty.

(2) Petitions for the issuance thereof must: State clearly and concisely the controversy or uncertainty; name the persons and cite the statutory authority involved; include a complete statement of the facts and grounds prompting the petition, together with full disclosure of petitioner's interest; be served upon all parties named therein; and conform to the requirements of subpart H of this part.

(3) Petitions must be accompanied by remittance of a $241 filing fee.

(b) Petitions under this section must be limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission. The procedures of this section must be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view. Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint under section 11 of the Shipping Act of 1984 (46 U.S.C. 41301–41302, 41305–41307(a)) and § 502.62, or by filing of a petition for investigation under § 502.76.

(c) Petitions under this section must be accompanied by the complete factual and legal presentation of petitioner as to the desired resolution of the controversy or uncertainty, or a detailed explanation why such can only be developed through discovery or evidentiary hearing.

(d) Responses to the petition must contain the complete factual and legal presentation of the responding party as to the desired resolution, or a detailed explanation why such can only be developed through discovery or evidentiary hearing. Responses must conform to the requirements of § 502.69 and must be served pursuant to subpart H of this part.

(e) No additional submissions will be permitted unless ordered or requested by the Commission or the presiding officer. If discovery or evidentiary hearing on the petition is deemed necessary by the parties, such must be requested in the petition or responses. Requests must state in detail the facts to be developed, their relevance to the issues, and why discovery or hearing procedures are necessary to develop such facts.

(f)(1) A notice of filing of any petition which meets the requirements of this section must be published in the **Federal Register**. The notice will indicate the time for filing of responses to the petition. If the controversy or uncertainty is one of general public interest, and not limited to specifically named persons, opportunity for response will be given to all interested persons including the Commission's Bureau of Enforcement.

(2) In the case of petitions involving a matter limited to specifically named persons, participation by persons not named therein will be permitted only upon grant of intervention by the Commission pursuant to § 502.68.

(3) Petitions for leave to intervene must be submitted on or before the response date and must be accompanied by intervenor's complete response including its factual and legal presentation in the matter.

(g) Petitions for declaratory order which conform to the requirements of this section will be referred to a formal docket. Referral to a formal docket is not to be construed as the exercise by the Commission of its discretion to issue an

order on the merits of the petition. [Rule 75.]

§ 502.76 Petitions—General and fee.

(a) Except when submitted in connection with a formal proceeding, all claims for relief or other affirmative action by the Commission, including appeals from Commission staff action, except as otherwise provided in this part, must be by written petition, which must state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon and the relief sought, must cite by appropriate reference the statutory provisions or other authority relied upon for relief, must be served upon all parties named therein, and must conform otherwise to the requirements of subpart H of this part. Responses thereto must conform to the requirements of § 502.67.

(b) Petitions must be accompanied by remittance of a $241 filing fee. [Rule 76.]

§ 502.77 Proceedings involving assessment agreements.

(a) In complaint proceedings involving assessment agreements filed under section 5(e) of the Shipping Act of 1984 (46 U.S.C. 40301(e), 40305), the Notice of Filing of Complaint and Assignment will specify a date before which the initial decision will be issued, which date will not be more than eight months from the date the complaint was filed.

(b) Any party to a proceeding conducted under this section who desires to utilize the prehearing discovery procedures provided by subpart L of this part must commence doing so at the time it files its initial pleading, i.e., complaint, answer, or petition for leave to intervene. Discovery matters accompanying complaints must be filed with the Secretary of the Commission for service pursuant to § 502.113. Answers or objections to discovery requests must be subject to the normal provisions set forth in subpart L.

(c) Exceptions to the decision of the presiding officer, filed pursuant to § 502.227, must be filed and served no later than 15 days after date of service of the initial decision. Replies thereto must be filed and served no later than 15 days after date of service of exceptions. In the absence of exceptions, the decision of the presiding officer must be final within 30 days from the date of service, unless within that period, a determination to review is made in accordance with the procedures outlined in § 502.227. [Rule 77.]

§ 502.78 Brief of an amicus curiae.

(a) A brief of an amicus curiae may be filed only by leave of the Commission or the presiding officer granted on motion with notice to the parties, or at the request of the Commission or the presiding officer, except that leave must not be required when the brief is presented by the United States or any agency or officer of the United States. The brief may be conditionally filed with the motion for leave. A brief of an amicus curiae must be limited to questions of law or policy.

(b) A motion for leave to file an amicus brief must identify the interest of the applicant and must state the reasons why such a brief is desirable.

(c) Except as otherwise permitted by the Commission or the presiding officer, an amicus curiae must file its brief no later than 7 days after the initial brief of the party it supports is received at the Commission. An amicus curiae that is not supporting either party must file its brief no later than 7 days after the initial brief of the first party filing a brief is received at the Commission. The Commission or the presiding officer must grant leave for a later filing only for cause shown, in which event the period within which an opposing party may answer must be specified.

(d) A motion of an amicus curiae to participate in oral argument will be granted only in accordance with the requirements of § 502.241. [Rule 78.]

3. Revise subpart L to read as follows:

Subpart L—Disclosures and Discovery

§ 502.201 Duty to disclose; general provisions governing discovery.

(a) *Applicability.* Unless otherwise stated in subpart S, T, or any other subpart of this part, the procedures described in this subpart are available in all adjudicatory proceedings under the Shipping Act of 1984.

(b) *Initial disclosures.* Except as otherwise stipulated or ordered by the Commission or presiding officer, and except as provided in this subpart related to disclosure of expert testimony, all parties must, within 7 days of service of a respondent's answer to the complaint or Order of Investigation and Hearing and without awaiting a discovery request, provide to each other:

(1) The name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(2) A copy, or a description by category and location, of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(3) An estimate of any damages claimed by the disclosing party who must also make available for inspection and copying the documents or other evidentiary material, unless privileged or protected from disclosure, on which the estimate is based, including materials bearing on the nature and extent of injuries suffered.

(c) *For parties served or joined later.* A party that is first served or otherwise joined after the answer is made must make the initial disclosures within 5 days after an answer is filed by the late-joined party, unless a different time is set by stipulation or order of presiding officer. All parties must also produce to the late-joined party any initial disclosures previously made.

(d) *Disclosure of expert testimony*—(1) *In general.* A party must disclose to the other parties the identity of any witness it may use in the proceeding to present evidence as an expert.

(2) *Witnesses who are required to provide a written report.* Unless otherwise stipulated or ordered by the presiding officer, if the witness is one retained or specially employed to provide expert testimony in the proceeding or one whose duties as the party's employee regularly involve giving expert testimony, the disclosure must be accompanied by a written report, prepared and signed by the witness. The report must contain:

(i) A complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) The facts or data considered by the witness in forming them;

(iii) Any exhibits that will be used to summarize or support them;

(iv) The witness's qualifications, including a list of all publications authored in the previous 10 years;

(v) A list of all other proceedings or cases in which, during the previous 4 years, the witness testified as an expert in a trial, an administrative proceeding, or by deposition; and

(vi) A statement of the compensation to be paid for the study and testimony in the proceeding.

(3) *Witnesses who are not required to provide a written report.* Unless otherwise stipulated or ordered by the presiding officer, if the witness is not required to provide a written report under paragraph (2) above, the disclosure must state:

(i) The subject matter on which the witness is expected to present evidence as an expert; and

(ii) Summary of the facts and opinions to which the witness is expected to testify.

(4) *Time to disclose expert testimony.* The time for disclosure of expert testimony must be addressed by the parties when they confer as provided in paragraph (h) of this section and, if applicable, must be included in the proposed discovery schedule submitted to the presiding officer.

(e) *Scope of discovery and limits.* (1) Unless otherwise limited by the presiding officer, or as otherwise provided in this subpart, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the presiding officer may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at hearing if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Limitations on frequency and extent—*

(i) *Specific limitations on electronically stored information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the presiding officer may nonetheless order discovery from such sources if the requesting party shows good cause. The presiding officer may specify conditions for the discovery.

(ii) *When required.* On motion or on its own, the presiding officer may limit the frequency or extent of discovery otherwise allowed by these rules if the presiding officer determines that:

(A) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(C) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the proceeding, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(f) *Scope of discovery and limits—experts.* (1) A party may depose any person who has been identified as an expert whose opinions may be presented in a proceeding. If a report is required of the witness, the deposition may be conducted only after the report is provided.

(2) Drafts of any report or disclosure required by these rules are not discoverable regardless of the form in which the draft is recorded.

(3) Communications between the party's attorney and any expert witness required to provide a report are not discoverable regardless of the form of communications, except to the extent that the communications relate to compensation for the expert's study or testimony; identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(4) A party may not by interrogatories or deposition discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for a proceeding and who is not expected to be presented as a witness; provided, however, that the presiding officer may permit such discovery and may impose such conditions as deemed appropriate upon a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(g) *Completion of discovery.* Discovery must be completed within 120 days of the service of a respondent's answer to the complaint or Order of Investigation and Hearing.

(h) *Duty of the parties to confer.* In all proceedings in which the procedures of this subpart are used, it is the duty of the parties to confer within 14 days after receipt of a respondent's answer to a complaint or Order of Investigation and Hearing in order to: Establish a schedule for the completion of discovery, including disclosures and discovery related to experts, within the 120-day period prescribed in paragraph (g) of this section; resolve to the fullest extent possible disputes relating to discovery matters; and expedite, limit, or eliminate discovery by use of admissions, stipulations and other techniques. The parties must submit the schedule to the presiding officer not later than 5 days after the conference. Nothing in this rule should be construed to preclude the parties from conducting discovery and conferring at an earlier date.

(i)(1) *Conferences by order of the presiding officer.* The presiding officer may at any time order the parties or their attorneys to participate in a conference at which the presiding officer may direct the proper use of the procedures of this subpart or make such orders as may be necessary to resolve disputes with respect to discovery and to prevent delay or undue inconvenience.

(2) *Resolution of disputes.* After making every reasonable effort to resolve discovery disputes, a party may request a conference or rulings from the presiding officer on such disputes. If necessary to prevent undue delay or otherwise facilitate conclusion of the proceeding, the presiding officer may order a hearing to commence before the completion of discovery.

(j) *Protective orders*—(1) *In general.* A party or any person from whom discovery is sought may move for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without Commission or presiding officer action. The Commission or presiding officer may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(i) Forbidding the disclosure or discovery;

(ii) Specifying terms, including time and place, for the disclosure or discovery;

(iii) Prescribing a discovery method other than the one selected by the party seeking discovery;

(iv) Forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(v) Designating the persons who may be present while the discovery is conducted;

(vi) Requiring that a deposition be sealed and opened only on Commission or presiding officer order;

(vii) Requiring that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a specified way; or

(viii) Requiring that the parties simultaneously file specified documents or information in sealed envelopes, to

be opened as the Commission or presiding officer directs.

(2) *Ordering discovery.* If a motion for a protective order is denied in whole or in part, the Commission or presiding officer may, on just terms, order that any party or person provide or permit discovery.

(k) *Supplementing responses.* A party who has made a disclosure under paragraph (b) of this section, or who has responded to an interrogatory, request for production, or request for admission, must supplement or correct its disclosure or response:

(1) In a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in written communication; or

(2) As ordered by the presiding officer.

(l) *Stipulations.* Unless the presiding officer orders otherwise, the parties may stipulate that other procedures governing or limiting discovery be modified, but a stipulation extending the time for any form of discovery must have presiding officer's approval if it would interfere with the time set for completing discovery, for adjudicating a motion, or for hearing. [Rule 201.]

§ 502.202 Persons before whom depositions may be taken.

(a) *Within the United States*—(1) *In general.* Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:

(i) An officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(ii) A person appointed by the Commission or the presiding officer to administer oaths and take testimony.

(b) *In a foreign country*—(1) *In general.* A deposition may be taken in a foreign country:

(i) Under an applicable treaty or convention;

(ii) Under a letter of request, whether or not captioned a ''letter rogatory'';

(iii) On notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(iv) Before a person authorized by the Commission or the presiding officer to administer any necessary oath and take testimony.

(2) *Issuing a letter of request or an authorization.* A letter of request, an authorization, or both may be issued:

(i) On appropriate terms after an application and notice of it; and

(ii) Without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) *Form of a request, notice, or authorization.* When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed ''To the Appropriate Authority in [name of country].'' A deposition notice or an authorization must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) *Letter of request—admitting evidence.* Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) *Disqualification.* A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action. [Rule 202.]

§ 502.203 Depositions by oral examination.

(a) *When a deposition may be taken*—(1) *Without leave.* A party may, by oral questions, depose any person, including a party, without leave of the presiding officer except as provided in § 502.203(a)(2). The deponent's attendance may be compelled by subpoena under subpart I of this part.

(2) *With leave.* A party must obtain leave of the presiding officer, if the parties have not stipulated to the deposition and:

(i) The deposition would result in more than 20 depositions being taken under this rule or § 502.204 by any party; or

(ii) The deponent has already been deposed in the case.

(b) *Notice of the deposition; other formal requirements*—(1) *Notice in general.* A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) *Producing documents.* If a subpoena duces tecum is to be served on the deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request under § 502.206 to produce documents and tangible things at the deposition.

(3) *Method of recording.*

(i) *Method stated in the notice.* The party who notices the deposition must state in the notice the method for recording the testimony. Unless the presiding officer orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(ii) *Additional method.* With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the presiding officer orders otherwise.

(4) *By remote means.* The parties may stipulate, or the presiding officer may on motion order, that a deposition be taken by telephone or other remote means.

(5) *Officer's duties*—

(i) *Before the deposition.* Unless the parties stipulate otherwise, a deposition must be conducted before an officer appointed or designated under § 502.202. The officer must begin the deposition with an on-the-record statement that includes:

(A) The officer's name and business address;

(B) The date, time, and place of the deposition;

(C) The deponent's name;

(D) The officer's administration of the oath or affirmation to the deponent; and

(E) The identity of all persons present.

(ii) *Conducting the deposition; avoiding distortion.* If the deposition is recorded nonstenographically, the officer must repeat the items in § 502.203(b)(5)(i)(A)–(C) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(iii) *After the deposition.* At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) *Notice or subpoena directed to an organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity

and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing representatives, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. A subpoena must advise a nonparty organization of its duty to make this designation. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(c) *Examination and cross-examination; record of the examination; objections; written questions*—

(1) *Examination and cross-examination.* The examination and cross-examination of a deponent proceed as they would at hearing under the provisions of § 502.154. After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under § 502.203(b)(3). The testimony must be recorded by the officer personally or by a person acting in the presence and under the direction of the officer.

(2) *Objections.* An objection at the time of the examination, whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition, must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the presiding officer, or to present a motion under § 502.203(d)(2).

(3) *Participating through written questions.* Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) *Duration; sanction; motion to terminate or limit*—(1) *Duration.* Unless otherwise stipulated or ordered by the presiding officer, a deposition is limited to 1 day of 7 hours. The presiding officer must allow additional time consistent with § 502.201(e)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.

(2) *Motion to terminate or limit*—

(i) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may be filed with the presiding officer. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(ii) *Order.* The presiding officer may order that the deposition be terminated or may limit its scope and manner as provided in § 502.201(j). If terminated, the deposition may be resumed only by order of the Commission or presiding officer.

(e) *Review by the witness; changes*—(1) *Review; statement of changes.* On request by the deponent or a party before the deposition is completed, the deponent must be allowed 15 days after being notified by the officer that the transcript or recording is available in which:

(i) To review the transcript or recording; and

(ii) If there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) *Changes indicated in the officer's certificate.* The officer must note in the certificate prescribed by § 502.203(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 15-day period.

(f) *Certification and delivery; exhibits; copies of the transcript or recording; filing*—

(1) *Certification and delivery.* The officer must certify in writing that the witness was duly sworn and that the deposition, transcript or recording accurately records the witness's testimony. The certificate must accompany the record of the deposition. Unless the presiding officer orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked ''Deposition of [witness's name]'' and must promptly send it to the attorney who arranged for the transcript or recording. The attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) *Documents and tangible things*—

(i) *Originals and copies.* Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. But if the person who produced them wants to keep the originals, the person may:

(A) Offer copies to be marked, attached to the deposition, and then used as originals, after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(B) Give all parties a fair opportunity to inspect and copy the originals after they are marked, in which event the originals may be used as if attached to the deposition.

(ii) *Order regarding the originals.* Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) *Copies of the transcript or recording.* Unless otherwise stipulated or ordered by the presiding officer, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent. [Rule 203.]

§ 502.204 Depositions by written questions.

(a) *When a deposition may be taken*—(1) *Without leave.* A party may, by written questions, depose any person, including a party, without leave of the presiding officer except as provided in paragraph (a)(2) of this section. The deponent's attendance may be compelled by subpoena under subpart I of this part.

(2) *With leave.* A party must obtain leave of the presiding officer, if the parties have not stipulated to the deposition and:

(i) The deposition would result in more than 20 depositions being taken under this rule or § 502.203 by any party;

(ii) The deponent has already been deposed in the case.

(3) *Service; required notice.* A party who wants to depose a person by written questions must serve them on every other party, with a notice stating, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs. The notice must also state the name or descriptive title and the address of the officer before whom the deposition will be taken.

(4) *Questions directed to an organization.* A public or private corporation, a partnership, an association, or a governmental agency

may be deposed by written questions in accordance with § 502.203(b)(6).

(5) *Questions from other parties.* Any questions to the deponent from other parties must be served on all parties as follows: Cross-questions, within 14 days after being served with the notice and direct questions; redirect questions, within 7 days after being served with cross-questions; and recross-questions, within 7 days after being served with redirect questions. The presiding officer may, for good cause, extend or shorten these times.

(b) *Delivery to the officer; officer's duties.* The party who noticed the deposition must deliver to the officer before whom the deposition will be taken a copy of all the questions served and of the notice. The officer must promptly proceed to:

(1) Take the deponent's testimony in response to the questions;

(2) Prepare and certify the deposition; and

(3) Send it to the party, attaching a copy of the questions and of the notice.

(c) *Notice of completion or filing*—(1) *Completion.* The party who noticed the deposition must notify all other parties when it is completed.

(2) *Filing.* A party who files the deposition must promptly notify all other parties of the filing. [Rule 204.]

§ 502.205 Interrogatories to parties.

(a) *In general*—(1) *Number.* Unless otherwise stipulated or ordered by the presiding officer, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with § 502.201(e)(2).

(2) *Scope.* An interrogatory may relate to any matter that may be inquired into under § 502.201(e)–(f). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the presiding officer may order that the interrogatory need not be answered until designated discovery is complete, or until a prehearing conference or some other time.

(b) *Answers and objections*—(1) *Responding party.* The interrogatories must be answered:

(i) By the party to whom they are directed; or

(ii) If that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or representative, who must furnish the information available to the party.

(2) *Time to respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to as provided in § 502.201(l) of this subpart or be ordered by the presiding officer.

(3) *Answering each interrogatory.* Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) *Objections.* The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the presiding officer, for good cause, excuses the failure.

(5) *Signature.* The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) *Use.* An answer to an interrogatory may be used to the extent allowed by the rules in this part.

(d) *Option to produce business records.* If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:

(1) Specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and

(2) Giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries. [Rule 205.]

§ 502.206 Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(a) *In general.* A party may serve on any other party a request within the scope of § 502.201(e)–(f):

(1) To produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(i) Any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations, stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(ii) Any designated tangible things; or

(2) To permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) *Procedure*—(1) *Contents of the request.* The request:

(i) Must describe with reasonable particularity each item or category of items to be inspected;

(ii) Must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(iii) May specify the form or forms in which electronically stored information is to be produced.

(2) *Responses and objections.*

(i) *Time to respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to as provided in § 502.201(l) of this subpart or be ordered by the presiding officer.

(ii) *Responding to each item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(iii) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(iv) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party must state the form or forms it intends to use.

(v) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the presiding officer, these procedures apply to producing documents or electronically stored information:

(A) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(B) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(C) A party need not produce the same electronically stored information in more than one form.

(c) *Nonparties.* By subpoena under subpart I of this part, a nonparty may be compelled to produce documents and tangible things or to permit an inspection. [Rule 206.]

§ 502.207 Requests for admission.

(a) *Scope and procedure*—(1) *Scope.* A party may serve on any other party a written request to admit, for the purposes of the pending action only, the truth of any nonprivileged relevant matters relating to facts, the application of law to fact, or opinions about either, and the genuineness of any described documents.

(2) *Form; copies of documents.* Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of failure to respond.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to as provided in § 502.201(l) of this subpart or be ordered by the presiding officer.

(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 may not object solely on the ground that the request presents a genuine issue for adjudication.

(6) *Motion regarding the sufficiency of an answer or objection.* The requesting party may move for a determination of the sufficiency of an answer or objection. Unless the presiding officer finds an objection justified, the presiding officer must order that an answer be served. On finding that an answer does not comply with this rule, the presiding officer may order either that the matter is admitted or that an amended answer be served. The presiding officer may defer a decision until a prehearing conference or a specified time prior to hearing.

(b) *Effect of admission; withdrawal or amendment of admission.* A matter admitted under this rule is conclusively established unless the presiding officer, on motion, permits the admission to be withdrawn or amended. The presiding officer may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the presiding officer is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding. [Rule 207.]

§ 502.208 Use of discovery procedures directed to Commission staff personnel.

(a) Discovery procedures described in §§ 502.202, 502.203, 502.204, 502.205, 502.206, and 502.207, directed to Commission staff personnel must be permitted and must be governed by the procedures set forth in those sections except as modified by paragraphs (b) and (c) of this section. All notices to take depositions, written interrogatories, requests for production of documents and other things, requests for admissions, and any motions in connection with the foregoing, must be served on the Secretary of the Commission.

(b) The General Counsel must designate an attorney to represent any Commission staff personnel to whom any discovery requests or motions are directed. The attorney so designated must not thereafter participate in the Commission's decision-making process concerning any issue in the proceeding.

(c) Rulings of the presiding officer issued under paragraph (a) of this section must become final rulings of the Commission unless an appeal is filed within 10 days after date of issuance of such rulings or unless the Commission on its own motion reverses, modifies, or stays such rulings within 20 days of their issuance. Replies to appeals may be filed within 10 days. No motion for leave to appeal is necessary in such instances and no ruling of the presiding officer must be effective until 20 days from date of issuance unless the Commission otherwise directs. [Rule 208.]

§ 502.209 Use of depositions at hearings.

(a) *Using depositions*—(1) *In general.* At a hearing, all or part of a deposition may be used against a party on these conditions:

(i) The party was present or represented at the taking of the deposition or had reasonable notice of it;

(ii) It is used to the extent it would be admissible if the deponent were present and testifying; and

(iii) The use is allowed by § 502.209(a)(2) through (7).

(2) *Impeachment and other uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by § 502.156 of subpart J of this part.

(3) *Deposition of party, representative, or designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing representative, or designee under § 502.203(b)(6) or § 502.204(a)(4).

(4) *Unavailable witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the Commission or presiding officer finds:

(i) That the witness is dead;

(ii) That the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;

(iii) That the party offering the deposition could not procure the witness's attendance by subpoena; or

(iv) On motion and notice, that exceptional circumstances make it desirable, in the interest of justice and with due regard to the importance of live testimony at a hearing, to permit the deposition to be used.

(5) *Using part of a deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.

(6) *Substituting a party.* Substituting a party does not affect the right to use a deposition previously taken.

(7) *Deposition taken in an earlier action.* A deposition lawfully taken and, if required, filed in any federal or state court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by § 502.156 of subpart J of this part.

(b) *Objections to admissibility.* Subject to Rules § 502.202(b) and § 502.209(d)(3), an objection may be made at a hearing to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of presentation.* Unless the presiding officer orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the presiding officer with the testimony in nontranscript form as well.

(d) *Waiver of objections*—(1) *To the notice.* An objection to an error or irregularity in a deposition notice is waived unless promptly served in writing on the party giving the notice.

(2) *To the officer's qualification.* An objection based on qualification of the officer before whom a deposition is to be taken is waived if not made:

(i) Before the deposition begins; or

(ii) Promptly after the basis for disqualification becomes known or, with reasonable diligence, could have been known.

(3) *To the taking of the deposition*—

(i) *Objection to competence, relevance, or materiality.* An objection to a deponent's competence, or to the competence, relevance, or materiality of testimony, is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time.

(ii) *Objection to an error or irregularity.* An objection to an error or irregularity at an oral examination is waived if:

(A) It relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and

(B) It is not timely made during the deposition.

(iii) *Objection to a written question.* An objection to the form of a written question under § 502.204 of this subpart is waived if not served in writing on the party submitting the question within the time for serving responsive questions or, if the question is a recross-question, within 7 days after being served with it.

(4) *To completing and returning the deposition.* An objection to how the officer transcribed the testimony, or prepared, signed, certified, sealed, endorsed, sent, or otherwise dealt with the deposition, is waived unless a motion to suppress is made promptly after the error or irregularity becomes known or, with reasonable diligence, could have been known. [Rule 209.]

§ 502.210 Motions to compel initial disclosures or compliance with discovery requests; failure to comply with order to make disclosure or answer or produce documents; sanctions; enforcement.

(a) *Motion for order to compel initial disclosures or compliance with discovery requests.* (1) A party may file a motion pursuant to § 502.69 for an order compelling compliance with the requirement for initial disclosures provided in § 502.201 or with its discovery requests as provided in this subpart, if a deponent fails to answer a question asked at a deposition or by written questions; a corporation or other entity fails to make a designation of an individual who will testify on its behalf; a party fails to answer an interrogatory; or a party fails to respond that inspection will be permitted, or fails to permit inspection, as requested under § 502.206 of this subpart. For purposes of this section, a failure to make a disclosure, answer, or respond includes an evasive or incomplete disclosure, answer, or response.

(2) A motion to compel must include:

(i) A certification that the moving party has conferred in good faith or attempted to confer with the party failing to make initial disclosure or respond to discovery requests as provided in this subpart in an effort to obtain compliance without the necessity of a motion;

(ii) A copy of the discovery requests that have not been answered or for which evasive or incomplete responses have been given. If the motion is limited to specific discovery requests, only those requests are to be included;

(iii) If a disclosure has been made or an answer or response has been given, a copy of the disclosure, answer, or response in its entirety;

(iv) A copy of the certificate of service that accompanied the discovery request; and

(v) A request for relief and supporting argument, if any.

(3) A party may file a response to the motion within 7 days of the service date of the motion. Unless there is a dispute with respect to the accuracy of the versions of the discovery requests, responses thereto, or the disclosures submitted by the moving party, the response must not include duplicative copies of them.

(4) A reply to a response is not allowed unless requested by the presiding officer, or upon a showing of extraordinary circumstances.

(b) *Failure to comply with order compelling disclosures or discovery.* If a party or a party's officer or authorized representative fails or refuses to obey an order requiring it to make disclosures or to respond to discovery requests, the presiding officer upon his or her own initiative or upon motion of a party may make such orders in regard to the failure or refusal as are just. A motion must include a certification that the moving party has conferred in good faith or attempted to confer with the disobedient party in an effort to obtain compliance without the necessity of a motion. An order of the presiding officer may:

(1) Direct that the matters included in the order or any other designated facts must be taken to be established for the purposes of the action as the party making the motion claims;

(2) Prohibit the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; or

(3) Strike pleadings in whole or in part; staying further proceedings until the order is obeyed; or dismissing the action or proceeding or any party thereto, or rendering a decision by default against the disobedient party.

(c) *Enforcement of orders and subpoenas.* In the event of refusal to obey an order or failure to comply with a subpoena, the Attorney General at the request of the Commission, or any party injured thereby may seek enforcement by a United States district court having jurisdiction over the parties. Any action with respect to enforcement of subpoenas or orders relating to depositions, written interrogatories, or other discovery matters must be taken within 20 days of the date of refusal to obey or failure to comply. A private party must advise the Commission 5 days (excluding Saturdays, Sundays and legal holidays) before applying to the court of its intent to seek enforcement of such subpoenas and discovery orders.

(d) *Persons and documents located in a foreign country.* Orders of the presiding officer directed to persons or documents located in a foreign country must become final orders of the Commission unless an appeal to the Commission is filed within 10 days after date of issuance of such orders or unless the Commission on its own motion reverses, modifies, or stays such rulings within 20 days of their issuance. Replies to appeals may be filed within 10 days. No motion for leave to appeal is necessary in such instances and no orders of the presiding officer must be effective until 20 days from date of issuance unless the Commission otherwise directs. [Rule 210.]

By the Commission.

Karen V. Gregory,

Secretary.

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