71.1. The Class E airspace designations listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation, as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority since it would contain aircraft executing instrument approach procedures to David City Municipal Airport.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9N, Airspace Designations and Reporting Points, dated September 1, 2005, and effective September 16, 2005, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ACE NE E5 David City, NE

David City Municipal Airport, NE
(Lat 41°13′51″N., long. 97°07′23″W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of David City Municipal Airport.

* * * * *

Issued in Kansas City, MO, on December 19, 2005.

Paul J. Sheridan,

Area Director, Western Flight Services Operations.

[FR Doc. 06–81 Filed 1–4–06; 8:45 am]

BILLING CODE 4910–13–M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Parts 2700, 2704, and 2705

Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Proposed rule.

SUMMARY: The Federal Mine Safety and Health Review Commission (the ''Commission'') is an independent adjudicatory agency that provides trials and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (2000) (the ''Mine Act''). Trials are held before the Commission's Administrative Law Judges and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. The Commission is proposing to revise its procedural rules, regulations implementing the Equal Access to Justice Act, and regulations implementing the Privacy Act in order to aid the efficient adjudication of proceedings at the Commission's trial and appellate levels and to ensure consistency with the statutes underlying those regulations.

DATES: Written and electronic comments must be submitted on or before March 6, 2006.

ADDRESSES: Written comments should be mailed to Thomas A. Stock, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202–434–9944. Persons mailing written comments shall provide an original and three copies of their comments. Electronic comments should state ''Comments on Notice of Proposed Rulemaking'' in the subject line and be sent to *tstock@fmshrc.gov.*

FOR FURTHER INFORMATION CONTACT: Thomas A. Stock, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202–434–9935; fax 202–434–9944.

SUPPLEMENTARY INFORMATION:

I. Background

In October 2004, the Commission published an Advance Notice of Proposed Rulemaking (''ANPRM'') in which it sought suggestions for improving its procedural rules (29 CFR part 2700), Government in the Sunshine Act regulations (29 CFR part 2701), regulations implementing the Freedom of Information Act (''FOIA'') (29 CFR part 2702), and regulations implementing the Equal Access to Justice Act (''EAJA'') (29 CFR part 2704). *See* 69 FR 62632, Oct. 27, 2004. In the ANPRM, the Commission identified several procedural rules set forth in part 2700 that require further revision, clarification, or expansion. *See id.* at 62632–35. The Commission also stated that it would examine its procedures for processing requests for relief from final judgments. *Id.* at 62632. The Commission did not include in the ANPRM any specific proposed revisions to the Commission's regulations implementing the Government in the Sunshine Act (part 2701), the FOIA (part 2702), the EAJA (part 2704), or the Privacy Act (part 2705).

Although notice-and-comment rulemaking requirements under the Administrative Procedure Act (''APA'') do not apply to rules of agency procedure (*see* 5 U.S.C. 553(b)(3)(A)), the Commission invited members of the interested public to submit comments until January 25, 2005. The Commission invited comments on the revisions described in the ANPRM and on any other revisions not in the ANPRM but which the interested public believed could lead to the more efficient adjudication of Commission proceedings under the Commission's procedural rules (part 2700). The Commission also invited comments on its regulations implementing the Government in the Sunshine Act (part 2701), FOIA (part 2702), and EAJA (part 2704). 69 FR at 62632.

The Commission received comments from the Secretary of Labor through the U.S. Department of Labor's Office of the Solicitor; the Pennsylvania Coal Association; the United Mine Workers of America; the National Stone, Sand & Gravel Association; and other

individual members of the mining community or bar who practice before the Commission. As discussed in the section-by-section analysis, some changes in this notice are proposed in response to the comments received. Other changes are proposed in response to further reflection by the Commission or in response to developments in Commission proceedings since publication of the ANPRM. For example, the Commission has determined that some changes may be necessary to its regulations implementing the Privacy Act (part 2705). Further consideration by the Commission has also revealed that further changes are unnecessary at the present time to various rules, including the Commission's regulations implementing the Government in the Sunshine Act (part 2701) and FOIA (part 2702). In addition, after examining its procedures for processing requests for relief from final judgment, the Commission has determined that such procedures could be made more efficient through informal means rather than through the rulemaking process. Such informal means include making available a summary of the Commission's procedural rules described in simple terms and placing on the Commission's Web site a page of frequently asked questions and answers regarding Commission procedure.

Although the proposed rules in this notice are procedural in nature and do not require notice and comment publication (*see* 5 U.S.C. 553(b)(3)(A)), the Commission is inviting and will consider public comment before adopting in final form any revisions to the existing rules. In addition, anyone interested in providing oral statements on the Commission's proposed rule revisions announced in this notice may submit a request for a public meeting. In the request for a public meeting, the party shall identify the individual or entity requesting the public meeting and the name of the individual who will present the oral statement at the public meeting, provide a summary of the content of the oral statement to be presented at the public meeting, indicate the amount of time needed to present the oral statement, and propose a geographic location for the meeting. If the Commission receives a request for a public meeting on this notice, the Commission may hold a public meeting at its headquarters at 601 New Jersey Avenue, NW., Suite 9500, Washington, DC, or at other locations depending upon the level of interest shown. If public meetings are scheduled, the Commission will issue a subsequent notice to be published in the Federal Register no later than 30 days before the dates of such meetings announcing the dates and locations of such meetings and setting forth guidelines for the meetings.

All comments and requests for a public meeting shall be mailed to Thomas A. Stock, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; sent via facsimile to 202–434–9944; or emailed to *tstock@fmshrc.gov.* It is requested that comments and requests be filed no later than March 6, 2006.

II. Section-by-Section Analysis

Set forth below is an analysis of proposed changes to the Commission's rules, including any comments received.

A. Part 2700—Procedural Rules

Subpart A—General Provisions

29 CFR 2700.1

Proceedings before the Commission have sometimes revealed confusion regarding the relationship between the Commission and the Department of Labor and its Mine Safety and Health Administration (''MSHA''). In order to minimize such confusion, the Commission proposes amending paragraph (a) of Commission Procedural Rule 1 to add an explanation regarding the Commission's role and relationship to the Department of Labor. In addition, the Commission proposes adding to paragraph (a), for easy reference, pertinent information necessary for contacting the Commission or gaining access to Commission records.

29 CFR 2700.5

Privacy-related issues raised by pleadings and other documents in Mine Act cases. With the advent of electronic filings and Internet access to judicial files, there has been increased sensitivity regarding personal information in files that are easily accessed by the public. Identity theft and other misuse of personal information are problems that have been exacerbated by the widespread availability of information over the Internet. Since publication of the ANPRM, the Commission has reviewed the rules of the courts and other agencies and proposes to add a new subsection to Commission Procedural Rule 5, formerly subsection 5(d), to prevent incorporation into the Commission's case files of certain kinds of information (social security numbers, bank account numbers, and drivers' license numbers) and information related to certain individuals (e.g., minor children). It is generally anticipated that the role of the Commission's Judges in enforcing the rule will be limited because implementation of this rule will fall heavily on the parties in Mine Act proceedings in light of their interests in redacting personal information.

Filing and service requirements. Commission Procedural Rule 5(d) currently provides that a notice of contest of a citation or order; a petition for assessment of penalty; a complaint for compensation; a complaint of discharge, discrimination, or interference; an application for temporary reinstatement; and an application for temporary relief shall be filed by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.5(d). Commission Procedural Rule 7(c) also requires that such documents, in addition to a proposed penalty assessment, shall be served by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.7(c); *see also* 29 CFR 2700.45(a) (providing, in part, for service by certified mail of pleadings in a temporary reinstatement proceeding). Although not explicitly required by the Commission's procedural rules in all circumstances, the Commission, as a matter of practice, generally mails by certified mail, return receipt requested, Judges' decisions after hearing, default orders, and orders that require timely action by a party. *Cf.* 29 CFR 2700.66(a) (requiring show cause orders to be mailed by registered or certified mail, return receipt requested).

In addition, Commission Procedural Rule 5(d) currently provides that certain documents may be filed by facsimile transmission (''fax''), while Commission Procedural Rule 7(c) contains corresponding provisions governing service when filing is by fax. The documents which may be filed by fax are motions for extension of time (29 CFR 2700.9), petitions for Commission review of a Judge's temporary reinstatement decision (29 CFR 2700.45(f)), motions for expedition of proceedings (29 CFR 2700.52(a)), petitions for discretionary review (''PDRs'') (29 CFR 2700.70(a)), motions to file a PDR in excess of the applicable page limit (29 CFR 2700.70(f)), and motions to file a brief in excess of the applicable page limit (29 CFR 2700.75(f)). Under Commission Procedural Rule 5(d), a Judge or the Review Commission may also order the filing via fax of other documents. In practice, the Commission accepts by fax

many documents that are not specified in current Commission Procedural Rule 5(d).

In the ANPRM, the Commission stated that it was reviewing whether sections 2700.5(d) and 2700.7(c) should permit parties to use other methods, such as commercial mail services, to file and serve the documents for which personal delivery or registered or certified mail are presently required. 69 FR at 62632. In addition, the Commission stated that it was considering whether notices designating a PDR as an opening brief should be added to the list of pleadings that may be filed by fax. *Id.*

The Secretary opposes changing the present rules on the use of registered or certified mail because she does not consider the rules to be burdensome and considers the availability of the return receipt desirable for proving that a document has been filed or served. Another commenter also states that the requirements for certified mail should not be changed, except that the Commission should codify its current practice of mailing documents by certified mail. Most commenters support changing the rule to allow the use of commercial mail services but further suggest that the Commission allow filing by fax to a greater degree than allowed under current rules. Those commenters state that the use of commercial mail services can provide reliable information about the date of filing or service and that most fax machines will also print a verification of transmission. One commenter explains that because some mines are located in remote locations, it may be difficult to satisfy the requirements for certified or registered mail in a timely manner.

The pleadings and other documents for which the current rules presently require personal delivery or certified or registered mail as the method for filing and service are generally those that initiate Commission proceedings. The purpose for requiring such methods of filing and service is to provide the party initiating the proceeding with proof that filing and service have taken place in the event a question later arises. The documents that may be filed by fax under current Commission Procedural Rule 5(d) are generally those requesting Commission action of a time-sensitive nature.

Whenever a party initiates a Commission proceeding, the party is assuming a certain degree of risk that it may not be successful in initiating the proceeding due to unexpected circumstances involving the document it is filing or serving once the document has left the party's control. It is in the filing party's best interest to ensure against that risk by using a method of delivery that provides adequate proof of proper filing and service. While a signed receipt is reliable proof that filing and service were actually accomplished, the Commission believes that a waybill provided by a private carrier that contains tracking information or a fax machine transmission report may also provide sufficiently reliable information that proper filing and service have been accomplished.

Accordingly, the Commission proposes revising the filing and service requirements of current Commission Procedural Rules 5(d) and 7(c) in an effort to require a method of filing and service that would be convenient to most parties yet would provide reliable verification of the time of filing and service. The Commission proposes to redesignate current Commission Procedural Rule 5(d) as 5(e), and in redesignated Commission Procedural Rule 5(e), to allow the filing party to choose the manner for filing a document, unless a certain method is otherwise required by the Mine Act or the Commission's procedural rules. Under this proposed change, it would be incumbent upon parties to use a method of delivery that provides adequate proof of timely filing and service, particularly if a filing party is initiating a proceeding. It would be the responsibility of the filing or serving party to confirm receipt of the document filed or served.

The newly redesignated Commission Procedural Rule 5(e) would not include the specific description of documents which may be filed by fax. Rather than limiting fax filing to various types of documents, the proposed rule would impose a 15-page length limit on most documents that may be filed by fax. Documents filed pursuant to 30 CFR 2700.70 (petitions for discretionary review), 30 CFR 2700.45 (temporary reinstatement proceedings) or 30 CFR subpart F (applications for temporary relief) may be filed by fax and would not be subject to the 15-page limit. Under the proposed rule, a notice designating a PDR as an opening brief may be filed by fax as it certainly would be 15 pages or less. The effective date of filing depends upon the method of delivery chosen and is specified accordingly in new Commission Procedural Rule 5(e). The Commission also proposes deleting references to permissible fax filing presently found in other rules (*see* 29 CFR 2700.9(a), 2700.45(f), 2700.52(a), 2700.70(a), 2700.75(f)), so as to avoid the misperception that those are the only instances in which fax filing is permitted. Proposed § 2700.7(c) sets forth service requirement revisions that conform with those set forth in proposed § 2700.5(e) related to filing requirements.

Finally, the Commission intends to continue its current practice of mailing by certified mail, return receipt requested: Judges' decisions (after hearing), default orders, and orders that require timely action by a party. The Commission has determined that further codification of that practice is not necessary at this time since such codification would not alter the Commission's practice or ultimately result in a benefit to parties. *See* 29 CFR 2700.66(a) (requiring an order to show cause to be mailed by registered or certified mail, return receipt requested).

Number of file copies. Commission Procedural Rule 5(e) currently sets forth the number of copies to be submitted in cases before a Judge and the Review Commission, requiring represented parties to file two copies per docket in cases before Judges and seven copies in cases before the Review Commission. 29 CFR 2700.5(e). The rule further requires that when filing by fax a party must file the proper number of copies with the Judge or Review Commission within 3 days of the facsimile transmission. *Id.*

In the ANPRM, the Commission stated that it was considering requiring fewer copies than are currently required by the rule. 69 FR at 62632. All commenters support reducing the number of copies that must be filed.

The Commission proposes redesignating current Commission Procedural Rule 5(e) as 5(f). In newly redesignated Commission Procedural Rule 5(f), the Commission would require that only those parties represented by a lawyer need file, unless otherwise ordered, the original document and one copy for each docket in cases before a Judge, and the original document and six copies in cases before the Review Commission. For parties not represented by a lawyer, filing the original document would be sufficient. Under the proposed rule, when filing is by fax, the original document must be filed with the Judge or Review Commission within 3 days of transmission, but no other copies need be filed. The Commission proposes making a conforming change to 29 CFR 2700.75(g), setting forth the number of copies of briefs to be filed.

Form of pleadings. Current Commission Procedural Rule 5(f) contains various format requirements for pleadings filed with the Commission, providing in part that ''briefs'' not meeting the requirements may be rejected. 29 CFR 2700.5(f). The

rule is intended to permit rejection of all pleadings not meeting the format requirements, rather than only briefs. The Commission proposes redesignating current Commission Procedural Rule 5(f) as 5(g). Newly redesignated Commission Procedural Rule 5(g) would provide that any pleading not meeting the format requirements would be subject to rejection. Current 29 CFR 2700.5(g) would be redesignated as 29 CFR 2700.5(i).

Citations to Judges' decisions. Commission Procedural Rule 72 currently provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation in a pleading to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR at 62634. The Commission explained that such a revision would provide the reader with information regarding whether the citation is binding precedent on the proposition for which it is cited. *Id.*

The majority of commenters do not oppose the suggested citation change. However, a few commenters suggest that a system for designating cases should be published. One commenter suggests that a change is unnecessary because citation to a Judge's decision without subsequent Commission history is presumptively an unreviewed decision.

Presently, there is no requirement that citations to Commission cases in pleadings differentiate between Judge and Review Commission decisions, regardless of whether the former are reviewed or unreviewed. In an effort to maximize clarity and accuracy in citation format, the Commission proposes adding a requirement that citations to a Judge's decision include ''(ALJ)'' at the end of the citation. Because such a change would be general and apply to pleadings before the Judges and the Review Commission, the Commission would include the requirement in Commission Procedural Rule 5. The Commission proposes redesignating current Commission Procedural Rule 5(g) as 5(i) and including in new Rule 5(h) the requirement regarding citation to a Judge's decision. In addition, the Commission would further clarify that Judges' decisions are not binding precedent upon the Review Commission. The Commission believes that such a clarification is most appropriately included in 29 CFR 2700.69, which addresses Judges' decisions. The Commission proposes deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use.

29 CFR 2700.8

Commission Procedural Rule 8 provides in part that the last day of a period computed shall be included unless that day is a Saturday, Sunday, or federal holiday, in which event the period runs until the next business day. 29 CFR 2700.8. The rule further provides that when a period of time prescribed in the rules is less than 7 days, intermediate Saturdays, Sundays, and federal holidays shall be excluded in the computation of time. *Id.* Commission Procedural Rule 8 also states that when the service of a document is by mail, 5 days shall be added to the time allowed by the rules for the filing of a response or other documents. *Id.*

In the ANPRM, the Commission stated that it was considering whether to more closely conform its time computation rule with federal procedural rules. 69 FR at 62633. It specified that the Commission was considering whether it should increase the period for which intervening Saturdays, Sundays, and federal holidays shall be excluded, and decrease the number of days added for filing a response if service is by mail. *Id.* The Commission further stated that it was considering clarifying changes to Commission Procedural Rule 8 that would dispel confusion regarding the circumstances and the types of mail and delivery that qualify for the additional days for filing when service is by mail. *Id.* Finally, the Commission stated that it was considering making explicit that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day would otherwise fall on a weekend or federal holiday. *Id.*

Most commenters support expanding the period in which intervening weekends and holidays would not be counted, in conformance with federal procedural rules. The Secretary also agrees that such a period should be expanded, but further states that such an expanded time should not apply to the time periods set forth in 29 CFR 2700.45 pertaining to temporary reinstatement proceedings. In addition, the Secretary suggests that Commission Procedural Rule 8 should be revised to provide that the last day of a filing period should not be counted if the Commission's office is closed due to inclement weather or other conditions. Most commenters also support clarifying Commission Procedural Rule 8 to explain the circumstances in which 5 days are added to time periods when service is by mail. Most commenters do not support reducing the 5-day period added on for filing when service is by mail. Most commenters support making explicit that the Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day would otherwise fall on a weekend or Federal holiday.

As to the time period for which holidays and weekends are excluded in the computation of time, the Commission considers it appropriate to harmonize Commission Procedural Rule 8 with federal procedural rules in order to decrease confusion and to better afford parties ample time in which to prepare their pleadings. Federal procedural rules provide that when a period of time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Fed. R. Civ. P. 6(a); Fed. R. App. P. 26(a)(2). The Commission would propose to revise Commission Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days.

However, adopting the 11-day period set forth in federal procedural rules, without other Commission procedural rule changes, may have an unintended negative impact on the efficient adjudication of proceedings before the Review Commission and its Judges. Under Commission Procedural Rule 10(d), a party has 10 days to respond to a motion. 29 CFR 2700.10(d). Under proposed Commission Procedural Rule 8, weekends and holidays that occur within the 10-day response time of current Commission Procedural Rule 10(d) would not be counted, which could result in the return response period being unreasonably extended to nearly 3 weeks where parties are served by mail. In order to avoid this result, the Commission also proposes changing the period of time for responding to a motion set forth in 29 CFR 2700.10(d) from 10 days to 8 days. This proposed change would guarantee parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules. Under current Commission Procedural Rules 8 and 10(d), intervening weekends and holidays are included in time computation, resulting in parties receiving a response time of 10 to 12 calendar days, or 5 to 8 business days.

The Commission agrees with the Secretary's comment that any proposed change to Commission Procedural Rule 8 providing for an expanded response time should not apply to the time periods set forth in 29 CFR 2700.45

pertaining to temporary reinstatement proceedings. Section 105(c)(2) of the Mine Act requires the Commission to consider applications for temporary reinstatement on an expedited basis. 30 U.S.C. 815(c)(2). Therefore, the Commission proposes that Commission Procedural Rule 45 be amended to specify time periods in ''business'' days when the time period prescribed for action is less than 7 days, and ''calendar'' days when the time period prescribed is 7 or more days under that rule. This proposed change would maintain the same time frames currently provided in Commission Procedural Rule 45.

The Commission also agrees with the Secretary's comment that Commission Procedural Rule 8 should be revised to recognize that the last day of a filing period should not be counted if the Commission's offices are closed due to inclement weather or other conditions. The Commission proposes revising Commission Procedural Rule 8 to include more general language stating that the last day of a prescribed period for action shall be the due date unless the Commission's offices are not open or the Commission is otherwise unable to accept filings. This proposed revision would apply to deadlines for both Commission and party action.

The Commission also agrees with commenters that the 5-day period that is added under Commission Procedural Rule 8 when service is by mail should not be reduced. Commenters have explained that for many operators in isolated areas, it would be unreasonable to expect delivery within a shorter period of time. In addition, there have been mail delays caused by security concerns and increased screening procedures. Nonetheless, the Commission proposes specifying that the 5 days added when service is by mail are 5 additional calendar days. The rule is presently silent as to whether the 5 days are calendar days or business days.

Furthermore, in order to better explain the circumstances in which the 5 additional days will be added, the Commission proposes inserting language to clarify that 5 calendar days will be added to the due date for a responding party's reply to a pleading which has been served by a method of delivery other than same-day service. This proposed change clarifies that the 5-day period is added to documents responding to a party's pleading, rather than to documents responding to orders from the Commission. In addition, the proposed change clarifies that the 5 days will be added when responding to a party's pleading that has been served by any means other than same-day service. Service by courier or fax would result in same-day delivery so that the 5 days would not be added to the time for response to such pleadings. However, service by U.S. Postal Service first-class mail or any other mail service resulting in other than same-day delivery would result in the addition of 5 days to the response time.

The Commission has determined that, given these proposed changes, it need not further clarify that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day would otherwise fall on a weekend or federal holiday. Rather, the proposed changes to Commission Procedural Rule 8 should sufficiently clarify that the Review Commission may act on the PDR until the end of the next day that the Commission's offices are open. Such proposed language would apply to other deadlines for Commission action as well. *See, e.g.*, 30 U.S.C. 823(d)(2)(B) (providing the period within which the Review Commission may direct sua sponte review).

The various provisions of proposed Commission Procedural Rule 8 may result in different determinations of due dates depending upon the order in which the provisions are applied. Therefore, the Commission proposes to state in the rule that its subsections apply in sequential order. That is, in computing time, a party must apply the subsections in order, beginning with subsection (a) and ending with subsection (c). The Commission also proposes including as a part of the rule two examples demonstrating how the provisions would apply sequentially.

29 CFR 2700.9

Commission Procedural Rule 9 currently provides in part that the time for filing or serving ''any document'' may be extended for good cause. 29 CFR 2700.9(a). Experience has shown that a number of parties believe that they can seek an extension of time to file a petition for discretionary review. The Commission therefore proposes revising the rule to clarify that the rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(i), and 29 CFR 2700.70(a).

29 CFR 2700.10(c)

Commission Procedural Rule 10(c) currently provides that prior to filing a ''procedural motion,'' the moving party shall make reasonable efforts to confer with other parties and state in the motion whether the other parties oppose the motion. 29 CFR 2700.10(c). In the ANPRM, the Commission stated that it was considering whether the phrase ''procedural motion'' should be changed to clarify that it refers to any non-dispositive motion. 69 FR at 62633.

Most commenters support clarifying that movants must confer with opposing parties on non-dispositive motions. The Secretary does not oppose the change, provided that it is intended to exclude summary decision motions from the rule.

The Commission considered changing Commission Procedural Rule 10(c) because the phrase ''procedural motion'' is broad and may create confusion regarding which documents constitute procedural motions. The Commission believes that the phrase ''dispositive motion'' may more accurately describe the type of motion about which parties need not confer. Consequently, in an effort to dispel confusion, the Commission proposes revising the rule to state that consultation with opposing parties is required for any motion other than a dispositive motion.

29 CFR 2700.10(d)

As discussed in the section above regarding 29 CFR 2700.8, the Commission proposes decreasing the period of time for responding to a motion from 10 days to 8 days. Such a change is proposed in combination with the proposed changes to 29 CFR 2700.8. The Commission proposes revising Commission Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days. If the Commission were to leave unchanged the time period for responding to a motion in current 29 CFR 2700.10(d), the response period could be unreasonably extended. The proposed change to Commission Procedural Rule 10(d) guarantees parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules.

Subpart B—Contests of Citations and Orders; Subpart C—Contests of Proposed Penalties

29 CFR 2700.25

Commission Procedural Rule 25 currently provides that the Secretary shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary of any contest of the proposed penalty assessment. 29 CFR 2700.25.

The Commission received two comments suggesting that the Commission adopt a time limit after a citation or order is issued for the Secretary to issue a proposed penalty assessment for the violations involved. The commenters state that a time limit of 6 or 12 months would be appropriate and that such a time limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable.

Section 105(a) of the Act requires the Secretary to issue a proposed penalty assessment to an operator ''within a reasonable time'' after the termination of the inspection or investigation that led to the issuance of the citation or order in question. 30 U.S.C. 815(a). Commission Procedural Rule 25 does not further define the period of ''reasonable time'' set forth in the statute. The Commission invites comment from members of the interested public regarding the imposition of a time limit on the issuance of a proposed penalty assessment and whether failing to issue a proposed penalty within the limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable.

29 CFR 2700.26

The Commission has dual filing requirements under subparts B and C that reflect the filing procedures set forth in sections 105(a) and (d) of the Mine Act, 30 U.S.C. 815(a) and (d). Subpart B sets forth the manner in which a party may contest a citation or order before the Secretary has proposed a civil penalty for the alleged violation described in the citation or order. Subpart C sets forth the manner in which a party may contest a civil penalty after a proposed penalty assessment has been issued. If a party chooses not to file a contest of a citation or order under subpart B, it may nonetheless contest the proposed penalty assessment under subpart C. In such circumstances, in addition to contesting the proposed penalty assessment, the party may challenge the fact of violation and any special findings alleged in the citation or order. *See* 29 CFR 2700.21. However, if a party files a contest of a citation or order under subpart B, it must also file additional pleadings under subpart C in order to challenge the proposed penalty assessment related to the citation or order.

In the ANPRM, the Commission stated that it was considering whether the filing requirements relating to contesting citations, orders, and proposed penalties could be streamlined while remaining consistent with the procedures set forth in sections 105(a) and (d) of the Mine Act. 69 FR at 62633. It explained that the dual filing requirements under subparts B and C are inconsistent and can sometimes lead to confusion. *Id.* For instance, parties have failed to contest a proposed penalty assessment or to answer the Secretary's petition for assessment of penalty under subpart C based on the mistaken belief that they have been relieved of those obligations by having filed a notice of contest of a citation or order under subpart B. In such circumstances, a final order requiring the payment of the proposed penalty may have been entered against the party by default.

After publishing the ANPRM, the Commission considered streamlining the filing procedures by adding a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed the timely filing of a notice of contest of a proposed penalty assessment. The Commission discussed the provision with MSHA because such a provision would impact the manner in which MSHA processes notices of contests and issues proposed penalty assessments and related documents. During those discussions the Commission was informed that, due to administrative and technological problems, the proposed new rule would be extremely difficult for MSHA to implement and that the expense of implementing the rule might not be justified by the relatively low number of default cases that would be eliminated by the new rule's implementation.

The Commission has determined that it is inadvisable at this time to add a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed the timely filing of a notice of contest of a proposed penalty assessment. Rather, the Commission proposes adding a provision to Commission Procedural Rule 26 which would clarify that a party who wishes to contest a proposed penalty assessment must provide such notification regardless of whether that party has previously contested the underlying citation or order pursuant to 29 CFR 2700.20. The Commission also proposes explaining, in Commission Procedural Rule 28(b), that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment.

Rather than proposing further changes to its rules, the Commission intends to employ a number of informal practices in an effort to reduce the number of cases resulting in default. For instance, the Commission intends to work with MSHA to clarify the instructions provided to parties for the filing of various documents, to distribute and make available to the interested public a document that summarizes the Commission's procedural rules in simple terms, and to place on its website a page of frequently asked questions and answers regarding Commission procedures.

29 CFR 2700.28(b)

Commission Procedural Rule 44(a), which pertains to a petition for the assessment of a penalty in a discrimination proceeding arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), currently provides that ''[t]he petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act.'' 29 CFR 2700.44(a), *citing* 30 U.S.C. 820(i). Procedural Rule 28, which sets forth the procedure for the Secretary to file a petition for assessment of penalty when an operator has contested a proposed penalty in non-discrimination cases, does not include the ''short and plain statement'' requirement of Commission Procedural Rule 44(a). Rather, Commission Procedural Rule 28(b) provides merely that the petition for assessment of penalty shall state whether the citation or order has been contested, the docket number of any contest, and that the party against whom a penalty petition is filed has 30 days to answer the petition. 29 CFR 2700.28(b).

In the ANPRM, the Commission stated that it was considering whether the provisions of Commission Procedural Rules 44(a) and 28(b) should be made consistent by adding to Rule 28(b) the ''short and plain statement'' requirement of Rule 44(a) so as to provide notice to the party against whom the penalty is filed of the basis for the penalty. 69 FR at 62633.

Most of the comments received by the Commission support requiring the Secretary to provide a short and plain statement of supporting reasons for a penalty based on the section 110(i) criteria. The reasons given in support of amending Commission Procedural Rule 28 are that it would provide a better understanding of the basis for the Secretary's allegations, enable a more complete response to the petition, make Rule 28 consistent with Rule 44, and promote more expeditious disposition of the case. One commenter does not support making the change because it

perceives that such a change would likely result in the consumption of additional resources and lead to delays in the issuance of paperwork. The Secretary states that requiring a short and plain statement is unnecessary because the supporting reasons for the penalty are set forth in the proposed penalty assessment (referred to by MSHA as ''Exhibit A''), which is attached to the petition for assessment of penalty.

The Secretary's regulations in part 100 describe three methods for calculating civil penalties: the regular assessment, the special assessment, and the single penalty assessment. *See* 30 CFR 100.3, 100.4, 100.5. For regular assessments, Exhibit A generally identifies in non-narrative form, among other things, the citation or order by number, whether the alleged violation is significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), the date of issuance, the standard allegedly violated, and the points assigned to each of 10 factors listed, which fall under 5 of the section 110(i) penalty criteria. The Secretary adds a narrative describing the basis of the penalty to Exhibit A only when she assesses a special assessment. However, in a proceeding in which individual liability is sought under section 110(c) of the Mine Act, 30 U.S.C. 820(c), Exhibit A does not include a narrative or other document explaining the proposed assessment. See, *e.g.*, *Wayne R. Steen*, 20 FMSHRC 381, 386 (Apr. 1998) (applying the section 110(i) criteria in a section 110(c) agent case). The Commission believes that inclusion of a narrative description for the bases of a penalty within a petition may better provide a party notice of the rationale behind the penalty amount. In addition, the Commission questions whether Exhibit A is an adequate explanation of the bases of a proposed assessment.

When the Secretary issues a single penalty assessment, there is no enumeration of the points attributed for each criterion in Exhibit A. The Commission recognizes that since single penalty assessments do not involve individualized application of section 110(i) criteria (*see Coal Employment Project* v. *Dole*, 889 F.2d 1127, 1134 (D.C. Cir. 1989)), a narrative description requirement may not apply to these penalties. The Commission invites comment from members of the interested public regarding whether, if a short and plain statement requirement is added to Rule 28(b), an exception to that requirement for single penalty assessments should be explicitly stated.

The Commission does not believe that requiring the inclusion of a short and plain statement in a petition for assessment of penalty for regular and special assessments will impose an onerous burden on the Secretary's resources. While section 110(i) does not require the Secretary to make findings on the six criteria, the Secretary generally bears the burden of presenting the evidence concerning section 110(i) penalty criteria in support of her proposed assessment in a civil penalty proceeding. *Hubb Corp.*, 22 FMSHRC 606, 613 (May 2000); *see also Sec'y of Labor on behalf of Hannah* v. *Consolidation Coal Co.*, 20 FMSHRC 1293, 1302 (Dec. 1998) (noting that the Secretary ''must initially produce preliminary information that will assist the Judge in making findings concerning the statutory penalty criteria''). The Commission anticipates that providing the operator with notice of the bases of the Secretary's proposed penalty assessment and allowing the operator the opportunity to identify issues with respect to the proposed penalty would ultimately lead to a more efficient resolution of penalty cases.

Moreover, the revision would make the requirements for petitions for assessment of penalties in both discrimination and non-discrimination cases consistent under the Commission's procedural rules. The Secretary's own regulations in 30 CFR part 100 consistently require the consideration of the same six criteria when proposing penalties in discrimination and non-discrimination cases. *See* 30 CFR 100.1. Thus, the Commission proposes revising Commission Procedural Rule 28(b) to add the requirement that a petition for assessment of penalty shall include a short and plain statement of supporting reasons for the penalty based on the section 110(i) criteria.

Finally, as described in the section above regarding 29 CFR 2700.26, in an effort to decrease the number of cases resulting in default, the Commission proposes to add to Commission Procedural Rule 28(b) an explanation that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment.

Subpart E—Complaints of Discharge, Discrimination or Interference

29 CFR 2700.45

Judge's jurisdiction. Commission Procedural Rule 45 sets forth procedures governing the temporary reinstatement of a miner alleging discrimination under section 105(c) of the Mine Act, 30 U.S.C. 815(c). Currently, as to a Judge's jurisdiction, Commission Procedural Rule 45 states only that a Judge shall dissolve an order of temporary reinstatement if the Secretary's investigation reveals that the provisions of section 105(c)(1) of the Mine Act have not been violated. 29 CFR 2700.45(g). The rule further provides that an order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3). Id.

In the ANPRM, the Commission stated that it was considering whether to revise Rule 45 to codify the Review Commission's holding in *Sec'y of Labor on behalf of York* v. *BR&D Enterprises, Inc.*, 23 FMSHRC 386, 388–89 (Apr. 2001), that a Commission Judge retains jurisdiction over a temporary reinstatement proceeding pending issuance of a final Commission order on the underlying complaint of discrimination. 69 FR at 62634. All commenters agreed with the suggested change.

In B*R&D Enterprises, Inc.*, the Review Commission noted that section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2), provides for the temporary reinstatement of a miner ''pending final order on the complaint,'' and that Commission Procedural Rule 45(g), 29 CFR 2700.45(g), states that if the Secretary determines there was no section 105(c)(1) violation, the Judge ''shall enter an order dissolving'' the reinstatement order. 23 FMSHRC at 388–89. The Review Commission interpreted this language to mean that the Judge retains jurisdiction over the temporary reinstatement proceeding during the investigation and adjudication of the formal discrimination complaint. *Id.* at 389. Moreover, the Review Commission also noted that under Rule 45(f), its jurisdiction over a temporary reinstatement proceeding is very limited, and concluded that when the parties do not appeal the Judge's reinstatement order, the Judge retains sole jurisdiction. *Id.*

Thus, a temporary reinstatement order remains in effect until 40 days after the Judge issues a decision on the merits of the discrimination complaint if the decision is not appealed to the Review Commission. *See* 30 U.S.C. 823(d)(1). If either party to a discrimination proceeding appeals the Judge's decision in the discrimination proceeding to the Review Commission, the temporary reinstatement order remains in effect while the Review Commission considers

the Judge's decision, and until such time that the Review Commission's decision becomes final and non-appealable. *See Sec'y of Labor on behalf of Bernardyn* v. *Reading Anthracite Co.*, 21 FMSHRC 947, 949 (Sept. 1999) (construing sections 105(c)(2) and 113(d)(1) of the Mine Act, 30 U.S.C. 823(d)(1), as prohibiting a Judge from dissolving a temporary reinstatement order upon issuing a decision dismissing a discrimination complaint and holding that the temporary reinstatement order remains in effect while the Review Commission considers the Judge's decision).

Accordingly, the Commission proposes to revise Commission Procedural Rule 45(e) by inserting a statement explaining that the Judge's order temporarily reinstating a miner is not a final decision within the meaning of 29 CFR 2700.69 and that the Judge shall retain jurisdiction over a temporary reinstatement proceeding except during Review Commission or court review of the Judge's order of temporary reinstatement.

Effect of section 105(c)(3) action on temporary reinstatement order. The Secretary submitted a comment in which she suggests that Rule 45(g) be amended to provide that once temporary reinstatement is ordered, absent agreement of the parties, the order of temporary reinstatement shall remain in effect until there is a final decision on the merits of the miner's complaint of discrimination even when the Secretary determines that there was no violation of section 105(c) of the Mine Act. The Secretary explains that the current language of 29 CFR 2700.45(g) suggests that if, after temporary reinstatement has been ordered, the Secretary determines not to proceed on the complaint of discrimination under section 105(c)(2) of the Act, but the miner files a complaint of discrimination under section 105(c)(3), the order of reinstatement should be dissolved. The Secretary contends that such a result is at odds with the meaning of section 105(c)(2). The Secretary reads section 105(c)(2) to require that the temporary reinstatement order remain in effect until the underlying discrimination complaint is resolved regardless of whether the complaint of discrimination is litigated by the Secretary under section 105(c)(2) of the Act or whether it is litigated by the miner under section 105(c)(3) of the Act.

The Secretary raises the issue of whether a temporary reinstatement order remains in effect during a miner's pursuit of his or her discrimination complaint before the Commission under section 105(c)(3). To date, the Review Commission has not decided this issue. The Commission believes that the issue of statutory interpretation raised by the Secretary's comment is more appropriately addressed in the context of litigation rather than rulemaking. Accordingly, the Commission declines proposing to revise Commission Procedural Rule 45(g) in the manner suggested by the Secretary at this time.

Time computation. As discussed in the section above regarding 29 CFR 2700.8, the Commission does not intend the proposed rule revisions regarding time computation to affect the filing and service requirements of temporary reinstatement proceedings currently set forth in 29 CFR 2700.45. Accordingly, the Commission proposes that Commission Procedural Rule 45 be amended to reflect time periods in ''business'' days when the time period described for action is less than 7 days, and ''calendar'' days when the time period prescribed is 7 or more days. This proposed change would maintain the time frames currently provided in 29 CFR 2700.45.

Subpart G—Hearings

Amendment of Pleadings

The Commission received two comments suggesting that the Commission adopt a rule limiting the amendment of pleadings by the Secretary. The Commission has determined that the comments raise an issue which falls within the sound discretion of the Commission's judges. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (setting forth guidance in the exercise of discretion regarding amendment of pleadings). Accordingly, the Commission has determined that the issue should be determined on a case-by-case basis and declines to propose adopting a rule regarding the amendment of pleadings.

29 CFR 2700.51 and 2700.54

Commission Procedural Rule 54 currently provides in part that written notice of the time, place, and nature of a hearing shall be given to all parties at least 20 days before the date set for hearing. 29 CFR 2700.54. In the ANPRM, the Commission stated that it was considering whether Rule 54 should be revised to require a Judge to consult with all parties before setting a date for hearing. 69 FR at 62634.

The comments received by the Commission favor imposing a requirement that a Judge confer with the parties before establishing a hearing date. The comments note that when hearing dates are set ex parte, one or both parties must often move for a continuance to avoid schedule conflicts. The Secretary adds that the requirement to confer should be extended to the choice of a hearing site, while another commenter suggests at least 45 days' notice of a hearing should be required. Another commenter suggests that Judges should be required to hold the hearing without undue delay, and that a time frame within which the hearing must be held should be established.

The Commission believes that establishing a time within which hearings must be held is not necessary at this time. In practice, a hearing date is typically set within 45–90 days after the case has been assigned. Later dates may be established with the agreement of the parties. Under the current and proposed rules, any party would be free to request or move for an expedited hearing in appropriate cases, pursuant to 29 CFR 2700.52.

Many of the Commission's Judges confer with parties before setting a hearing in all cases, and others confer in certain types of cases, e.g., where discovery has been initiated and/or the case appears complex. Experience has revealed that requiring Judges to confer with parties prior to setting a hearing date may result in undue delay in situations in which it is difficult to contact a party or a party's representative. For instance, difficulties can sometimes arise in contacting pro se parties or operators of seasonal or intermittent mining operations during periods when those facilities are not in operation.

The Mine Act requires that hearings before the Commission's Judges be held pursuant to 5 U.S.C. 554 (the APA). 30 U.S.C. 815(c), (d). The APA requires that in ''fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.'' 5 U.S.C. 554(b).

Commission Procedural Rule 51 currently provides in part that a Judge shall give due regard to the convenience and necessity of parties or their representatives and witnesses in setting a hearing site. 29 CFR 2700.51. The Commission proposes that Rule 51 should be revised to explicitly require a Judge to consider the convenience of parties or their representatives and witnesses in setting the hearing date and site.

29 CFR 2700.56(d) and (e)

Commission Procedural Rule 56(d) sets forth a time for initiating discovery, providing in part that ''[d]iscovery shall be initiated within 20 days after an answer to a notice of contest, an answer

to a petition for assessment of penalty, or an answer to a complaint under section[s] 105(c) or 111 of the Act has been filed.'' 29 CFR 2700.56(d), *citing* 30 U.S.C. 815(c) and 821. Commission Procedural Rule 56(e) sets forth a time for completing discovery, providing that ''[d]iscovery shall be completed within 40 days after its initiation.'' 29 CFR 2700.56(e).

In the ANPRM, the Commission stated that it was considering whether there should be no specific time frame for initiating discovery, and whether 40 days is too short a period of time for the completion of discovery. 69 FR at 62634.

The comments received by the Commission favor eliminating the present rules' specific time periods for commencing and completing discovery, and suggest substituting language providing that discovery not cause undue delay and that it be completed 30 days in advance of a hearing. Several comments note that the present time frames are outmoded and, if enforced, would require initiation of potentially costly and burdensome discovery before settlement options could be explored. Several also note that a specific provision should be added allowing the Judge to permit discovery within the 30-day period prior to the hearing for good cause shown.

The Commission proposes amending Commission Procedural Rule 56 to permit discovery to begin with the filing of a responsive pleading and requiring that it be completed 20 days in advance of a scheduled hearing. The Commission believes that the 20-day period, combined with a general provision that discovery not unduly delay or otherwise impede disposition of the case, will assure that discovery be completed in time to allow the filing of comprehensive prehearing statements and full presentation of the case.

29 CFR 2700.61 and 2700.62

Commission Procedural Rule 61 currently provides that a ''Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.'' 29 CFR 2700.61. Commission Procedural Rule 62 currently states that a ''Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness.'' 29 CFR 2700.62.

The Commission received two comments suggesting that the Commission should modify Rule 62 to require disclosure of the names of miner witnesses, along with any documents containing statements by the miner witnesses, at the time of the filing of a prehearing statement or no later than 15 days before a scheduled hearing. The commenters suggest that the 2-day period precludes proper preparation for hearing. The commenters further state that the Commission should also modify Rule 61 to provide that the Secretary cannot rely upon evidence from miner informants without providing the names of these informants and the substance of their testimony to the operator 15 days before the hearing.

The Commission has concluded that extending the time period for identifying anticipated miner witnesses from 2 days to 15 days before the start of a hearing, as suggested, would unacceptably weaken the protection afforded to miners under Rules 61 and 62. In the majority of cases, an operator will be able to independently depose miners who might be witnesses well in advance of the trial and therefore will not be harmed by the 2-day limitation. In most instances, the universe of potential witnesses, i.e., those with knowledge of the facts of a violative condition or an accident, is generally limited, and the operator will know who has knowledge of the facts of the alleged violation. If the potential miner informant/witness is an employee, the operator will be able to easily contact the employee for purposes of arranging a deposition. Moreover, the identification of miner witnesses, who may also be informants, 15 days in advance of a hearing would not be necessary to ensure the operator a fair trial in circumstances in which a hearing is continued to a later date or eliminated altogether for unrelated reasons.

The Commission's Judges have indicated that they generally have not experienced problems applying Commission Procedural Rules 61 and 62 and have been able to balance the interests of all parties under the current rules. Because the 2-day period set forth in Rule 62 refers to 2 business days, under current Rule 8 and its proposed revisions, the operator also may use weekend days contiguous to the 2-day period for depositions of miner witnesses. In any event, should there be an occasion where the late identification of a miner witness or the late discovery of the scope of his testimony causes prejudice to the operator, the operator can request a continuance in order to have time to adequately prepare for the hearing. Accordingly, the Commission has determined that it is not appropriate to propose revisions to Commission Procedural Rules 61 and 62 at this time.

29 CFR 2700.63(a)

Commission Procedural Rule 63(a) currently provides that ''[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.'' 29 CFR 2700.63(a). The Commission received two comments suggesting that the Commission modify its rule to require that hearsay evidence be supported by some evidence of reliability in order to be admissible.

Under Commission precedent, hearsay evidence is admissible in proceedings before the Commission's Judges as long as the evidence is ''material and relevant.'' *Kenny Richardson,* 3 FMSHRC 8, 12 n.7 (Jan. 1981), *aff'd,* 689 F.2d 632 (6th Cir. 1982), *cert. denied,* 461 U.S. 928 (1983). Hearsay evidence can constitute substantial evidence supporting a Judge's decision only if that evidence ''is surrounded by adequate indicia of probativeness and trustworthiness.'' *Mid-Continent Res., Inc.,* 6 FMSHRC 1132, 1135–36 (May 1984) (citations omitted). The Commission has determined that its precedents sufficiently address the commenters' concerns, and that rulemaking on the issue is not warranted at this time.

29 CFR 2700.67

Commission Procedural Rule 67(a) currently provides that ''[a]t any time after commencement of a proceeding and no later than 10 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding.'' 29 CFR 2700.67(a).

In the ANPRM, the Commission stated that it was considering whether the filing deadline for a summary decision motion should be changed from 10 days to 20 or 30 days before the hearing, allowing the Judge a greater period of time to rule on the motion. 69 FR at 62634.

Most of the comments received by the Commission support changing the time period for filing a motion for summary decision from 10 days to 20 days before the hearing date. The Secretary and another commenter favor increasing the time period to 30 days. That commenter further suggests adding a requirement that the Judge rule on the motion at least 10 days before the hearing.

An appropriate deadline for filing a motion for summary decision prior to a hearing must be considered in light of other rule provisions governing filing and time computation. Under the

present rules, which provide that filing is effective upon mailing (29 CFR 2700.5(d)), a party has 10 days to respond to a motion (29 CFR 2700.10(d)), and an additional 5 days is added to that time when the motion is served by mail (29 CFR 2700.8). Consequently, a party could file by mail a motion for summary decision 10 days prior to a hearing, and the opposition would not have to be filed by mail until 5 days after commencement of the hearing.

The Commission proposes amending Commission Procedural Rule 67(a) to ensure adequate time for a Judge to review the motion and the opposition, and to make an informed decision as to whether a hearing will be necessary. The Commission believes that a time period of 25 days should be sufficient, provided that proposed Commission Procedural Rule 67(a) also specifies that the filing of such motions and responses would be effective upon receipt. Additional language allowing motions and oppositions to be filed and served by fax is no longer required in light of the proposed amendments to Commission Procedural Rule 5 providing that most documents can be filed and served by facsimile. Pursuant to 29 CFR 2700.9, a party may request an extension of time if it is unable to meet the deadline for filing a motion for summary decision.

The Commission further finds unnecessary at this time a requirement that the motion be decided by a time certain. Under the proposed rule, the Judge may not have the opposition until approximately 10 days before the hearing. Such a time period should be sufficient to allow the Judge to make an informed determination of whether to cancel, postpone, or go forward with the hearing, without inconveniencing the parties. Requiring a decision on the motion 10 days prior to hearing, as a commenter suggested, would not in all instances allow the Judge sufficient time to prepare the decision.

29 CFR 2700.69

Commission Procedural Rule 69(c) sets forth the procedure for the correction of clerical errors in a Judge's decision. 29 CFR 2700.69(c). It provides that, at any time before the Review Commission has directed review of a Judge's decision, a Judge may correct clerical errors on his/her own motion, or on the motion of a party. *Id.* After the Review Commission has directed review of the Judge's decision or after the Judge's decision has become the final order of the Commission, the Judge may correct clerical errors with the leave of the Review Commission. *Id.*

In the ANPRM (69 FR at 62634), the Commission stated that it was considering inserting a provision which would make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR of the Judge's decision on the merits. *See Earl Begley,* 22 FMSHRC 943, 944 (Aug. 2000).

Most of the comments received by the Commission favor making the change described in the ANPRM. The Secretary, however, states that a Judge's authority to correct decisions should be ''expanded'' in the rule to include errors that result from oversight or omission, and that such a corrected decision be separately appealable.

The Commission believes that it is inadvisable to make the change suggested by the Secretary. Broadening a Judge's authority to alter or amend a decision to cover more substantive changes, like those addressed under Fed. R. Civ. P. 59(e) and 60(a), could create questions involving finality and appealability that could result in a delay in Commission proceedings. Accordingly, the Commission proposes to amend Commission Procedural Rule 69(c) to make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR.

Finally, as described in the section-by-section analysis of 29 CFR 2700.5 and 2700.72, the Commission proposes adding Commission Procedural Rule 69(d) to clarify that Judges' decisions are not binding precedent upon the Commission.

Subpart H—Review by the Commission

29 CFR 2700.70(h)

Commission Procedural Rule 70(h) currently provides that a petition for discretionary review that is not granted within 40 days after the issuance of a Judge's decision is deemed denied. 29 CFR 2700.70(h).

In the ANPRM, the Commission stated that it was considering making explicit its present practice under the rule that the Review Commission may act on a PDR on the 1st business day following the 40th day after a Judge's decision, where the 40th day would otherwise fall on a weekend or federal holiday. 69 FR at 62634.

As discussed in the section above regarding 29 CFR 2700.8, the Commission has determined that it need not clarify in Commission Procedural Rule 70 that the Review Commission may act on a PDR on the next day that the Commission's offices are open if the Commission's offices are closed on the 40th day. The changes that the Commission has proposed with respect to Commission Procedural Rule 8 sufficiently clarify the Review Commission's authority in this respect.

29 CFR 2700.72

As noted above in the section-by-section analysis of 29 CFR 2700.5, the Commission proposes deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use. Presently, Commission Procedural Rule 72 provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR at 62634.

The Commission proposes including in Commission Procedural Rule 5 a requirement that citations to a Judge's decision shall include ''(ALJ)'' at the end of the citation. In addition, the Commission proposes adding to Commission Procedural Rule 69 a provision stating that all Judge's decisions are not binding precedent upon the Commission.

29 CFR 2700.75

As noted above in the section-by-section analysis regarding 29 CFR 2700.5, the Commission is proposing to revise Commission Procedural Rule 5 to require that fewer copies be filed. The Commission proposes to make conforming changes to 29 CFR 2700.75(g) which require that each party shall file the original and six copies of its brief with the Review Commission, or if the party is not represented by a lawyer, it need file only the original document.

In addition, the Commission proposes adding a new paragraph (h) to Commission Procedural Rule 75 requiring a table of contents for opening and response briefs filed with the Review Commission. The Commission suggests that a table of contents in opening and response briefs would be helpful to the Review Commission and parties, particularly in lengthy briefs involving multiple issues. As provided in current Commission Procedural Rule 75(c), the table of contents would be excluded from the page limit allowed for such briefs. 29 CFR 2700.75(c).

29 CFR 2700.76

Commission Procedural Rule 76 currently sets forth the procedure for interlocutory review by the Commission. 29 CFR 2700.76. The rule provides for the simultaneous filing of briefs within 20 days of the order

granting interlocutory review. 29 CFR 2700.76(c). While the rule specifies that the Review Commission's consideration is confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review (29 CFR 2700.76(d)), there is no description of what constitutes the record on interlocutory review. In the ANPRM, the Commission stated that it was considering whether Commission Procedural Rule 76 should be revised to state what constitutes the record on interlocutory review. 69 FR at 62634.

A few commenters support amending the rule to clarify what constitutes the record on interlocutory review, while others state that such a change is unnecessary. The Secretary further suggests that Commission Procedural Rule 76 should be revised to provide for the filing of briefs seriatim, and that the party seeking review should be permitted to file a reply brief.

Since the ANPRM was published, the Commission has improved its internal processes to better provide the Review Commission with the record on interlocutory review in the event the parties do not supply the Commission with all the relevant record excerpts. Because the changes in the Commission's internal processes will not impose any additional or different requirements upon parties, the Commission has determined that it need not revise Commission Procedural Rule 76 to describe what constitutes the record on interlocutory review.

Furthermore, the Commission agrees with the Secretary that there may be occasions when it is useful for parties to file briefs seriatim or for the filing party to have the opportunity to file a reply brief. However, the Commission believes that the briefing schedule for interlocutory appeals is best determined on a case-by-case basis. Accordingly, the Commission proposes substituting for the rule's current briefing requirements, language stating that when the Commission grants interlocutory review, it will also issue an order addressing the sequence and timing of briefs, including any reply briefs.

29 CFR 2700.78

Commission Procedural Rule 78(b) currently provides in part that, unless the Review Commission orders otherwise, the filing of a petition for reconsideration does not stay the effect of a Review Commission decision and does not affect the finality of a decision for purposes of review in the courts. 29 CFR 2700.78(b). In the ANPRM, the Commission stated that it was considering whether it should revise Rule 78 to state that the filing of a petition for reconsideration tolls the time period for filing an appeal for judicial review until the Review Commission has issued an order disposing of the petition for reconsideration. 69 FR at 62634.

Some commenters do not support revising the rule, stating that judicial review would simply be delayed, given the unlikelihood that the Review Commission would grant a petition for reconsideration, or that the revision could encourage parties to file petitions for reconsideration in order to delay court review, with the result being an increase in the duration of Commission proceedings. Another commenter supports the revision on the ground that it may help avoid unnecessary court review and expedite final resolution. The Secretary supports the revision on the ground that it would make the Commission's rules consistent with the decisions of federal courts of appeal on the question.

The terms of Commission Procedural Rule 78(b) date from the Commission's inception and were carried over without change from the procedural rules promulgated by the Interior Department's Board of Mine Operations Appeals. *See* 43 CFR 4.604 (1977); 43 FR 10320, 10327, Mar. 10, 1978 (Interim Procedural Rules).

Courts have interpreted petition for reconsideration provisions to preclude court review while a petition for reconsideration before the agency is pending. *See, e.g., United Transportation Union* v. *ICC,* 871 F.2d 1114, 1116–18 (D.C. Cir. 1989) (''*UTU*''); *West Penn Power Co.* v. *EPA,* 860 F.2d 581, 585 (3d Cir. 1988). Courts have reasoned that court review should be so precluded in order to prevent the waste of judicial resources and consideration of questions that may be disposed of by the agency when acting upon a reconsideration request. *See UTU,* 871 F.2d at 1116–18 (discussing rationale of the different courts addressing the issue).

The Commission believes that it is appropriate to revise Commission Procedural Rule 78(b) to conform more closely with such precedent. The Commission considers it inadvisable, however, to insert a statement that filing a petition for reconsideration tolls the time period for filing an appeal for judicial review. Such an insertion may lead to the misperception that a Review Commission decision that is the subject of petition for reconsideration is non-final with respect to even those parties who did not petition for reconsideration. Courts have determined that a pending reconsideration request at the administrative level does not make the underlying decision non-final for parties who do not seek administrative reconsideration. *ICG Concerned Workers Ass'n* v. *United States,* 888 F.2d 1455 (D.C. Cir. 1989). Consequently, the Commission proposes deleting the present language that the filing of a petition for reconsideration with the Review Commission shall not affect the finality of a decision or order for purposes of judicial review and otherwise leaving to the courts the determination of the extent to which court review will proceed while a petition for reconsideration is before the Review Commission.

Subpart I—Miscellaneous

29 CFR 2700.80

Commission Procedural Rule 80(a) presently provides that ''[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.'' 29 CFR 2700.80(a). In the ANPRM, the Commission stated that it was considering revising Rule 80(a) to clarify that certain ethical conduct is required of individuals practicing before the Review Commission or before its Judges. 69 FR at 62634. The Commission did not receive any objections to the suggested revision.

Commission Procedural Rule 80(a) can be literally read to cover: (a) individuals practicing before the Review Commission; *and* (b) Commission Judges. Rule 80, however, is intended to be directed only at individuals practicing before the Review Commission or practicing before Commission Judges. Rule 80(c)(1), in discussing the disciplinary referral that initiates the disciplinary proceeding for alleged violations of the standard of conduct described in Rule 80(a), mentions forwarding such a referral only against ''an individual who is practicing or has practiced before the Commission.'' 29 CFR 2700.80(c)(1). Moreover, other Commission rules explicitly impose standards of conduct upon Judges. *See* 29 CFR 2700.81 (recusal and disqualification); 29 CFR 2700.82 (ex parte communications). Consequently, the Commission proposes revising Rule 80(a) to clarify that certain ethical conduct is required of individuals practicing before the Review Commission or before Commission Judges.

B. Part 2704—Implementation of the Equal Access to Justice Act in Commission Proceedings

Interplay of Parts 2700 and 2704

Experience under the agency's EAJA rules of procedure has highlighted procedural matters in Commission EAJA proceedings that are governed by the Commission's rules of procedure in 29 CFR part 2700. Issues including scope of review by the Review Commission once review has been granted (29 CFR 2700.70(g)); motion practice (29 CFR 2700.10); and standards of conduct (29 CFR 2700.80); for example, are not separately covered in the Commission's EAJA rules. These rules stand in contrast to other rules in part 2700 that clearly are applicable only to Mine Act proceedings, such as 29 CFR 2700.25 (proposed penalty assessments). Therefore, the Commission proposes to revise its EAJA rule at 29 CFR 2704.100 to clarify that its rules of procedure at part 2700 apply to EAJA proceedings where appropriate.

Eligibility for Fees

In *Colorado Lava, Inc.*, 27 FMSHRC 186, 188–95 (Mar. 2005), the Review Commission ruled unanimously that only non-prevailing parties may be eligible for fees under the ''excessive and unreasonable demand'' prong of EAJA and the Commission's regulations implementing it. As currently written, the Commission's regulations are silent as to whether prevailing parties may obtain fees under this provision. The Commission proposes to clarify these rules and to revise 29 CFR 2704.100, 2704.104, 2704.105, and 2704.206 to make it clear, consistent with its decision in *Colorado Lava*, that only non-prevailing parties may be awarded fees under EAJA's ''excessive and unreasonable demand'' provision.

Aggregation of Assets and Employees of Prevailing Parties

Commission EAJA Rule 104(b)(2) presently provides for the aggregation of net worth and employees of the affiliates of a prevailing party to determine eligibility for an EAJA award. 29 CFR 2704.104(b)(2). The Commission received one comment suggesting that the Commission rescind this rule because there was no statutory basis for this treatment of prevailing parties. The Commission's rule is consistent with the vast majority of federal agency regulations addressing this question. However, after consideration of the issue, the Commission has concluded that it will entertain further comments on whether it should repeal the rule. The Commission requests that, in particular, commenters focus their attention on judicial and administrative developments since the Commission's last revision of its EAJA rules in 1998. (*See Tri-State Steel Construction Co.* v. *Herman*, 164 F.3d 973 (6th Cir. 1999), and 70 FR 22785, 22787, May 3, 2005).

Hourly Rate

Commission EAJA Rule 106(b) currently provides that the award for the fee of an attorney or agent to those parties who are successful on EAJA claims may not exceed $125 per hour, except as provided in 29 CFR 2704.107. 29 CFR 2704.106(b). The Commission received one comment recommending that the Commission amend the rule to provide for an automatic increase in the $125 hourly rate. The Commission has considered the recommendation but determined no change is presently necessary because no party has sought an increase in the present rate for attorney's fees since the rule was revised in 1998. Further, the Commission notes that 29 CFR 2704.107(a) allows parties to petition the Review Commission or its Judges for a higher rate.

Standards for Awards

Commission EAJA Rule 105(b) presently provides that a non-prevailing party may establish that the Secretary's demand is excessive when compared to the Commission's decision and that the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to the decision. 29 CFR 2704.105(b). The Commission received a comment that Rule 105(b) improperly places the burden of proof on EAJA applicants to show that the Secretary's demand is both excessive and unreasonable. The Commission concluded that Commission EAJA Rules 105(b) and 203(a) require that the EAJA applicant ''show'' that the Secretary's demand is excessive, while the Secretary can only avoid an award by establishing that the demand is not unreasonable when compared to the Commission's decision. 29 CFR 2704.203(a). Contrary to the commenter's suggestion, the rule does not require the applicant to prove that the penalty is unreasonable. Further, experience under the rules has not indicated any change to the pleading requirements is necessary. *See L&T Fabrication & Constr., Inc.*, 22 FMSHRC 509, 514 (Apr. 2000).

Automatic Stay of Proceedings

Commission EAJA Rule 206(b) currently provides that if review or reconsideration is sought or taken of a decision on the merits, EAJA proceedings shall be stayed pending final disposition of the underlying case. 29 CFR 2704.206(b). The Secretary submitted a comment stating that generally she files a motion for stay in these circumstances, and that the stay is routinely granted. The Secretary suggests that the Commission revise Commission EAJA Rule 206(b) to provide that the stay of EAJA proceedings is automatic, which will make the filing of such motions unnecessary.

The Commission has carefully considered the Secretary's suggestion. The Commission believes that the issuance of an order in response to a motion creates certainty as to the procedural posture of a case. The absence of a stay order could lead to uncertainty among the parties, particularly those unfamiliar with the Commission's procedures. The advantage of certainty among the parties is not outweighed by the minimal hardship imposed on the Secretary when she is required to file a stay motion. The Commission consequently concludes that a stay in such circumstances should not be automatic and that Commission EAJA Rule 206(b) should not be revised in the manner suggested by the Secretary.

EAJA Application Deadline

Commission EAJA Rule 206(a) requires that an application be filed no later than 30 days after the Commission's final disposition of the underlying proceeding (or 30 days after a final and nonappealable court judgment in a Commission case). 29 CFR 2704.206(a). Commission EAJA Rule 206(c) currently defines ''final disposition'' as the date on which a case on the merits becomes final pursuant to sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. 815(d) and 823(d). 29 CFR 2704.206(c). As currently written, it is not clear whether this term means ''final and not appealable.''

Two circuit court cases that have addressed the question of EAJA application filing deadlines have ruled that an EAJA application is due 30 days following the expiration of the time for an appeal on the merits—that is, the time for appeal must lapse or the appeal be completed before the 30-day deadline begins to run. *See Scafar Contracting, Inc.* v. *Sec'y of Labor*, 325 F.3d 422 (3d Cir. 2003); *Adams* v. *SEC*, 287 F.3d 183 (D.C. Cir. 2002). The Commission proposes to amend the definition of ''final disposition'' in Commission EAJA Rule 206(c) to clarify that it means the date on which a decision or order on the merits becomes final and unappealable.

Effect of Stay on Filing Answer

Commission EAJA Rule 302(a), as currently worded, sets forth time frames for the filing of an answer in an EAJA proceeding without taking into account the possible existence of a stay. 29 CFR 2704.302(a). The Commission received a comment from the Secretary stating that the Commission should consider revising this rule to address the interplay of Commission EAJA Rule 206(b), 29 CFR 2704.206(b) (providing for a stay of EAJA proceedings under certain circumstances) and the 30-day requirement for answering the EAJA application. The Secretary suggests that the Commission should revise its rules to require that the Secretary file an answer within 30 days after service of an application unless the matter has been stayed under Rule 206(b), in which case the Secretary must file an answer within 30 days after the expiration of the stay. The Commission agrees with the Secretary that the interplay between Commission EAJA Rule 302(a) and the stay provisions in Rule 206(b) should be addressed. The Commission believes it appropriate to amend Rule 302(a), which provides guidance regarding the filing of an answer.

C. Part 2705—Privacy Act Implementation

29 CFR 2705.1

Privacy Act Rules and the Commission's Case Files Under the Mine Act

As part of the Commission's plenary review of its rules following publication of the ANPRM, the Commission has examined its practices under the Privacy Act of 1974, 5 U.S.C. 552a (2000), to determine whether any revisions to its rules were necessary. The Commission's statutory obligation to treat files that pertain to its personnel under the Privacy Act has long been recognized. In addition, there are circumstances arising under the Mine Act when a case adjudicatory file may bear the name of an individual. These situations include miner discrimination complaints under 30 U.S.C. 815(c); violations involving operators that do business as sole proprietorships; violations involving individual directors, owners, or officers under 30 U.S.C. 820(c); violations involving miners for carrying smoking materials under 30 U.S.C. 820(g); and persons charged with giving advance notice of mine inspections under 30 U.S.C. 820(e). While these files are retrievable by a ''personal identifier,'' one of the criteria for coverage under the Privacy Act, it is not apparent that files generated in Mine Act enforcement proceedings are ''records'' within the meaning of the Privacy Act. Accordingly, the Commission proposes to add a sentence to 29 CFR 2705.1 to clarify that the Commission's Privacy Act rules do not apply to its files generated under the Mine Act.

Miscellaneous

Electronic Filing

In the ANPRM, the Commission stated that it was considering the feasibility of electronic filing and may consider initiating a program that would permit the electronic filing of limited categories of documents in proceedings on a voluntary basis. 69 FR at 62634. Most commenters support the electronic filing of Commission documents.

The Commission will continue its consideration of the feasibility of electronic filing separately from the subject rulemaking in order to avoid any potential delay in the revision of the Commission's rules. If the Commission determines that electronic filing is feasible, the Commission will amend its rules as necessary.

III. Matters of Regulatory Procedure

The Commission has determined that these rules are not subject to the Office of Management and Budget (''OMB'') review under Executive Order 1286, 58 FR 51735, Sept. 30, 1993.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that these rules, if adopted, would not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

List of Subjects

29 CFR Part 2700

Administrative practice and procedure, Lawyers, Penalties.

29 CFR Part 2704

Administrative practice and procedure, Equal access to justice, Claims.

29 CFR Part 2705

Privacy.

For the reasons stated in the preamble, it is proposed to amend 29 CFR parts 2700, 2704, and 2705 as follows:

PART 2700—PROCEDURAL RULES

1. The authority citation for part 2700 continues to read as follows:

Authority: 30 U.S.C. 815, 820, and 823.

2. In § 2700.1, revise paragraphs (a) and (b) to read as follows:

§ 2700.1 Scope; applicability of other rules; construction.

(a) *Scope.* This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission (''the Commission'') and its Administrative Law Judges. The Commission is an adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (''the Act''). The Commission is an independent agency, not a part of nor affiliated in any way with the U.S. Department of Labor or its Mine Safety and Health Administration (''MSHA''). The Commission's headquarters are at 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; its primary phone number is 202–434–9900; and the fax number of its Docket Office is 202–434–9954. The Commission maintains a Web site at *http://www.fmshrc.gov* where these rules, recent and many past decisions of the Commission and its Judges, and other information regarding the Commission, can be accessed.

(b) *Applicability of other rules.* On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

* * * * *

3. In § 2700.5, redesignate paragraphs (d), (e), (f), and (g) as (e), (f), (g), and (i); revise newly redesignated paragraphs (e), (f), and (g); and add new paragraphs (d) and (h), to read as follows:

§ 2700.5 General requirements for pleadings and other documents; status or informational requests.

* * * * *

(d) *Privacy considerations.* Persons submitting information to the Commission shall protect information that tends to identify certain individuals or tends to constitute an unwarranted intrusion of personal privacy in the following manner:

(1) All but the last four digits of social security numbers, financial account numbers, driver's license numbers, or other personal identifying numbers, shall be redacted or excluded;

(2) Minor children shall be identified only by initials;

(3) If dates of birth must be included, only the year shall be used;

(4) Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.

(e) *Manner and effective date of filing.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be filed with a Judge or the Commission by any means of delivery a party chooses, including facsimile transmission. With the exception of documents filed pursuant to Rule 70 (Petitions for discretionary review), Rule 45 (Temporary reinstatement proceedings), or Subpart F (Applications for Temporary Relief), documents filed by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. Parties filing by facsimile are also required to file the original document with the Judge or Commission within 3 days of the facsimile transmission.

(2) When filing is by personal delivery or facsimile, filing is effective upon successful receipt by the Commission. When filing is by mail, filing is effective upon mailing, except that the filing of a petition for discretionary review, a petition for review of a temporary reinstatement order, a motion for extension of time, a motion for summary decision, and a motion to exceed page limit is effective upon receipt. *See* §§ 2700.9(a), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f).

(f) *Number of copies.* In cases before a Judge, unless otherwise ordered, the original document, along with one copy for each docket, shall be filed; in cases before the Commission, the original and six copies shall be filed; but if the filing party is not represented by a lawyer, the original shall be sufficient. When filing is by facsimile transmission, the original must be filed with the Judge or Commission within 3 days of the facsimile transmission, but no additional copies should be filed.

(g) *Form of pleadings.* All printed material shall appear in at least 12-point type on paper 8½ by 11 inches in size, with margins of at least 1 inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph or the use of compacted or otherwise compressed printing features will be grounds for rejection of a pleading.

(h) *Citation to a decision of a Judge.* Each citation to a decision of a Judge shall include ''(ALJ)'' at the end of the citation.

* * * * *

4. In § 2700.7, revise paragraph (c) to read as follows:

§ 2700.7 Service.

* * * * *

(c) *Methods of service.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be served by any means of delivery a party chooses, including facsimile transmission. With the exception of documents served pursuant to Rule 70 (Petitions for discretionary review), Rule 45 (Temporary reinstatement proceedings), or Subpart F (Applications for Temporary Relief), documents served by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. When filing by facsimile transmission (*see* § 2700.5(e)), the filing party must also serve by facsimile transmission or, if service by facsimile transmission is impossible, the filing party must serve by a third-party commercial overnight delivery service or by personal delivery.

(2) When service is by personal delivery or facsimile, service is effective upon successful receipt by the party intended to be served. When service is by mail, service is effective upon mailing.

* * * * *

5. Revise § 2700.8 to read as follows:

§ 2700.8 Computation of time.

Except to the extent otherwise provided herein (see, *e.g.*, § 2700.45), the due date for a pleading or other deadline for party or Commission action (hereinafter ''due date'') is determined sequentially as follows:

(a) When the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and federal holidays shall be excluded in determining the due date.

(b) When a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days beyond the date otherwise prescribed, after consideration of paragraph (a) of this section where applicable.

(c) The day from which the designated period begins to run shall not be included in determining the due date. The last day of the prescribed period for action, after consideration of paragraphs (a) and (b) of this section where applicable, shall be included and be the due date, unless it is a Saturday, Sunday, federal holiday, or other day on which the Commission's offices are not open or the Commission is open but unable to accept filings, in which event the due date shall be the next day which is not one of the aforementioned days.

Example 1: A motion is filed with the Commission on Friday, July 1, 2005. Under § 2700.10(d), other parties in the proceeding have 8 days in which to respond to the motion. Because the response period is less than 11 days, intervening weekends and holidays, such as Monday, July 4, 2005, are excluded in determining the due date. A response is thus due by Thursday, July 14, 2005. In addition, those parties not served with the motion on the day it was filed, such as by facsimile or messenger, have 5 additional calendar days in which to respond, or until Tuesday, July 19, 2005.

Example 2: A Commission Judge issues his final decision in a case on Friday, July 1, 2005. Under § 2700.70(a), parties have until July 31, 2005, to file with the Commission a petition for discretionary review of the Judge's decision. Even though the decision was mailed, 5 additional calendar days are not added, because paragraph (b) of this section only applies to actions in response to parties' pleadings. However, because July 31, 2005, is a Sunday, the actual due date for the petition is Monday, August 1, 2005.

6. In § 2700.9, revise paragraph (a) and add a new paragraph (c) to read as follows:

§ 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

(c) This rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Act, 30 U.S.C. § 823(d)(2)(A)(i), and § 2700.70(a).

7. In § 2700.10, revise paragraph (c) and the first sentence of paragraph (d) to read as follows:

§ 2700.10 Motions.

* * * * *

(c) Prior to filing any motion other than a dispositive motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.

(d) A statement in opposition to a written motion may be filed by any party within 8 days after service upon the party. * * *

8. Revise § 2700.26 to read as follows:

§ 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

9. In § 2700.28, revise paragraph (b) to read as follows:

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

* * * * *

(b) *Contents.* The petition for assessment of penalty shall:

(1) List the alleged violations and the proposed penalties. Each violation shall be identified by the number and date of the citation or order and the section of the Act or regulations alleged to be violated.

(2) Include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i).

(3) State whether the citation or order has been contested pursuant to § 2700.20 and the docket number of any contest proceeding.

(4) Advise the party against whom the petition is filed that he has 30 days to file an answer pursuant to § 2700.29 and that an answer to the petition must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment involved.

* * * * *

10. In § 2700.45, revise paragraph (a), the first and last sentences of paragraph (c), and paragraphs (e) and (f) to read as follows:

§ 2700.45 Temporary reinstatement proceedings.

(a) *Service of pleadings.* A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be expeditiously served on all parties, such as by personal delivery, including courier service, by express mail, or by facsimile transmission.

* * * * *

(c) *Request for hearing.* Within 10 calendar days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested. * * * If a hearing on the application is requested, the hearing shall be held within 10 calendar days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

* * * * *

(e) *Order on application.* (1) Within 7 calendar days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge.

(2) The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought.

(3) The parties shall be notified of the Judge's determination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(4) A Judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

(f) *Review of order.* Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned ''Petition for Review of Temporary Reinstatement Order,'' with supporting arguments, within 5 business days following receipt of the Judge's written order. The filing of any such petition is effective upon receipt. The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be filed within 5 business days following service of a petition. Pleadings under this rule shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery. The Commission's ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 calendar days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

* * * * *

11. Revise § 2700.51 to read as follows:

§ 2700.51 Hearing dates and sites.

All cases will be assigned a hearing date and site by order of the Judge. In fixing the time and place of the hearing, the Judge shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

12. In § 2700.52, revise the first sentence of paragraph (a) to read as follows:

§ 2700.52 Expedition of proceedings.

(a) *Motions.* In addition to making a written motion pursuant to § 2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties. * * *

* * * * *

13. In § 2700.56, revise paragraphs (d) and (e) to read as follows:

§ 2700.56 Discovery; general.

* * * * *

(d) *Initiation of discovery.* Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821.

(e) *Completion of discovery.* Discovery shall not unduly delay or otherwise impede disposition of the case, and must be completed at least 20 days prior to the scheduled hearing date. For good cause shown, the Judge may extend or shorten the time for discovery.

14. In § 2700.67, revise paragraph (a) to read as follows:

§ 2700.67 Summary decision of the Judge.

(a) *Filing of motion for summary decision.* At any time after commencement of a proceeding and no later than 25 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

* * * * *

15. In § 2700.69, add a new last sentence to paragraph (c) and add new paragraph (d) to read as follows:

§ 2700.69 Decision of the Judge.

* * * * *

(c) *Correction of clerical errors.* * * * Neither the filing of a motion to correct a clerical error, nor the issuance of an order or amended decision correcting a clerical error, shall toll the time for filing a petition for discretionary review of the Judge's decision on the merits.

(d) *Effect of decision of Judge.* A decision of a Judge is not a precedent binding upon the Commission.

16. In § 2700.70, revise the second sentence of paragraph (a) and paragraph (f) to read as follows:

§ 2700.70 Petitions for discretionary review.

(a) *Procedure.* * * * Filing of a petition for discretionary review is effective upon receipt. * * *

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

§ 2700.72 [Removed and reserved]

17. Remove and reserve § 2700.72.

18. In § 2700.75, revise paragraphs (f) and (g) and add new paragraph (h) to read as follows:

§ 2700.75 Briefs.

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(g) *Number of copies.* As provided in § 2700.5(e), each party shall file the original and six copies of its brief. If the filing party is not represented by a lawyer, the original shall be sufficient.

(h) *Table of contents.* Each opening and response brief filed with the Commission shall contain a table of contents. Unless otherwise ordered by the Commission, a party is not required to submit a table of contents for a previously filed petition for discretionary review that has been designated as the party's opening brief pursuant to paragraph (a) of this section.

19. In § 2700.76, revise paragraph (c) to read as follows:

§ 2700.76 Interlocutory review.

* * * * *

(c) *Briefs.* When the Commission grants interlocutory review, it shall also issue an order which addresses page limits on briefs and the sequence and schedule for filing of initial briefs, and, if permitted by the order, reply briefs.

* * * * *

20. In § 2700.78, revise paragraph (b) to read as follows:

§ 2700.78 Reconsideration.

* * * * *

(b) Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not stay the effect of a decision or order of the Commission.

21. In § 2700.80, revise paragraph (a) to read as follows:

§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

* * * * *

PART 2704—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN COMMISSION PROCEEDINGS

22. The authority citation for part 2704 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1); Pub. L. 99–80, 99 Stat. 183; Pub. L. 104–121, 110 Stat. 862.

23. Revise § 2704.100 to read as follows:

§ 2704.100 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration (''MSHA''), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission's general rules of procedure, part 2700 of this chapter, apply where appropriate.

24. In § 2704.104, revise paragraph (c) to read as follows:

§ 2704.104 Eligibility of applicants.

* * * * *

(c) For the purposes of awards for non-prevailing parties under § 2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 13 CFR part 121.

* * * * *

25. In § 2704.105, revise paragraph (b) introductory text to read as follows:

§ 2704.105 Standards for awards.

* * * * *

(b) If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision,

under the facts and circumstances of the case, the Commission shall award to an eligible applicant who does not prevail the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary's demand is substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to that decision. As used in this section, ''demand'' means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty—

* * * * *

26. In § 2704.206, revise the second sentence of paragraph (a) and paragraph (c) to read as follows:

§ 2704.206 When an application may be filed.

(a) * * * An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. * * *

* * * * *

(c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. 815(d) and 823(d)) and unappealable, both within the Commission and to the courts (pursuant to section 106(a) of the Mine Act (30 U.S.C. 816(a)).

27. In § 2704.302, revise the second sentence of paragraph (a) to read as follows:

§ 2704.302 Answer to application.

(a) * * * Unless counsel requests an extension of time for filing, files a statement of intent to negotiate under paragraph (b), or a proceeding is stayed pursuant to § 206(b), failure to file an answer within the 30-day period may be treated as a consent to the award requested.

* * * * *

PART 2705—PRIVACY ACT IMPLEMENTATION

28. The authority citation for part 2705 continues to read as follows:

Authority: 5 U.S.C. 552a; Pub. L. 93–579, 88 Stat. 1896.

29. In § 2705.1, republish the introductory text and revise paragraph (a) to read as follows:

§ 2705.1 Purpose and scope.

The purposes of these regulations are to:

(a) Establish a procedure by which an individual can determine if the Federal Mine Safety and Health Review Commission, hereafter the ''Commission,'' maintains a system of records which includes a record pertaining to the individual. This does not include Commission files generated in adversary proceedings under the Federal Mine Safety and Health Act; and

* * * * *

Dated: December 29, 2005.

Michael F. Duffy,

Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. 06–64 Filed 1–4–06; 8:45 am]

BILLING CODE 6735–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2005–ME–0006; A–1–FRL–8018–1]

Approval and Promulgation of Air Quality Implementation Plans; Maine; 15% and 5% Emission Reduction Plans, Inventories, and Transportation Conformity Budgets for the Portland One and Eight Hour Ozone Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve State Implementation Plan (SIP) revisions submitted by the state of Maine. These revisions establish a 15% VOC emission reduction plan, and revised 1990 base year emissions inventory, for the Portland Maine one-hour ozone nonattainment area. Additionally, these revisions establish a 5% increment of progress emission reduction plan, 2002 base year inventory, and transportation conformity budget for the Portland Maine eight-hour ozone nonattainment area. The intended effect of this action is to propose approval of these plans as revisions to the Maine SIP. This action is being taken under the Clean Air Act.

DATES: Written comments must be received on or before February 6, 2006.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID Number EPA–R01–OAR–2005–ME–0006 by one of the following methods:

1. Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the on-line instructions for submitting comments.

2. Agency Web site: *http://docket.epa.gov/rmepub/* Regional Material in EDocket (RME), EPA's electronic public docket and comment system, will be replaced by an enhanced federal-wide electronic docket management and comment system located at *http://www.regulations.gov*. On November 28, 2005, when that occurs, you will be redirected to that site to access the docket EPA–R01–OAR–2005–ME–0006 and submit comments. Follow the on-line instructions for submitting comments.

3. E-mail: *conroy.dave@epa.gov.*

4. Fax: 617–918–0661.

5. Mail: ''RME ID Number EPA–R01–OAR–2005–ME–0006'' David Conroy, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, Suite 1100 (mail code CAQ), Boston, MA 02114–2023.

6. Hand Delivery or Courier. Deliver your comments to: David Conroy, Manager, Air Programs Branch, Office of Ecosystem Protection, U.S. Environmental Protection Agency, EPA New England Regional Office, One Congress Street, 11th floor, (CAQ), Boston, MA 02114–2023. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30 excluding federal holidays.

Instructions: Direct your comments to Regional Material in EDocket (RME) ID Number EPA–R01–OAR–2005–ME–0006. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://docket.epa.gov/rmepub/* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through Regional Material in EDocket (RME), regulations.gov, or e-mail, information that you consider to be CBI or otherwise protected. The EPA RME website and