OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2200

Rules of Procedure

AGENCY: Occupational Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Occupational Safety and Health Review Commission (''OSHRC'' or ''Commission'') is making comprehensive revisions to the procedural rules governing practice before the Occupational Safety and Health Review Commission.

DATES: These revised rules will take effect on June 10, 2019. They apply to all cases docketed on or after that date. They also apply to proceedings in cases pending on that date, except to the extent that their application would be infeasible or would work an injustice, in which event the present rules apply.

FOR FURTHER INFORMATION CONTACT: Ron Bailey, via telephone at 202–606–5410, or via email at *rbailey@oshrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On September 7, 2018, the Commission published in the **Federal Register** an Advanced Notice of Proposed Rulemaking (ANPR). 83 FR 45366 (September 7, 2018). In that notice the Commission announced that it was considering comprehensive revisions to its procedural rules in light of technological advances, including implementation of the Commission's electronic-filing system, and the evolution of practice before the Commission since the last comprehensive revision of its rules of procedure in 2005. The Commission expressed interest in recommended changes to any rule and announced that it was especially interested in whether: Rules on the computation of time should be simplified; electronic filing and service should be mandatory and, if so, what exceptions, if any, should be allowed; the definition of ''affected employee'' should be broadened; citing to Commission decisions as posted on the agency's website should be allowed; the rule on the staying of a final order is not needed and should be eliminated; the requirement for agency approval of settlements should be narrowed or eliminated; the grounds for obtaining Commission review of interlocutory orders issued by its administrative law judges should be revised; protection of sensitive personal information should be broadened; and whether the threshold amount for cases referred for mandatory settlement proceedings should be increased. The Commission thanks those who responded to the ANPR for their time and interest; the submitted comments were helpful and aided the Commission in formulating a number of these rule changes.

II. Revisions to Rules

Following an internal review of the rules and having considered all the comments submitted in response to the ANPR, the Commission has made comprehensive revisions to the procedural rules governing practice before the Commission. To aid the public in identifying the numerous revisions, the Commission will also publish on its website a ''redline'' version of the rules that will show the changes. Some of these revisions are technical and clarifying in nature. For example, cross-references to rules have been added throughout; all references to ''mail,'' ''United States Mail,'' and ''U.S. Mail'' have been changed to ''U.S. Mail'' for clarity and consistency; all references to ''paper'' have been changed to ''document'' to include both electronically-filed and conventionally-filed documents; and, in the interest of plain language, sentences have been rewritten to eliminate words such as ''herein,'' ''therein,'' and ''thereafter,'' among others. In addition, gender-neutral language is now used throughout the rules. To that end, gender-specific pronouns have been eliminated where possible. Finally, references to ''unrepresented parties'' have been changed to ''self-represented parties'' to recognize parties (excluding the Secretary) that are represented in Commission proceedings by one of their officers or managers.

Other changes have been made to make the rules easier to read and understand, particularly for self-represented parties. For example, Rule 52(f) has been broken into two subparts. In another example, a phrase in Rule 60 formerly read, ''notice of the time, place, and nature of the first hearing shall be given to the parties and intervenors,'' while the revised version reads, ''when a hearing is first set, the Judge shall give the parties and intervenors notice of the time, place, and nature of the hearing.''

Subpart A—General Provisions

In the definition section, the definition of ''authorized employee representative'' has been revised to specify that it means a labor organization that represents affected employees who are members of the collective bargaining unit. This conforms the definition's language with Rule 22(b).

The Commission has amended Rule 4, Computing time, to facilitate and clarify practice before the Commission. Previously, time periods of 11 days or more were calculated based on calendar days, but time periods of less than 11 days were calculated based on working days. This bifurcated approach to calculating time periods, which was reported as confusing and problematic, particularly for self-represented parties, has been eliminated. Most time periods are now based on calendar days—referred to simply as ''days''—and have been adjusted so that the actual amount of time provided is either the same as, or more than, before. Some periods, however, remain specified in ''working days'' when that is how the corresponding period is expressed in specific sections of the Occupational Safety and Health Act of 1970 (''Act''), 29 U.S.C. 651 *et seq.*

The elimination of the ''less than 11 days'' method of computing time is consistent with a 2009 change to Federal Rule of Civil Procedure 6, Computing and Extending Time; Time for Motion Papers, that eliminated a similar provision. As part of that revision, most 10-day periods in the Federal Rules of Civil Procedure were expanded to 14 (calendar) days. Similarly, throughout the revised rules of procedure, the Commission has expanded most, but not all, of the existing time periods of less than 11 days. Ogletree Deakins Nash Smoak & Stewart, P.C. (''Ogletree'') recommended further adopting the 2009 changes to the federal rules by changing all 10- and 20-day periods to periods measured in weeks, specifically 14 and 21 days. Ogletree pointed out that whole-week periods provide the advantage that the final day will always fall on the same day of the week as the event that triggered the period, so deadlines will always fall on weekdays. Where practicable and not otherwise governed by statute, the periods in the Commission rules have been similarly revised.

To further facilitate time calculation and practice before the Commission, the Commission has revised Rule 7, Service, notice, and posting, to use plain language to explain service methods and when service is deemed accomplished. For clarity and consistency, the rules have been revised throughout to begin stated time periods based on ''service,'' rather than on ''receipt'' or ''transmission.'' In certain rules, however, ''receipt'' was retained as the beginning of a time period where ''receipt'' is stated in the corresponding section of the Act. The Commission has also consolidated all requirements for

the service of show cause orders in new paragraph (o), to which cross-references have been added throughout the rules.

The Commission requested comment on whether it should make electronic filing mandatory. Four commenters (Ogletree; the Occupational Safety & Health Law Project (''OSH Law Project''); Conn Maciel Carey LLP; and the Occupational Safety and Health Division, Office of the Solicitor, U.S. Department of Labor (''SOL'')) recommended that it be mandatory. Three of those commenters (Ogletree, Conn Maciel Carey, and SOL) suggested creating an exception for self-represented parties and one (Ogletree) requested an exception for privileged materials or materials filed under seal. One commenter (James Sassaman) recommended keeping the current non-mandatory filing system, noting that the Commission cannot assist e-filing parties and not every practitioner has an information technology department at the ready.

The Commission has decided to make e-filing mandatory for parties represented by attorneys or non-attorney representatives. Self-represented parties have the option of using the Commission's E-File System or filing documents by conventional means. Once e-filing has been elected, the party must continue to file all documents electronically, but, because the Commission cannot guarantee the confidentiality of documents filed in the E-File System, confidential and privileged documents cannot be filed electronically. Conforming revisions have been made throughout where necessary, particularly to Rule 6, Record address, Rule 7, Service, notice, and posting, and Rule 8, Filing.

The Commission also requested comment on whether to permit citation to Commission decisions that are posted on the agency's website. Four commenters (James Sassaman, the OSH Law Project, Ogletree, and Conn Maciel Carey) suggested that this be allowed. Rule 12, References to cases, has been revised to allow citations to the website and specifies the citation format that should be followed, depending on whether the PDF version (which shows page numbers) or the HTML version (which does not show page numbers) of the case is being cited. Specifically, because the HTML version does not show page numbers, when citing that version the party must identify the paragraph number (or numbers) of the cited text.

Subpart B—Parties and Representatives

The Commission has amended Rule 20, Party status, to specify that an individual who, at the time of the violation, met the definition of ''affected employee'' set forth in Rule 1(e) and was employed by the cited employer, but who, as the case progresses, is no longer employed by the cited employer, is permitted to elect party status. This revision to the rule is in conformity with the Commission's decision in *S. Scrap Materials Co.,* 23 BNA OSHC 1596, 1613 n.15 (No. 94–3393, 2011) (''[Rule 20(a)] does not preclude participation in OSHA proceedings by employees who, at the time of the hearing, are no longer employed by the cited employer.'').

In response to comments the Commission received on whether the definition of ''affected employee'' should be broadened, the Commission has revised Rule 21, Intervention; Appearance by non-parties. The OSH Law Project asked that the Commission broaden the definition of ''affected employee'' to include temporary or contract employees as well as workers who may be affected by exposures created or controlled by a cited employer, even if they are not directly employed by the cited employer. Four commenters (the Chamber of Commerce of the United States and the Associated General Contractors (''Chamber/AGC''), the Coalition of Workplace Safety (''CWS''), Ogletree, and Conn Maciel Carey) recommended that the Commission not broaden the definition. Conn Maciel Carey asserted that non-employees and those not working in areas affected by the citations could not reasonably provide better value to the litigation process than those employees actually exposed to the hazard. The other three commenters asserted that the employees referred to by the OSH Law Project could instead participate as intervenors, pursuant to Rule 21.

As the OSH Law Project pointed out, under the current definition of ''affected employee'' a worker not employed by the cited employer and not exposed to or without access to the cited hazard is unable to elect party status under Rule 20. In addition, although it seems clear that employees of a non-cited employer working on the worksite and/or exposed to hazards substantially similar to the cited hazard would be eligible to participate in the proceedings as intervenors in accordance with Rule 21—in that they would have an interest in the proceeding and would be able to assist in the determination of the issues in question—the rules did not require intervenor status to be granted.

The Commission has decided to retain the current definition of ''affected employee'' in Rule 1 and revise Rule 21 to clarify how an exposed employee can meet the criteria set forth in that rule. The revision also requires intervenor status to be granted when the specified criteria are met.

The OSH Law Project also suggested that the Commission clarify in Rule 22, Representation of parties and intervenors, that employees may designate any person to represent their interests before the Commission. The Commission has revised the language to state that any party or intervenor may appear in person, through an attorney, or through any non-attorney representative.

Rule 23(b), Withdrawal of counsel, has been revised to require counsel or representatives of record who are withdrawing their appearance to provide current contact information for the client. This revision was made to ensure that clients continue to receive important communications from the Judge and the Commission.

Subpart C—Pleadings and Motions

In an effort to assist self-represented parties, the Commission has added a note to Rule 33, Notices of contest, to explain that, in extraordinary circumstances, an employer that fails to meet the 15-working day statutory deadline to file a notice of contest may seek relief from the resulting final order pursuant to Federal Rule of Civil Procedure 60, Relief from a Judgment or Order. The Commission has also reorganized the text of Rule 33 for clarity.

The Commission has made a number of revisions to Rule 40, Motions and requests, to clarify the requirements for how and when to make a motion and specify the form and content of motions. For example, the requirement that moving parties confer or make reasonable efforts to confer with all other parties before filing a motion in the existing rules has now been highlighted in a separate provision. Also, in light of SOL's comment suggesting that the Commission incorporate Federal Rule of Civil Procedure 56, Summary Judgment, into its rules, guidance specifying that the provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment before the Commission has been moved from Rule 61 to new paragraph (j) for clarity and consistency.

Subpart D—Prehearing Procedures and Discovery

Ogletree commented that paragraph (a)(1) of Rule 52, General provisions governing discovery, which specifies that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to

Commission proceedings, has generated considerable confusion. Specifically, Ogletree asserts that there have been inconsistent rulings among the Commission's Judges regarding whether initial disclosures, written expert reports, and pretrial disclosures may be exchanged. The Commission has added language explaining that Judges may use scheduling orders to direct prehearing disclosures, including disclosure of expert testimony and written reports. In addition, new paragraph (a)(4) has been added to allow parties to make stipulations about discovery procedures. This paragraph mirrors the language in Federal Rule of Civil Procedure 29, Stipulations about Discovery Procedure.

SOL suggested that the Commission clarify whether the proportionality requirements for discovery specified in Federal Rule of Civil Procedure 26(b) apply to proceedings before the Commission. To improve clarity, paragraphs (b) and (c) of Rule 52 have been revised to conform the Commission's rules to the 2015 amendments to the Federal Rules of Civil Procedure.

Both SOL and Ogletree suggested that Rule 54, Request for admissions, be revised to be consistent with the analogous Federal Rule of Civil Procedure 36(a). The Commission has revised Rule 54 to be consistent with Federal Rule of Civil Procedure 36(a), as tailored to Commission practice.

The Commission received comments from Conn Maciel Carey suggesting an increase in the permitted number of requests for admissions and interrogatories for cases involving numerous citation items. In the experience of the Commission's Judges, the parties are generally able to agree to more requested admissions or interrogatories as appropriate. Rule 54 and Rule 55, Interrogatories, have been revised to clarify that the number of requested admissions or interrogatories can exceed 25 upon agreement of the parties or by order of the Commission or the Judge.

For clarity, the Commission has streamlined Rule 56, Depositions. Edits have also been made for consistency with Federal Civil Rule of Procedure 30(b)(3). In addition, guidance regarding depositions formerly located in Rule 65 (Subpart E) has been relocated to Rule 56 for clarity and organizational consistency. The Commission has also made several revisions to clarify that parties cannot introduce audio or audiovisual depositions without a transcript of the introduced portion of the deposition.

Finally, the Commission has combined the subpoena provisions formerly set forth in Rule 57 with the subpoena provisions set forth in Rule 65 so that all subpoena practice provisions will be in one rule. This results in the deletion of former Rule 57.

Subpart E—Hearings

The Commission has revised Rule 64, Failure to appear, to clarify the consequences of failing to appear at a hearing. If the Secretary fails to appear, the Judge will consider the Secretary to have abandoned the case. If the Respondent fails to appear, the Judge will deem the Respondent to have admitted the facts alleged and consented to the relief sought by the Secretary.

In addition to revising Rule 65 to include the subpoena provisions formerly set forth in Rule 57, the Commission has made clarifying edits throughout this section to explain the process of issuing, serving, revoking, or modifying a subpoena, as well as the consequences of failing to comply with a subpoena. SOL suggested that the Commission clarify that nationwide service of Commission subpoenas is permissible. Language has been added to paragraph (b) stating that a subpoena may be served anywhere in the United States or its territories and may command the production of documents or tangible things, and a person to attend, from any place in the United States or its territories.

Rule 68, Recusal of the Judge, formerly referred to the ''disqualification'' of the Judge. The Commission has revised this section to instead refer to the ''recusal'' of the Judge to reflect current parlance and remove any negative connotation suggested by the word ''disqualification.'' The Commission has also added guidelines to clarify which situations may require the recusal of a Judge.

The Commission has added a provision to Rule 72, Objections, to conform the Commission's rules with language in Federal Rule of Evidence 103, Rulings on Evidence, specifying the circumstances in which a party need not continuously renew an objection or offer of proof.

Two commenters responded to the Commission's request for recommendations on revisions to Rule 73, Interlocutory review. Ogletree recommended deleting the phrase ''and that immediate review of the ruling may materially expedite the final disposition of the proceedings,'' asserting that the phrase required the Commission to attempt to predict the effect of interlocutory review on future litigation in the proceedings. SOL recommended leaving the rule unchanged. Based on the Commission's experience with interlocutory matters, the Commission has revised the requirements for granting interlocutory review. Most significantly, the Commission has deleted the phrase ''about which there is substantial ground for difference of opinion'' because under that language, cases in which the error is obvious may be construed as not meeting the criteria for interlocutory review. The rule has also been revised to make clear that the important question presented must control the outcome of the case for the Commission to review it on an interlocutory basis. Rather than delete the phrase ''may materially expedite the final disposition of the proceedings,'' the Commission has instead revised it to replace ''may'' with ''will.'' Finally, based on language in the Model Adjudication Rules adopted by the Administrative Conference of the United States in October 2018, the Commission has also added an alternative consideration to the ''materially expedite'' phrase: that subsequent review by the Commission may provide an inadequate remedy.

Subpart F—Posthearing Procedures

Revisions to Rule 90, Decisions and reports of Judges, clarify that after a Judge's decision has become a final order of the Commission, the Commission or the Judge may correct a clerical mistake or a mistake arising from oversight or omission under Federal Rule of Civil Procedure 60(a).

In Rule 91, Discretionary review, the Commission has sought to eliminate confusion regarding where to file petitions for discretionary review by revoking the part of the rule that allowed such petitions to be filed with the Judge during the 10-day period specified in Rule 90(b)(2). Under the revised rule, petitions can only be filed with the Executive Secretary. The Commission has also revised paragraph (f) to clarify that filing a petition for review with the Commission is required before seeking review of a Judge's decision in a U.S. Circuit Court of Appeals.

The Commission has revised Rule 92, Review by the Commission, in two ways. Revisions to paragraph (a) clarify that the Commission has complete discretion to decide which issues to consider on review. The Commission deleted the list of issues that are normally considered to avoid implying that there is any constraint on the Commissioners when deciding which cases or particular issues to review. Furthermore, the Commission ordinarily specifies which issues are to be

considered in a briefing notice, not in the direction for review. The language in paragraph (b) is rephrased to reflect that the Act does not restrict which cases the Commission can direct for review on a Commissioner's own motion and to explain what factors Commissioners typically consider when directing review on their own motion.

Revisions have been made to Rule 93, Briefs before the Commission, with respect to the sequence in which briefs are to be filed. These edits are made in the interest of fairness and track Federal Rule of Appellate Procedure 28.1.

Rule 94, Stay of final order, has been deleted because the Commission's jurisdiction under the Act terminates once there is a final order. *See* section 10(c) of the Act, 29 U.SC. 659(c). Accordingly, the Commission cannot act on any motions for a stay of a final order.

The Commission has revised paragraph (d)(3) of Rule 95, Oral argument before the Commission, to reflect the Commission's practice of generally allowing counsel time for rebuttal. Counsel may use rebuttal time only to respond to the opposing counsel and are not permitted to reserve points of substance for presentation during rebuttal. Rules for allocating time to amicus curiae seeking to participate in the oral argument have been added to paragraph (k)(1) and specify that amicus curiae must generally share time with the party in whose interest the amicus curiae seeks to participate.

Subpart G—Miscellaneous Provisions

The Commission requested comment on whether the requirement for agency approval of settlements in Rule 100, Settlement, should be narrowed or eliminated. Ogletree suggested a series of revisions to clarify that the Commission does not approve the contents of settlement agreements but only hears procedural objections to them. The OSH Law Project asked that the Commission insist that the Secretary comply with section 6(e) of the Act, 29 U.S.C. 655(e), which requires the Secretary to publish a statement of reasons for settling a penalty in the **Federal Register**. SOL asked the Commission to clarify the length of time a settlement must be posted.

Rule 100 has been extensively revised to reflect that the Commission has no authority to approve the contents of settlement agreements. Under the revised rule, settlement agreements will not be submitted to the Commission or the Judge. Instead, in a joint submission, the parties will notify the Judge that a settlement has been reached and will specify certain information as required by the revised rule. Although the Commission has never approved the contents of settlement agreements, this change to the rule should eliminate the past practice of parties requesting that the Commission correct errors in settlement agreements that had been ''approved'' by the Judge, often after the settlement had become a final order of the Commission. The revised rule clarifies that the parties can correct a mistake in the agreement themselves without having to ask the Commission to alter the record or take any other action. Once the parties correct the agreement themselves, the revised rule requires the employer to follow the posting rules so that employees are properly notified. As suggested by SOL, the revised rule also specifies the amount of time a settlement must be posted (14 days). Only if the employer fails to follow the posting rules, or if there is an objection by an employee, would the Secretary (or affected employee or authorized employee representative) need to seek relief from the Commission (under Federal Rule of Procedure 60, if the final order date has passed).

The only scenario in this regard in which there would be a need to request Commission action on a settled case is if the parties mistakenly notify the Judge that the case has been completely settled when in fact one or more citation items have not been settled. If the final order date has passed, requesting relief under Federal Rule of Civil Procedure 60 would be required to litigate the remaining unsettled items. In an attempt to prevent such errors, the revised rule requires parties to include in the notification of settlement a list of the contested items that have been settled as well as a list of any items that remain to be decided.

The revisions also specify that if party status has been elected under Rule 20, certification is required that the party was afforded an opportunity to provide input on all matters pertaining to the settlement before the agreement was finalized. This revision is in accordance with the Commission's decision in *Boise Cascade Corp.* that employees must have an ''opportunity to provide input on all matters pertaining to the settlement before the agreement is finalized.'' 14 BNA OSHC 1993, 1997 (No. 89–3087, 1991).

The revisions made to Rule 100 are in accordance with federal practice. The Federal Rules of Civil Procedure require parties who have settled a matter to file settlement agreements only in limited circumstances (such as class actions, shareholder derivative actions, unincorporated association class member actions, and receiver actions). Federal Rule of Civil Procedure 41(a), Voluntary Dismissal of Actions, allows the plaintiff or stipulating parties to dismiss an action without a court order. Federal district courts only retain jurisdiction to enforce a settlement agreement if a court order of dismissal contains a provision that the court retains jurisdiction or if the terms of the settlement agreement are incorporated in the order. *See Kokkonen* v. *Guardian Life Ins. Co.,* 511 U.S. 375 (1994).

The Commission has revised paragraph (c) of Rule 103, Expedited proceeding, to delete the clause allowing Judges to order daily transcripts because doing so is financially burdensome and because Judges have discretion to make the appropriate rulings necessary to expedite proceedings.

Finally, the Commission has revised Rule 106, Amendment to rules, to allow the public, including stakeholders, to email suggestions for revisions to the rules of procedure.

Subpart H—Settlement Part

The Commission specifically requested comment on whether the threshold amount for cases referred for mandatory settlement proceedings in Rule 120, Settlement procedure, should be increased. Two commenters, Ogletree and Conn Maciel Carey, asked that the threshold amount not be increased. They explained that mandatory settlement proceedings have been a great success and recommended against making fewer cases eligible for the program. SOL proposed increasing the threshold amount to account for recent and future changes in the statutory maximum for OSHA penalties. It recommended increasing the amount to $185,000 and proportionately increasing that amount every three years to maintain the same or similar ratio to the maximum penalty for willful or repeat violations.

In light of the increasing statutory maximum penalty amounts for willful and repeat violations required by the Inflation Adjustment Act of 2015, the Commission has determined that it would be an inefficient use of resources to maintain the current threshold amount for cases referred for mandatory settlement proceedings. As the maximum penalty amounts increase, a single willful or repeat violation would make a case eligible for mandatory settlement. This would result in too many cases being assigned to mandatory settlement, taking too much time away from other cases and increasing travel expenses for the Commission's Judges. Regarding the comments submitted by

Ogletree and Conn Maciel Carey, the Commission points out that parties can always ask to participate in voluntary settlement proceedings in the event that their case no longer meets the eligibility requirements for mandatory settlement.

Accordingly, paragraph (b)(1) has been revised to set the threshold amount to $185,000. The rule also specifies that this threshold amount will be periodically and proportionately adjusted upon consideration of the penalty increases required by the Inflation Adjustment Act. Rather than revise the rules every time the threshold amount is increased, the rule directs parties to the Commission website to find the adjusted threshold penalty amount.

The Commission has also revised the rules governing mandatory settlement proceedings in paragraph (b)(3) to reflect current practice. The paragraph describes the varied methods and broad discretion of the Settlement Judge when conducting a settlement conference. The confidentiality of settlement discussions will be strictly maintained; the only exception is the rare circumstance in which disclosure is required by applicable law or public policy, and the revised rules reflect that limited exception. The OSH Law Project commented that the Commission's current confidentiality rule is too broad and that factual information disclosed during settlement discussions is treated as confidential, a view which appears to read the rule too broadly. The Commission has added language to paragraph (d)(3)(iv) to clarify that factual information disclosed in the settlement proceeding may be used in litigation if also obtained through appropriate discovery or subpoena. Finally, the timing and duration of the settlement process is amended to more accurately reflect current practice.

Subpart M—Simplified Proceedings

The Commission's revisions to the rules governing Simplified Proceedings are made largely for clarity, ease of understanding, and to conform the rules to current Commission practice. Rule 200, Purpose, and Rule 209(e), Oral and written argument at the hearing, have been revised to specify that the Judge may either allow or require post-hearing briefs. Rule 204, Discontinuance of Simplified Proceedings, has been revised to specify that the Judge may deny a motion to discontinue simplified proceedings filed less than 30 days before a scheduled hearing date. Rule 209(c), Evidence, has been revised to allow parties to stipulate that the Federal Rules of Evidence will apply in whole or in part, though generally the Federal Rules of Evidence do not control the admission of evidence in simplified proceedings. Finally Rule 209(f), Judge's decision, has been revised to give Judges 60 days to issue a written decision.

III. Statutory and Executive Order Reviews

Executive Orders 12866, 13132, 13563, and the Unfunded Mandates Reform Act of 1995: OSHRC is an independent regulatory agency and, as such, is not subject to the requirements of E.O. 12866, E.O. 13132, E.O 13563 or the Unfunded Mandates Reform Act, 2 U.S.C. 1501 *et seq.*

Regulatory Flexibility Act: Pursuant to 5 U.S.C. 605(a), a regulatory flexibility analysis is not required because these rules concern ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice'' under 5 U.S.C. 553(b).

Paperwork Reduction Act of 1995: OSHRC 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 OMB.

Congressional Review Act: These revisions do not constitute a ''rule,'' as defined by the Congressional Review Act, 5 U.S.C. 804(3)(C), because they involve changes to ''agency organization, procedure, or practice'' that do not ''substantially affect the rights or obligations of non-agency parties.''

List of Subjects in 29 CFR Part 2200

Administrative practice and procedure, Hearing and appeal procedures.

Dated: March 28, 2019.

Heather L. MacDougall,

Chairman.

Cynthia L. Attwood,

Commissioner.

James J. Sullivan,

Commissioner.

■ For the reasons discussed in the preamble, the Occupational Safety and Health Review Commission revises 29 CFR part 2200 to read as follows:

PART 2200—RULES OF PROCEDURE

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2200.96 Commission receipt of copies of petitions for judicial review of Commission orders when petitions for review are filed in two or more courts of appeals with respect to the same order.

Subpart G—Miscellaneous Provisions

2200.100 Settlement.
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2200.102 Withdrawal.
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Subpart M—Simplified Proceedings

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2200.210 Review of Judge's decision.
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Authority: 29 U.S.C. 661(g), unless otherwise noted.

Section 2200.96 is also issued under 28 U.S.C. 2112(a).

Subpart A—General Provisions

§ 2200.1 Definitions.

As used in this part:

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

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

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

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

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

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

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

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

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

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

(k) *Day* means a calendar day.

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

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

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

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

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

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

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

§ 2200.3 Use of gender and number.

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

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

§ 2200.4 Computing time.

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

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

(i) Exclude the day of the event that triggers the period;

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

(iii) Include the last day of the period, but if the last day is a Saturday, Sunday, or Federal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or Federal holiday.

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

(3) *Operating status of receiving Commission office.* Unless the Commission or the Judge orders otherwise, if the receiving Commission office is closed on the last day for filing due to inclement weather or other circumstance, then the time for filing is extended to the first day the office is open that is not a Saturday, Sunday, or Federal holiday.

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

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

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

(5) ''*Next day*'' *defined.* The ''next day'' is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) ''*Federal holiday*'' *defined.* ''Federal holiday'' means:

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

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

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

§ 2200.5 Extension of time.

The Commission or the Judge on their own initiative or, upon motion of a

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

§ 2200.6 Record address.

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

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

§ 2200.7 Service, notice, and posting.

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

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

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

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

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

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

(4) *Facsimile transmission.* Service by facsimile transmission shall be deemed accomplished upon delivery to the receiving facsimile machine. The party serving a document by facsimile is responsible for the successful transmission and legibility of documents intended to be served.

(d) *Proof of service.* Service shall be documented by a written certificate of service setting forth the date and manner of service. The certificate of service shall be filed with the pleading or document.

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

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

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

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

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

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

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

(Name of employer)

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

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

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

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

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

(j) *Notice of hearing to represented employees.* Immediately upon receipt of the notice of the hearing to be held before the Judge, the employer shall

serve a copy of the notice on the authorized employee representative of affected employees in the manner prescribed in paragraph (c) of this section. The employer need not serve the notice of hearing, as stated above, if on or before the date the hearing notice is received, the authorized employee representative has entered an appearance in conformance with §§ 2200.22 and 2200.23.

(k) *Employee contest; service on other employees.* (1) Where a notice of contest with respect to the reasonableness of the abatement period is filed under § 2200.38 by an affected employee who is not represented by an authorized employee representative and there are other affected employees who are represented by an authorized employee representative, the unrepresented affected employee shall serve the following documents on the authorized employee representative:

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

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

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

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

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

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

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

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

§ 2200.8 Filing.

(a) *What to file*—(1) *General.* All documents required to be served on a party or intervenor shall be filed either before service or within a reasonable time after service.

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

(b) *Where to file.* Prior to assignment of a case to a Judge, all documents shall be filed electronically in the Commission's E-File System or with the Executive Secretary at One Lafayette Centre, 1120 20th Street NW, Suite 980, Washington, DC 20036–3457. After the assignment of the case to a Judge, all documents shall be filed electronically in the Commission's E-File System or with the Judge at the address given in the notice of assignment. After the docketing of the Judge's report, all documents shall be filed with the Executive Secretary, except as provided in § 2200.90(b)(4).

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

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

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

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

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

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

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

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

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

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

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

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

on the Commission's website (*www.oshrc.gov*).

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

(9) *Certificate of service.* Proof of service shall accompany each document filed in the Commission's E-File System. The certificate of service shall certify simultaneous service of the document by email on all other parties and intervenors in the case. It is the responsibility of the filing party to retain records showing the date of transmission, including receipts.

(d) *Documents that are not filed in the Commission's E-File System; alternative filing methods*—(1) *How to file.* Documents may be filed by postage-prepaid first class or higher class U.S. Mail, commercial delivery service, personal delivery, electronic transmission, or facsimile transmission.

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

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

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

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

(4) *Certificate of service.* A certificate of service shall accompany each document filed. The certificate shall set forth the dates and manner of filing and service.

(5) *Sensitive information.* Unless the Commission or the Judge orders otherwise, in any filing with the Commission, information that is sensitive (*e.g.,* Social Security numbers, driver's license numbers, passport numbers, taxpayer-identification numbers, birthdates, mother's maiden names, names of minors, an individual's physical personal address, financial account numbers) but not privileged shall be redacted. 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 materials unnecessary to the case.

(6) *Privileged information.* Claims regarding privileged information shall comply with § 2200.52(d).

§ 2200.9 Consolidation.

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

§ 2200.10 Severance.

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

§ 2200.11 [Reserved]

§ 2200.12 References to cases.

(a) *Citing decisions by Commission and Judges*—(1) *Generally.* Parties citing decisions by the Commission should include in the citation the name of the employer, the OSHRC docket number, the year of the decision, and a citation to a print or electronic reference source. Citations to Commission and ALJ decisions published on the Commission's website (*www.oshrc.gov*) are also accepted. For example,

(i) *Print:*

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

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

(ii) *Electronic:*

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

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

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

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

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

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

(b) *References to court decisions.* (1) Citation to court decisions should be to the official reporter whenever possible. For example:

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

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

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

Subpart B—Parties and Representatives

§ 2200.20 Party status.

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

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

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

(c) *Employee contest.* (1) Where a notice of contest is filed by an employee or by an authorized employee representative with respect to the reasonableness of the period for abatement of a violation, the employer charged with the responsibility of abating the violation may elect party

status by a notice filed at least 14 days before the hearing.

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

§ 2200.21 Intervention; appearance by non-parties.

(a) *When allowed.* A petition for leave to intervene may be filed at any time prior to 14 days before commencement of the hearing. A petition filed less than 14 days prior to the commencement of the hearing will be denied unless good cause is shown for not timely filing the petition. A petition shall be served on all parties in accordance with § 2200.7.

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

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

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

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

(3) An order granting a petition shall specify the extent and terms of an intervenor's participation in the proceedings.

§ 2200.22 Representation of parties and intervenors.

(a) *Representation.* Any party or intervenor may appear in person, through an attorney, or through any non-attorney representative. A representative must file an appearance in accordance with § 2200.23. In the absence of an appearance by a representative, a party or intervenor will be deemed to appear for itself. A corporation or unincorporated association may be represented by an authorized officer or agent.

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

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

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

§ 2200.23 Appearances and withdrawals.

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

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

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

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

§ 2200.24 Brief of an amicus curiae.

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

Subpart C—Pleadings and Motions

§ 2200.30 General rules.

(a) *Format.* Pleadings and other documents (other than exhibits) shall be typewritten, double spaced, with typeface of text being no smaller than 12-point and typeface of footnotes being no smaller than 11-point, on letter size opaque paper (8½ inches by 11 inches). All margins shall be 1½ inches. Pleadings and other documents shall be fastened without the use of staples at the upper left corner.

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

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

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

(e) *Alternative pleading.* A party may set forth two or more statements of a claim or defense alternatively or hypothetically. When two or more statements are made in the alternative and one of them would be sufficient if made independently, the pleading is not made insufficient by the insufficiency of one or more of the alternative

statements. A party may state as many separate claims or defenses as it has regardless of consistency. All statements shall be made subject to the signature requirements of § 2200.32.

(f) *Form of pleadings, motions, and other documents.* Any pleading, motion, or other document shall contain a caption complying with § 2200.31 and a signature complying with § 2200.32. The form and content of motions shall conform with § 2200.40.

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

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

§ 2200.31 Caption; titles of cases.

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

Secretary of Labor,

Complainant,

v.

(Name of Employer),

Respondent.

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

(Name of employer),

Petitioner,

v.

Secretary of Labor,

Respondent.

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

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

§ 2200.32 Signing of pleadings and motions.

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

§ 2200.33 Notices of contest.

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

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

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

(c) A notice of contest filed by an employee or representative of employees with respect to the reasonableness of the abatement period under section 10(c) of the Act, 29 U.S.C. 659(c).

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

§ 2200.34 Employer contests.

(a) *Complaint.* (1) The Secretary shall file a complaint with the Commission no later than 21 days after receipt of the notice of contest.

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

(i) The basis for jurisdiction;

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

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

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

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

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

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

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

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

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

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

(b) *Failure to disclose.* The Commission or the Judge in its discretion may refuse to accept for filing an answer or other initial pleading that

lacks the disclosure declaration required by this paragraph. A party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should not be held in default. All show cause orders issued by the Commission or the Judge shall be served in a manner prescribed in § 2200.7(o).

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

§ 2200.36 [Reserved]

§ 2200.37 Petitions for modification of the abatement period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Where the petitioner is a corporation, it shall file a separate declaration listing all parents, subsidiaries, and affiliates of that corporation or stating that the corporation has no parents, subsidiaries, or affiliates, whichever is applicable, within 10 working days after service of the Commission docketing notice of the petition for modification of the abatement date. Service of the filed declaration on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c). The requirements set forth in § 2200.35(b) through (d) shall apply.

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

§ 2200.38 Employee contests.

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

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

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

§ 2200.39 Statement of position.

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

§ 2200.40 Motions and requests.

(a) *How to make.* An application or request for an order must be made by written motion. A motion shall not be included in another pleading or document, such as a brief or petition for discretionary review, but shall be made in a separate document. In exigent circumstances in cases pending before a Judge, an oral motion may be made during an off-the-record telephone conference if the motion is subsequently reduced to writing and filed within such time as the judge prescribes.

(b) *Form of motions.* All motions shall contain a caption complying with § 2200.31 and a signature complying with § 2200.32. Requests for orders that

are presented in any other form, such as by a business letter or by an email, shall not be considered or granted.

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

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

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

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

(g) *When to make.* (1) A motion filed in lieu of an answer pursuant to § 2200.34(c) shall be filed no later than 21 days after service of the complaint.

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

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

(h) *Responses.* Any party or intervenor upon whom a motion has been served shall file a response within 14 days from service of the motion.

(i) *Reconsideration.* A party adversely affected by a ruling on any motion may file a motion for reconsideration within 7 days of service of the ruling.

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

§ 2200.41 [Reserved]

Subpart D—Prehearing Procedures and Discovery

§ 2200.50 [Reserved]

§ 2200.51 Prehearing conferences and orders.

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

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

(ii) To file and hear motions; and

(iii) To complete discovery.

(2) The scheduling order also may include:

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

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

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

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

§ 2200.52 General provisions governing discovery.

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

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

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

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

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

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

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

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

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

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

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

(b) *Scope of discovery.* The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

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

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

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

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

(d) *Privilege*—(1) *Claims of privilege.* The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to

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

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

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

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

(1) That the discovery not be had;

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

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

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

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

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

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

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

(f) *Failure to cooperate; motions to compel; sanctions*—(1) *Motions to compel discovery.* A party may file a motion conforming to § 2200.40 for an order compelling discovery when another party refuses or obstructs discovery. In considering a motion to compel, the Judge shall treat an evasive or incomplete answer as a failure to answer.

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

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

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

(iii) An order striking pleadings or parts of pleadings or staying further proceedings until the order is obeyed; and

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

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

(h) *Show cause orders.* All show cause orders issued by the Commission or the Judge under paragraph (f) of this section shall be served in a manner prescribed in § 2200.7(o).

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

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

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

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

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

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

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

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

(j) *Filing of discovery.* Requests for production or inspection under § 2200.53, requests for admission under § 2200.54 and responses to requests for admission, interrogatories under § 2200.55 and the answers to interrogatories, and depositions under § 2200.56 shall be served upon other counsel or parties, but shall not be filed with the Commission or the Judge. The party responsible for service of the discovery material shall retain the original and become the custodian.

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

(l) *Use at hearing.* If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion

which might result in a final order on any claim, the portions to be used shall be filed with the Commission or the Judge at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated. Section 2200.56(f) prescribes additional procedures pertaining to the use of depositions at a hearing.

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

§ 2200.53 Production of documents and things.

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

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

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

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

§ 2200.54 Request for admissions.

(a) *Scope and procedure*—(1) *Scope.* Any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 2200.52(b) relating to:

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

(ii) The genuineness of any described documents.

(2) *Form; copy of a document.* Each matter must be separately stated. The number of requested admissions shall not exceed 25, including subparts, except upon the agreement of the parties or by order of the Commission or the Judge. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its representative. A shorter or longer time for responding may be provided by written stipulation of the parties or by order of the Commission or the Judge.

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

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

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

(b) *Effect of admission; withdrawal or modification.* A matter admitted under paragraph (a) of this section is conclusively established unless the Commission or the Judge on motion permits the admission to be withdrawn or amended. The Commission or the Judge may permit withdrawal or modification if it would promote the presentation of the merits of the case and if the Commission or the Judge is not persuaded that it would prejudice the requesting party in maintaining or defending the case on the merits. An admission under paragraph (a) of this section is not an admission for any other purpose and cannot be used against the party in any other proceeding.

§ 2200.55 Interrogatories.

(a) *General.* At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve interrogatories upon any other party. The number of interrogatories shall not exceed 25 questions, including subparts, except upon the agreement of the parties or by order of the Commission or the Judge. The party seeking to serve more than 25 questions, including subparts, shall have the burden of persuasion to establish that the complexity of the case or the number of citation items necessitates a greater number of interrogatories.

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

(c) *Procedure.* Each interrogatory shall be answered separately and fully under oath or affirmation. If the interrogatory is objected to, the objection shall be stated in lieu of the answer. The answers are to be signed by the person

making them and the objections shall be signed by the party or its counsel. The party on whom the interrogatories have been served shall serve a copy of its answers or objections upon the propounding party within 30 days after the service of the interrogatories. The Judge may allow a shorter or longer time. The burden shall be on the party submitting the interrogatories to file a motion conforming to § 2200.40 for an order with respect to any objection or other failure to answer an interrogatory.

§ 2200.56 Depositions.

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

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

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

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

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

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

§ 2200.57 [Reserved]

Subpart E—Hearings

§ 2200.60 Notice of hearing; location.

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

§ 2200.61 Submission without hearing.

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

(b) Motions for summary judgment are governed by § 2200.40(j).

§ 2200.62 Postponement of hearing.

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

(b) *Grounds for postponement.* A motion for postponement grounded on conflicting engagements of counsel or employment of new counsel shall be promptly filed.

(c) *When motion must be received.* A motion to postpone a hearing must be received at least 10 days prior to the hearing. A motion for postponement received less than 10 days prior to the hearing will generally be denied unless good cause is shown for late filing.

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

§ 2200.63 Stay of proceedings.

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

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

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

§ 2200.64 Failure to appear.

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

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

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

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

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

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

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

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

(e) *Witness fees and mileage.* Witnesses summoned to appear for a deposition or to appear before the Commission or the Judge shall be paid the same witness fees and mileage expense that are paid witnesses in the federal courts. Witness fees and mileage expense shall be paid by the party at whose instance the witness appears.

(f) *Failure to comply with subpoena.* Upon the failure of any person to comply with the subpoena issued upon the request of a party, the Commission by its counsel shall recommend to the U.S. Department of Justice that proceedings be initiated in the appropriate district court for the enforcement of the subpoena, if in the Commission's judgment the enforcement of the subpoena would be consistent with law and with policies of the Act. In such instances, neither the Commission nor its counsel shall be deemed to have assumed responsibility for the effective prosecution of the subpoena before the court.

§ 2200.66 Transcript of testimony.

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

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

(c) *Correction of errors.* Error in the transcript of the hearing may be corrected by the Judge on the Judge's own motion, on joint motion by the parties, or on motion by any party. The motion shall conform to § 2200.40 and shall state the error in the transcript and the correction to be made. The official transcript shall reflect the corrections.

§ 2200.67 Duties and powers of Judges.

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

(a) Administer oaths and affirmations;

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

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

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

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

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

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

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

(i) Make decisions that conform to 5 U.S.C. 557 of the Administrative Procedure Act;

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

(k) Approve or appoint an interpreter;

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

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

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

§ 2200.68 Recusal of the Judge.

(a) *Discretionary recusal.* A Judge may recuse himself or herself from a proceeding whenever the Judge deems it appropriate.

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

(c) *Request for recusal.* Any party may request that the Judge, at any time following the Judge's designation and before the filing of a decision, be recused under paragraph (a) or (b) of this section or both by filing with the Judge, promptly upon the discovery of the alleged facts, an affidavit setting forth in detail the matters alleged to constitute grounds for recusal.

(d) *Ruling on request.* If the Judge finds that a request for recusal has been filed with due diligence and that the material filed in support of the request establishes that recusal either is appropriate under paragraph (a) of this section or is required under paragraph (b) of this section, the Judge shall recuse himself or herself from the proceeding. If the Judge denies a request for recusal, the Judge shall issue a ruling on the record, stating the grounds for denying the request, and shall proceed with the hearing, or, if the hearing has closed, proceed with the issuance of a decision under the provisions of § 2200.90.

§ 2200.69 Examination of witnesses.

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

§ 2200.70 Exhibits.

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

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

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

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

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

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

(g) *Disposal of physical exhibit.* Any physical exhibit may be disposed of by the Commission's Executive Secretary subject to the requirements of the National Archives and Records Administration.

§ 2200.71 Rules of evidence.

The Federal Rules of Evidence are applicable.

§ 2200.72 Objections.

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

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

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

§ 2200.73 Interlocutory review.

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

(1) That the review involves an important question of law or policy that controls the outcome of the case, and that immediate review of the ruling will materially expedite the final disposition of the proceedings or subsequent review by the Commission may provide an inadequate remedy; or

(2) That the ruling will result in a disclosure, before the Commission may review the Judge's report, of information that is alleged to be privileged.

(b) *Petition for interlocutory review.* Within 7 days following the service of a Judge's ruling from which review is sought, a party may file a petition for interlocutory review with the Commission. Responses to the petition, if any, shall be filed within 7 days following service of the petition. Service of the filed petition on the other parties and intervenors shall be accomplished in a manner prescribed in § 2200.7(c). A copy of the petition and responses shall be filed with the Judge. The petition is denied unless granted within 30 days of the date of receipt by the Commission's Executive Secretary. A corporate party that files a petition for interlocutory review or a response to such a petition under this section shall file with the Commission a copy of its declaration of

corporate parents, subsidiaries, and affiliates previously filed with the Judge under the requirements of § 2200.35 or § 2200.37(d)(4). In its discretion the Commission may refuse to accept for filing a petition or response that fails to comply with this disclosure requirement. A corporate party filing the declaration required by this paragraph shall have a continuing duty to advise the Executive Secretary of any changes to its declaration until the petition is deemed denied or a decision is issued on the merits.

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

(d) *Stay*—(1) *Trade secret matters.* The filing of a petition for interlocutory review of a Judge's ruling concerning an alleged trade secret shall stay the effect of the ruling until the petition is deemed denied or ruled upon.

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

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

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

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

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

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

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

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

Subpart F—Posthearing Procedures

§ 2200.90 Decisions and reports of Judges.

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

(2) *Service of the Judge's decision.* The Judge shall serve a copy of the decision on each party in a manner prescribed in § 2200.7(c).

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

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

(3) *Docketing of Judge's report by Executive Secretary.* Promptly upon filing of the Judge's report, the Executive Secretary shall docket the report and notify all parties of the docketing date. The date of docketing of the Judge's report is the date that the Judge's report is made for purposes of section 12(j) of the Act, 29 U.S.C. 661(j).

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

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

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

(d) *Filing documents after the docketing date.* Except for documents filed under paragraph (b)(4)(i) of this section, which shall be filed with the Judge, on or after the date of docketing of the Judge's report all documents shall be filed with the Executive Secretary.

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

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

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

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

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

(c) *Cross-petitions for discretionary review.* Where a petition for discretionary review has been filed by

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

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

(e) *When filing effective.* A petition for discretionary review is filed when received by the Commission, as specified in § 2200.8(e)(2).

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

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

§ 2200.92 Review by the Commission.

(a) *Jurisdiction of the Commission; issues on review.* Unless the Commission orders otherwise, a direction for review establishes jurisdiction in the Commission to review the entire case. The issues to be decided on review are within the discretion of the Commission.

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

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

§ 2200.93 Briefs before the Commission.

(a) *Requests for briefs.* The Commission ordinarily will request the parties to file briefs on issues before the Commission. After briefs are requested, a party may, instead of filing a brief, file a letter setting forth its arguments or a letter stating that it will rely on its petition for discretionary review or previous brief. A party not intending to file a brief shall notify the Commission in writing within the applicable time for filing briefs and shall serve a copy on all other parties. The provisions of this section apply to the filing of briefs and letters filed in lieu of briefs.

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

(1) *Time for filing briefs.* The party required to file the first brief shall do so within 40 days after the date of the briefing notice. All other parties shall file their briefs within 30 days after the first brief is served. Any reply brief permitted by these rules or by order shall be filed within 15 days after the second brief is served.

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

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

(iii) If no petition has been filed, the parties shall file simultaneous briefs.

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

(c) *Motion for extension of time for filing brief.* An extension of time to file a brief will ordinarily not be granted except for good cause shown. A motion for extension of time to file a brief shall be filed at the Commission no later than 5 days prior to the expiration of the time limit prescribed in paragraph (b) of this section, shall comply with § 2200.40, and shall include the following information: when the brief is due, the number and duration of extensions of time that have been granted to each party, the length of extension being requested, the specific reason for the extension being requested, and an assurance that the brief will be filed within the time extension requested.

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

(e) *Length of brief.* Except by permission of the Commission, a main brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 35 pages of text. A reply brief, including briefs and legal memoranda it incorporates by reference, shall contain no more than 20 pages of text.

(f) *Format.* Briefs shall be typewritten, double spaced, with typeface of text being no smaller than 12-point and typeface of footnotes being no smaller than 11-point, on letter size opaque paper (8½ inches by 11 inches). All margins shall be 1½ inches.

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

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

(i) *Brief of an amicus curiae.* The Commission may allow a brief of an amicus curiae pursuant to the criteria and time period set forth in § 2200.23. Any brief of an amicus curiae must meet the requirements of paragraphs (b) through (h) of this section. No reply brief of an amicus curiae will be received.

§ 2200.94 [Reserved]

§ 2200.95 Oral argument before the Commission.

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

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

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

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

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

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

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

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

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

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

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

(g) *Multiple counsel.* Where more than one counsel argues for a party to the case or for multiple parties on the same side in the case, it is counsels' responsibility to agree upon a fair division of the total time allotted. In the event of a failure to agree, the Commission will allocate the time. The Commission may, in its discretion, limit the number of counsel heard for each party or side in the argument. No later than 5 days prior to the date of scheduled argument, the Commission must be notified of the names of the counsel who will argue.

(h) *Exhibits/visual aids.* (1) The parties may use exhibits introduced into evidence at the hearing. If a party wishes to use a visual aid not part of the record, written notice of the proposed use shall be given to opposing counsel 15 days prior to the argument. Objections, if any, shall be in writing, served on all adverse parties, and filed not fewer than 7 days before the argument.

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

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

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

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

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

(3) Error in the transcript of the oral argument may be corrected by the Commission on its own motion, on joint motion by the parties, or on motion by any party. The motion shall state the error in the transcript and the correction to be made. The official transcript shall reflect the corrections.

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

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

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

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

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

§ 2200.96 Commission receipt of copies of petitions for judicial review of Commission orders when petitions for review are filed in two or more courts of appeals with respect to the same order.

The Commission officer and office designated to receive, pursuant to 28 U.S.C. 2112(a)(1), copies of petitions for review of Commission orders, from the persons instituting the review proceedings in a court of appeals, are

the Executive Secretary and the Office of the Executive Secretary at the Commission's Office, One Lafayette Centre, 1120 20th Street NW, Suite 980, Washington, DC 20036–3457. The petition shall state that it is being submitted to the Commission pursuant to 28 U.S.C. 2112 by the persons or person who filed the petition in the court of appeals and shall be stamped by the court with the date of filing. (28 U.S.C. 2112(a) contains certain applicable requirements.)

Subpart G—Miscellaneous Provisions

§ 2200.100 Settlement.

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

(b) *Requirements*—(1) *Notification of Settlement.* If the parties have agreed to a partial or full settlement, they shall so notify the Judge in a written joint submission (titled ''Notification of Settlement'' or ''Notification of Partial Settlement,'' as appropriate), in which the parties shall:

(i) List the contested items that have been settled and, if only a partial settlement agreement has been reached, also list the contested items that remain to be decided;

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

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

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

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

(3) *Issuance of order terminating proceeding.* If the requirements of paragraphs (b)(1) and (2) of this section have been met with respect to all contested citation items and no affected employees who have elected party status have raised an objection to the reasonableness of any abatement period, the Judge shall issue an Order acknowledging that the parties have resolved all contested citation items and agreed to terminate the proceeding before the Commission.

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

§ 2200.101 Failure to obey rules.

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

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

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

(d) *Show cause orders.* All show cause orders issued by the Commission or the Judge under paragraph (a) of this section shall be served in a manner prescribed in § 2200.7(o).

§ 2200.102 Withdrawal.

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

§ 2200.103 Expedited proceeding.

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

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

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

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

§ 2200.104 Standards of conduct.

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

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

(2) *Appeal rights if excluded.* Any attorney or other representative excluded from a proceeding by a Judge may, within 7 days of the exclusion, appeal to the Commission for reinstatement. No proceeding shall be delayed or suspended pending disposition of the appeal.

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

(d) *Show cause orders.* All show cause orders issued by the Commission under paragraph (c) of this section shall be served in a manner prescribed in § 2200.7(o).

§ 2200.105 Ex parte communication.

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

(b) *Disciplinary action.* In the event an ex parte communication occurs, the Commission or the Judge may make such orders or take such actions as fairness requires. The exclusion of a person by a Judge from a proceeding shall be governed by § 2200.104(b). Any disciplinary action by the Commission, including suspension or disbarment, shall be governed by § 2200.104(c).

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

§ 2200.106 Amendment to rules.

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

§ 2200.107 Special circumstances; waiver of rules.

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

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

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

Subpart H—Settlement Part

§ 2200.120 Settlement procedure.

(a) *Voluntary settlement*—(1) *Applicability and duration.* (i) Voluntary settlement applies only to notices of contests by employers and to applications for fees under the Equal Access to Justice Act and 29 CFR part 2204.

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

(2) *Length of voluntary settlement procedures.* Voluntary settlement procedures shall be for a period not to exceed 75 days, unless extended with the concurrence of the Chief Administrative Law Judge.

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

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

(3) *Mandatory settlement proceedings.* (i) The Settlement Judge may consult all attorneys, non-attorney representatives, and self-represented parties by any suitable means to schedule the Settlement Conference and to facilitate preparation for the conference.

(ii) The Settlement Judge may issue a preconference scheduling order addressing procedural matters, including but not limited to, formal pleadings, settlement status conference calls, ex parte caucus calls, and allowing, limiting, or suspending discovery during the settlement proceedings.

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

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

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

(c) *Powers and duties of Settlement Judges.* (1) The Settlement Judge shall confer with the parties regarding the whole or partial settlement of the case and seek resolution of as many issues as is feasible.

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

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

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

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

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

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

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

(ii) The Settlement Judge shall not divulge any statements or information presented during private negotiations with a party or the party's representative during settlement proceedings except with the consent of that party.

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

(A) Evidence of statements or conduct in settlement proceedings under this section within the scope of Federal Rule of Evidence 408,

(B) Notes or other material prepared by or maintained by the Settlement Judge in connection with settlement proceedings, and

(C) Communications between the Settlement Judge and the Chief Administrative Law Judge in connection with settlement proceedings including the report of the Settlement Judge under paragraph (f) of this section.

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

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

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

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

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

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

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

Subpart I–L [Reserved]

Subpart M—Simplified Proceedings

§ 2200.200 Purpose.

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

554. These procedural rules will be applied to accomplish this purpose.

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

(1) Complaints and answers are not required.

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

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

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

(5) Interlocutory appeals are not permitted.

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

§ 2200.201 Application.

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

§ 2200.202 Eligibility for Simplified Proceedings.

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

(1) Relatively few citation items,

(2) An aggregate proposed penalty of not more than $20,000,

(3) No allegation of willfulness or a repeat violation,

(4) Not involving a fatality,

(5) A hearing that is expected to take less than 2 days, or

(6) A small employer whether appearing pro se or represented by counsel.

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

§ 2200.203 Commencing Simplified Proceedings.

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

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

(c) *Judge's ruling on request.* The Chief Administrative Law Judge or the Judge assigned to the case may grant a party's request and assign a case for Simplified Proceedings at the Judge's discretion. Such request shall be acted upon within 14 days of its receipt by the Judge.

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

§ 2200.204 Discontinuance of Simplified Proceedings.

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

(b) *Party motion.* At any time during the proceedings any party may request that Simplified Proceedings be discontinued and that the matter continue under conventional procedures. A motion to discontinue must conform to § 2200.40 and explain why the case is inappropriate for Simplified Proceedings. Responses to such motions shall be filed within the time specified by § 2200.40. Joint motions to return a case to conventional proceedings shall be granted by the Judge and do not require a showing of good cause, except that the Judge may deny such a motion that is filed less than 30 days before a scheduled hearing date.

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

§ 2200.205 Filing of pleadings.

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

(b) *Motions.* Limited, if any, motion practice is contemplated in Simplified Proceedings, but all motion practice shall conform with § 2200.40.

§ 2200.206 Disclosure of information.

(a) *Disclosure to employer.* (1) Within 21 days after a case is designated for Simplified Proceedings, the Secretary shall provide the employer, free of charge, copies of the narrative (Form OSHA 1–A) and the worksheet (Form OSHA 1–B) or their equivalents.

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

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

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

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

§ 2200.207 Pre-hearing conference.

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

(b) *Content.* At the pre-hearing conference, the parties may discuss the following: Settlement of the case; the narrowing of issues; an agreed statement of issues and facts; all defenses;

witnesses and exhibits; motions; and any other pertinent matter. Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing conference may not be raised later. At the conclusion of the conference, the Judge will issue an order that may set forth any agreements reached by the parties and that may specify the issues to be addressed by the parties at the hearing.

§ 2200.208 Discovery.

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

§ 2200.209 Hearing.

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

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

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

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

(e) *Oral and written argument.* Each party may present an oral argument at the close of the hearing. The Judge may allow or require post-hearing briefs or statements of position upon the request of either party or on the Judge's own motion. The form of any post-hearing briefs shall conform to § 2200.74 unless the Judge specifies otherwise.

(f) *Judge's decision*—(1) *Bench decision.* The Judge may render a decision from the bench. In rendering a decision from the bench, the Judge shall state the issues in the case and make clear both the Judge's findings of fact and conclusions of law on the record. The Judge shall reduce the bench decision in the matter to writing and serve it on the parties as soon as practicable, but no later than 45 days after the hearing. If additional time is needed, approval of the Chief Administrative Law Judge is required. The decision shall be prepared in accordance with § 2200.90(a). The written decision shall include, as an appendix, the bench decision as set forth in the transcript.

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

(g) *Filing of Judge's decision with the Executive Secretary.* When the Judge issues a written decision, service, filing, and docketing of the Judge's written decision shall be in accordance with § 2200.90.

§ 2200.210 Review of Judge's decision.

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

§ 2200.211 Applicability of subparts A through G.

The provisions of subpart D (§§ 2200.50–2200.56) and §§ 2200.34, 2200.37(d), 2200.38, 2200.71, and 2200.73 will not apply to Simplified Proceedings. All other rules contained in subparts A through G of the Commission's rules of procedure will apply when consistent with the rules in this subpart governing Simplified Proceedings.

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