

## § 10.44

## 17 CFR Ch. I (4-1-01 Edition)

### § 10.44 Depositions and interrogatories.

(a) *When permitted.* If it appears that:

(1) A prospective witness will be unable to attend or testify at a hearing on the basis of age, illness, infirmity, imprisonment or on the basis that he is or will be outside of the United States at the time of the hearing (unless it appears that the absence of the witness was procured by the party seeking to take the deposition),

(2) His testimony is material,

(3) It is necessary to take his deposition in the interest of Justice, the Administrative Law Judge may by order direct that his deposition be taken either orally or in the form of written interrogatories, and may issue a subpoena to compel the attendance of the witness for deposition.

(b) *Application for deposition.* Any party desiring to take the deposition of a witness shall make application in writing to the Administrative Law Judge for an order to take deposition. In addition to the showing required in § 10.44(a), the application shall include:

(1) The name and post office address of the witness;

(2) The specific matters concerning which the witness is expected to testify and their relevance;

(3) The reasons why the deposition should be taken, supported by affidavits and a physician's certificate, where appropriate;

(4) The time when, the place where, and the name and address of the person before whom the deposition is to be taken;

(5) A specification of the documents and materials which the deponent is requested to produce;

(6) Application for any subpoenas.

(c) *Service and reply.* A copy of the application to take deposition shall be served upon every other party to the proceeding and upon the person sought to be deposed. Any party or the deponent may serve and file an opposition to the application within seven days after the application is filed.

(d) *Time when, place where, and officer before whom deposition is taken—*(1) *Where the deposition is taken.* Unless otherwise ordered or agreed to by stipulation, depositions shall be taken in

the city or municipality where the deponent is located.

(2) *Officer before whom taken.* (i) Within the United States or a territory of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(ii) Within a foreign country, depositions may be taken before an officer or person designated by the Administrative Law Judge or agreed upon by the parties by a stipulation in writing to be filed with the Proceedings Clerk.

(e) *Procedures for taking oral depositions.* (1) Oral examination and cross-examination of witnesses shall be conducted in a manner similar to that permitted at a formal hearing. All questions and testimony shall be recorded verbatim, except to the extent that all parties present or represented may agree that a matter shall be off the record.

(2) All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, or any other objection to the proceeding shall be noted by the officer upon the deposition, and shall subsequently be determined by the Administrative Law Judge. Evidence objected to shall be taken subject to the objections. However, the parties may stipulate that, except as to objections to the form of questions, all objections to the matters testified to in a deposition are preserved for the hearing, whether or not raised at the time of deposition.

(3) During the taking of a deposition a party or deponent may request and obtain an adjournment to permit an application to be made to the Administrative Law Judge for an order suspending the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of a deponent or party, or improper questions. An attorney who requests and obtains an adjournment for this purpose but fails, without good cause, promptly to apply for relief to the Administrative Law Judge may be found guilty of contemptuous conduct

in accordance with §10.11(b) of these rules.

(f) *Procedures for use of interrogatories.*

(1) If depositions are to be taken and submitted on written interrogatories, the interrogatories shall be filed in triplicate with the application for deposition and served on the parties. Within ten days after service, any party may file, in triplicate, with the Proceedings Clerk, his objections, if any, to such interrogatories and may file such cross-interrogatories as he desires to submit. Other parties shall have ten days to file their objections to cross-interrogatories. Objections shall be settled by the Administrative Law Judge.

(2) When a deposition is taken upon written interrogatories and cross-interrogatories, no party shall be present or represented and no person other than the witness, a stenographic reporter, and the officer shall be present. The officer shall propound the interrogatories and cross-interrogatories to the witness, and the interrogatories and responses thereto shall be transcribed and reduced to writing.

(g) *Use of depositions at hearing.* (1) Any part or all of a deposition, to the extent admissible under rules of evidence applied as though the witness were then present and testifying at the hearing, may be used against any party who had reasonable notice of the taking of the deposition, if the Administrative Law Judge finds that:

(i) The witness is dead;

(ii) The witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(iii) The witness is out of the United States at the time of the hearing, unless it appears that the absence of the witness was procured by the party offering the deposition.

(2) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(3) Objection may be made at a hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of

the evidence if the witness were then present and testifying.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

### Subpart E—Hearings

#### § 10.61 Time and place of hearing.

(a) *Notice.* All parties shall be notified of the time and place of hearing, which shall be fixed with due regard for the public interest and the convenience and necessity of the parties and their representatives.

(b) *Requests for change.* A request for postponement of a hearing or for a change in the place assigned for hearing will be granted by the Administrative Law Judge only for good cause shown.

#### § 10.62 Appearances.

(a) *Who may appear.* The parties may appear in person, by counsel or by other representatives of their choosing, subject to the provisions of §10.11 of these rules and part 14 of this chapter, dealing with appearance and practice before the Commission.

(b) *Effect of failure to appear.* (1) If any party to the proceeding, after filing an answer fails to appear at the hearing or any part thereof, he shall to that extent be deemed to have waived the right to an oral hearing in the proceeding. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(2) A failure to appear at a hearing shall not constitute a waiver of a party's right to propose findings of fact based on the record in the proceeding, to propose conclusions of law or to submit briefs, in the manner provided in §10.82, if the non-appearing party submits prior to the scheduled hearing or within three days thereafter, a notice of appearance indicating his intent to continue to participate in the proceeding. Otherwise, his failure to appear will constitute a default, and a default order may be sought in accordance with procedures set forth in §10.93 of these rules.