

## § 10.92

## 17 CFR Ch. I (4-1-03 Edition)

(d) *Oral argument.* Oral argument may be granted at the discretion of the Administrative Law Judge.

(e) *Ruling on motion.* The Administrative Law Judge shall grant a motion for summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An order denying a motion for summary disposition is subject to interlocutory review under the provisions of § 10.101 on the same terms as a ruling on any other motion. An order granting a motion for summary disposition is reviewable by the Commission in accordance with the provisions of § 10.102 relating to appeals of initial decisions.

### § 10.92 Shortened procedure.

(a) *How initiated.* With the consent of the parties, in lieu of a full oral hearing, the Administrative Law Judge may order a shortened procedure as to the submission of direct evidence may be ordered in a proceeding. An order for shortened procedure shall list the names and addresses of all persons who are parties to the proceeding and shall direct compliance with the procedures established in this section. The order shall be served by the Proceedings Clerk upon all parties.

(b) *Filing of Statements*—(1) Opening statement. Within 20 days after receipt of notice that the shortened procedure will be used, the Division of Enforcement shall serve upon all other parties and file with the Proceedings Clerk, in triplicate, an opening statement, in support of the complaint;

(2) *Answering statement.* Within 20 days after receipt of the opening statement of the Division, each respondent may serve upon all other parties and file with the Proceedings Clerk, in triplicate, in support of his answer, an answering statement.

(3) *Statement in reply.* Within ten days after receipt of all answering statements, or within ten days after the expiration of the period within which an-

swering statements may be served, the Division of Enforcement may serve upon all other parties and file with the Proceedings Clerk, in triplicate, a statement in reply, which shall be confined strictly to replying to the facts and arguments set forth in the answering statements.

(c) *Joint statements.* Parties having a common interest may serve and file joint statements.

(d) *Failure to file statement.* Any party who, without the express permission of the Administrative Law Judge, should fail to file a statement within the time prescribed by this section after service upon him of an order for shortened procedures shall be in default and shall be deemed to have waived any further hearing.

(e) *Content of statements.* As used in this section, the term “statement” includes

(1) Statements of fact signed and sworn to by persons having knowledge of those facts;

(2) Documents filed as part of the proof of the alleged facts (which shall be duly authenticated under oath or otherwise in a manner that would render them admissible in evidence at an oral hearing under the rules in this part); and

(3) Briefs containing argument to sustain the contentions of the party submitting the statement.

(f) *Verification.* The facts asserted in any statement filed under shortened procedure must be sworn to by persons having knowledge thereof and, except under unusual circumstances, the persons should be those who would appear as witnesses to substantiate the facts asserted should a full oral hearing become necessary.

(g) *Hearings*—(1) *Request for cross-examination or other hearings.* If cross-examination is desired of any witness whose affidavit or other verified statement has been submitted, the name of the witness and the subject matter of the desired cross-examination shall be stated at the end of the answering statement or statement in reply as the case may be. Oral hearings under other circumstances may also be requested but will be granted only under exceptional circumstances. Any request filed under this subparagraph shall include a

justification of the need for oral hearing.

(2) *Hearings issues limited.* The order setting the proceeding for oral hearing, if hearing is found necessary, will specify the matters upon which the parties are not in agreement and concerning which oral evidence is to be introduced. Unless material facts are in dispute, oral hearing will not be held.

(h) *Subsequent procedure.* Post-hearing procedures shall be the same as those in proceedings in which the shortened procedures have not been followed.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995; 64 FR 30903, June 9, 1999]

#### § 10.93 Obtaining default order.

When a respondent has failed to (a) file an answer as provided in § 10.23 of these rules or (b) failed to appear or file a notice of appearance as provided in § 10.62 of these rules or (c) failed to file a statement under the shortened procedures as provided in § 10.92 of these rules, the Division of Enforcement may move the Administrative Law Judge to enter findings and conclusions and a default order against that respondent based upon the matters set forth in the complaint, which shall be deemed to be true for purposes of this determination.

#### § 10.94 Setting aside of default.

In order to prevent injustice and on such conditions as may be appropriate, (a) the Commission may at any time set aside a default order obtained under § 10.93; and (b) the Administrative Law Judge may set aside a default order obtained under § 10.93 at any time prior to filing of his initial decision in a proceeding in which there are remaining respondents. Any motion to set aside a default shall be made within a reasonable time, and shall state the reasons for the failure to file or appear and specify the nature of the proposed defense in the proceeding.

### Subpart H—Appeals to the Commission; Settlements

#### § 10.101 Interlocutory appeals.

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought in accordance with the following procedures:

(a) *Scope of review.* The Commission will not review a ruling of the Administrative Law Judge prior to the Commission's consideration of the entire proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from an adverse ruling pursuant to § 10.8(b) on a motion to disqualify an Administrative Law Judge;

(2) Appeal from a ruling pursuant to § 10.11(b) suspending an attorney from participation in a particular proceeding.

(3) Appeal from a ruling pursuant to §§ 10.33 and 10.34 denying intervention or limited participation;

(4) Appeal from a ruling pursuant to § 10.68(b) requiring the appearance of an officer or employee of the Commission or another government agency or the production of Commission records;

(5) Upon a determination by the Administrative Law Judge, certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

(b) *Procedure to obtain interlocutory review*—(1) *In general.* An application for interlocutory review may be filed within five days after notice of the Administrative Law Judge's ruling on a matter described in paragraphs (a)(1), (a)(2), (a)(3) or (a)(4) of this section, except if a request for certification under paragraph (a)(5) of this section has