

§ 104.9

be appropriate to facilitate the proceedings.

§ 104.9 Admission of evidence.

(a) Where the Presiding Officer has directed identification of witnesses and production of documentation evidence by a certain date, the Presiding Officer may exclude any such evidence, or refuse to allow any witness to testify, when the witness was not identified or the document was not served by the time set by the Presiding Officer. Any such direction with respect to a party's case in chief shall not preclude the use of such evidence or testimony on rebuttal or response, or upon a showing satisfactory to the Presiding Officer that good cause existed for failure to serve testimony or a document or identify a witness by the time required. The Presiding Officer may require direct testimony to be in writing under oath and served by a certain date, and may exclude testimony not so served.

(b) At the first prehearing conference, or at another time before the beginning of the taking of oral testimony to be set by the Presiding Officer, the statement of basis and purpose, together with any publications or reference materials cited therein, except where excluded by stipulation, shall be received in evidence.

(c) The Presiding Officer may exclude evidence which is immaterial, irrelevant, unduly repetitious or cumulative, or would involve undue delay, or which, if hearsay, is not of the sort upon which responsible persons are accustomed to rely.

(d) If relevant and material evidence is contained in a report or document containing immaterial or irrelevant matter, such immaterial or irrelevant matter may be excluded.

(e) Whenever written testimony or a document or object is excluded from evidence by the Presiding Officer, it shall at the request of the proponent be marked for identification. Where oral testimony is permitted by the Presiding Officer, but the Presiding Officer excludes particular oral testimony, the party offering such testimony may make a brief offer of proof.

(f) Any relevant and material documentary evidence, including but not limited to affidavits, published arti-

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cles, and official documents, regardless of the availability of the affiant or author for cross-examination, may be admitted in evidence, subject to the provisions of paragraphs (a), (c), and (d) of this section. The availability or non-availability of cross-examination shall be considered as affecting the weight to be accorded such evidence in any decision based upon the record.

(g) Official notice may be taken by the Presiding Officer or the Administrator of any matter which could be judicially noticed in the United States District Courts, and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show the contrary.

§ 104.10 Hearing procedures.

(a) Following the admission in evidence of the materials described in § 104.9(b), the Agency shall have the right at the commencement of the hearing to supplement that evidence or to introduce additional relevant evidence. Thereafter the evidence of each objector shall be presented in support of its objection and any proposed modification. The Agency staff shall then be given an opportunity to rebut or respond to the objectors' presentation, including at its option the introduction of evidence which tends to support a standard or standards other than as set forth in the Agency's own initially proposed standards. In the event that evidence which tends to support such other standard or standards is offered and received in evidence, then the objectors may thereafter rebut or respond to any such new evidence.

(b) The burden of proof as to any modification of any standard proposed by the Agency shall be upon the party who advocates such modification to show that the proposed modification is justified based upon a preponderance of the evidence.

(c) Where necessary in order to prevent undue prolongation of the hearing, or to comply with time limitations set forth in the Act, the Presiding Officer may limit the number of witnesses who may testify, and the scope and extent of cross-examination.