

§ 179.94

40 CFR Ch. I (7-1-04 Edition)

unusual cases where the memory or demeanor of the witness is of importance. Written direct testimony shall be in the form of a verified statement of fact or opinion prepared by the witness, in narrative form or in question-and-answer form. Written direct testimony may incorporate exhibits. Such a verified statement or exhibit may not be admitted into evidence sooner than 14 days (or such other reasonable period as the presiding officer may order) after the witness has delivered to the presiding officer and each party a copy of the statement or exhibit. The admissibility of the evidence contained in such a statement is subject to the same rules as if such testimony had been given orally.

(c) Oral cross-examination of witnesses will be permitted. Each exhibit that a party intends to rely upon in cross-examining a witness shall be furnished to the other parties not later than 3 days (or such other reasonable period as the presiding officer may order) before such exhibit is used in the cross-examination.

(d) Witnesses shall give testimony under oath or affirmation.

§ 179.94 Transcripts.

(a) The hearing clerk shall make arrangements to have all oral testimony stenographically reported or recorded and transcribed, with evidence that is admitted in the form of written testimony or exhibits attached or incorporated as appropriate.

(b) Unless the presiding officer orders otherwise, parties shall have 15 days from the date that the transcript of particular oral testimony first becomes available to propose corrections in the transcript of that testimony. Corrections are permitted only for transcription errors. The presiding officer shall promptly order justified corrections.

(c) As soon as practicable after the taking of the last evidence, the presiding officer shall certify:

(1) That the original transcript is a true transcript of the oral testimony offered or received at the hearing, except in such particulars as the presiding officer specifies.

(2) That the written testimony and exhibits accompanying the transcript

are all the written testimony and exhibits introduced at the hearing, with such exceptions as the presiding officer specifies.

(3) The transcript with attached or incorporated material, as so certified by the presiding officer, shall be submitted to and filed by the hearing clerk under § 179.80.

(d) Copies of the transcript shall be available to the public in accordance with § 179.81; parties may make special arrangements through the hearing clerk to obtain copies on an ongoing, expedited basis.

§ 179.95 Admission or exclusion of evidence; objections; offers of proof.

(a) Written material identified as direct testimony or as an evidentiary exhibit and offered by a party in a hearing, and oral testimony, whether on direct or on cross-examination, is admissible as evidence unless the presiding officer excludes it (on objection of a party or on the presiding officer's own initiative) because it is irrelevant, immaterial, or unduly repetitive, or because its exclusion is necessary to enforce a specific requirement of this part relating to the admissibility of evidence.

(b) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination, the party shall state briefly the grounds for such objection. The transcript shall include any argument or debate thereon, unless the presiding officer, with the consent of all the parties, orders that such argument not be transcribed. The ruling and the reasons given therefor by the presiding officer on any objection shall be a part of the transcript. An automatic exception to that ruling will follow.

(c) Whenever evidence is deemed inadmissible, the party offering such evidence may make an offer of proof, which shall be included in the transcript. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. If the evidence consists of a document or exhibit, it shall be inserted in the record in total. If the Administrator in reviewing the record

under §179.112 decides that the presiding officer's ruling in excluding the evidence was erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence, or, where appropriate, the Administrator may evaluate the evidence and proceed to a final decision.

(d) Official notice may be taken of Agency proceedings, any matter that might be judicially noticed by the courts of the United States, or any other fact within the knowledge and experience of the Agency as an expert agency. Any party shall be given adequate opportunity to show that such facts are erroneously noticed by presenting evidence to the contrary.

§ 179.97 Conferences during hearing.

The presiding officer may schedule and hold conferences as needed to monitor the progress of the hearing, narrow and simplify the issues, and consider and rule on motions, requests, or other matters concerning the development of the evidence.

§ 179.98 Briefs and arguments.

(a) Promptly after the taking of evidence is completed, the presiding officer will announce a schedule for the filing of briefs. Briefs must include a statement of position on each issue, with specific and complete citations to the evidence and points of law relied on. Briefs must contain proposed findings of fact and conclusions of law.

(b) The presiding officer may, as a matter of discretion, permit oral argument after the briefs are filed.

Subpart F—Decisions and Appeals

§ 179.101 Interlocutory appeal from ruling of presiding officer.

(a) Except as provided in paragraph (b) of this section and in §§179.20(b), 179.42(f), 179.75(b), and 179.90(f), rulings of the presiding officer may not be appealed to the Administrator before the Administrator's consideration of the entire record of the hearing.

(b) A ruling of the presiding officer is subject to interlocutory appeal to the Administrator if the presiding officer certifies on the record or by document submitted under §179.80 that immediate review is necessary to prevent ex-

ceptional delay, expense, or prejudice to any party or substantial harm to the public interest. When an order or ruling is not certified by the presiding officer, it shall be reviewed by the Administrator only upon appeal from the initial decision except when the Administrator determines upon the request of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests. Except in extraordinary circumstances, proceedings will not be stayed pending an interlocutory appeal. Where a stay is granted, a stay of more than 30 days must be approved by the Administrator.

(c) Ordinarily, the interlocutory appeal will be decided on the basis of the submission made to the presiding officer, but the Administrator may allow further briefs and oral arguments. Any oral argument will be transcribed and the transcript will be prepared and certified in the same manner as provided in §179.94.

§ 179.105 Initial decision.

(a) After the filing of briefs and any oral argument, the presiding officer shall prepare and file an initial decision on the issues of fact in the hearing and the objections relating to those issues.

(b) The initial decision must be based on a fair evaluation of the entire record, and must contain:

(1)(i) A conclusion that no change is warranted in the order or regulation to which objection was taken; or

(ii) A conclusion that changes in the order or regulation are warranted, the language of the order or regulation as changed, and an effective date for the order or regulation as changed, which date must not be earlier than the 90th day after it is published unless the order contains findings as to the existence of emergency conditions that necessitate an earlier effective date.

(2) Findings of fact supported by reliable, probative and substantial evidence that has been found admissible by the presiding officer, and adequate citations to the record supporting those findings.

(3) Conclusions on legal and policy issues, if such conclusions are necessary to resolve the objections.