

official determines that an answer does not comply with the requirements of this rule, he may order either that the matter is admitted or that an amended answer be served.

(d) *Effect of admission.* Any matter admitted under this rule is conclusively established and may be used as proof against the party who made the admission. However, the discovery or decisionmaking official may permit withdrawal or amendment when the presentation of the merits of the proceeding will be served thereby and the party who obtains the admission fails to satisfy such official that withdrawal or amendments will prejudice him in maintaining his action or defense on the merits.

**§ 12.34 Discovery by a decisionmaking official.**

(a) *Applicability.* The provisions of this rule apply only to summary decisional proceedings and formal decisional proceedings commenced pursuant to § 12.26 (b) and (c). This rule does not apply to a voluntary decisional proceeding commenced pursuant to § 12.26(a). For the purposes of this rule, the term “decisionmaking official” shall mean a Judgment Officer or Administrative Law Judge assigned to render a decision in the proceeding.

(b) *Production of documents and tangible things—(1) Order for production.* A decisionmaking official may, upon his own motion, order a party or non-party to produce copies of specifically designated documents, papers, books, accounts, or tangible things (or categories of any of the foregoing) which are in the possession, custody or control of the party, non-party or agent thereof, against whom the order is directed. Except as provided in paragraph (b)(2) of this section, a party or non-party ordered to produce documents or any of the above items under this rule shall file and serve the documents and items listed in the order within twenty (20) days from the date of service of the order, or within such period of time as the decisionmaking official may direct. The decisionmaking official may issue subpoenas to compel the production by parties or non-parties of such documents and tangible things as are described in this section.

(2) *Trade secrets, commercially sensitive or confidential information.* If any party or person against whom an order to produce has been directed acting in good faith has reason to believe that any documents or other tangible thing ordered to be produced contains a trade secret, or commercially sensitive or other confidential information, the party or person may, in lieu of serving any such document, in accordance with paragraph (b)(1) of this section, file and serve a written request for confidential treatment of such documents. Any such request for confidential treatment shall be accompanied by a verified statement identifying with particularity the information on those documents considered to be trade secrets, commercially sensitive or confidential information, with reasons therefor, and indicating which portions, if any, of those documents may be served on other parties without disclosure of such information. Upon considering a request for confidential treatment in accordance with this subsection, the decisionmaking official may, if he finds that the information identified in the request warrants confidential treatment and is not probative of any material fact in controversy, make copies of the documents produced, delete such information from the copies, and serve the copies as modified upon the other parties, with or without an appropriate protective order limiting dissemination to the parties and their counsel, if any.

(3) *Inability to produce.* Any party or person who cannot produce documents or other tangible things called for in an order for production, because those documents or things are not in his possession, custody or control, shall file and serve within the time provided in paragraph (b)(1) of this section a verified statement identifying the documents which cannot be produced and setting forth with particularity the reasons for non-production.

(c) *Order for written testimony.* The decisionmaking official may, upon his own motion, order a party or non-party witness to submit verified statements or written responses to interrogatories, or both, as to all relevant matters within the party’s personal knowledge which are required in response to the

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order. A party or person ordered to file affidavits and/or verified written responses to interrogatories shall file and serve the documents within such period of time as the decisionmaking official may direct. The official may issue subpoenas to compel the filing by parties or non-parties of such verified statements and written responses as are described in this subsection.

### **§ 12.35 Consequences of a party's failure to comply with a discovery order.**

If a party fails to comply with an order compelling discovery, or an order issued pursuant to §12.34, the official assigned to render the decision in the case may, upon motion by a party or on his own motion, take such action in regard thereto as is just, including but not limited to the following:

(a) Infer that the documents or things not produced would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the information in or contents of the documents or things not produced be taken as established adversely to the party;

(c) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown;

(d) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, to which the order for production related, be stricken;

(e) Dismiss the entire proceeding with prejudice to matters alleged in the complaint, but without prejudice to counterclaims; and

(f) Issue a default order and render a decision against the party, whose rights shall thereafter be determined by §§ 12.22 and 12.23 of these rules.

### **§ 12.36 Subpoenas to compel discovery.**

An application for a subpoena requiring a party or non-party to comply with a discovery order issued pursuant to §§12.31 and 12.32, may be made, in writing, by any party without notice to other parties, and may be filed simultaneously with the motion for the discovery order. The standards for issuance or denial of such an application, the service requirement, and the

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method for enforcing such subpoenas shall be determined by the provisions of § 12.313 of these rules.

### **Subpart C—Rules Applicable to Voluntary Decisional Proceedings**

#### **§ 12.100 Scope and applicability of rules.**

(a) *In general.* The rules set forth in this subpart are applicable only to proceedings forwarded pursuant to §12.26(a) of the Reparation Rules. The rules of subpart B permitting discovery are applicable in a voluntary decisional proceeding. Unless specifically made applicable, the rules prescribed in subparts D, E, and F shall not apply in a voluntary decisional proceeding.

(b) *Waiver by electing the voluntary decisional procedure.* By electing the voluntary decisional procedure, parties waive the opportunity for an oral hearing and whatever rights they may have otherwise had: to receive a written statement of the findings of fact upon which the final decision is based; to prejudgment interest in connection with a reparation award; to appeal to the Commission the final decision; and to appeal the final decision to a U.S. Court of Appeals pursuant to section 14(e) of the Commodity Exchange Act, 7 U.S.C. 18(e).

#### **§ 12.101 Functions and responsibilities of the Judgment Officer.**

The Judgment Officer shall be responsible for the fair and orderly conduct of the proceeding and shall have the authority:

(a) To rule upon discovery-related motions, and to issue orders pertaining to discovery;

(b) To take such action pursuant to §12.35 as is appropriate if a party fails to comply with a discovery order;

(c) To issue subpoenas pursuant to §12.36 of these rules;

(d) To issue orders of default for good cause shown against any party who fails to participate in the proceeding, or to comply with any provisions of these rules;

(e) To receive submissions of proof;

(f) Make the final decision in accordance with §12.106 of these rules; and