

### § 3.52

the case on its own docket for review or staying the effective date of the decision.

(b) *Exhaustion of administrative remedies.* An initial decision shall not be considered final agency action subject to judicial review under 5 U.S.C. 704. Any objection to a ruling by the Administrative Law Judge, or to a finding, conclusion or a provision of the order in the initial decision, which is not made a part of an appeal to the Commission shall be deemed to have been waived.

(c) *Content.* (1) An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence. The initial decision shall include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record (or those designated under paragraph (c)(2) of this section) and an appropriate rule or order. Rulings containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f).

(2) When more than one claim for relief is presented in an action, or when multiple parties are involved, the Administrative Law Judge may direct the entry of an initial decision as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of initial decision.

(d) *By whom made.* The initial decision shall be made and filed by the Administrative Law Judge who presided over the hearings, except when he shall have become unavailable to the Commission.

(e) *Reopening of proceeding by Administrative Law Judge; termination of jurisdiction.* (1) At any time prior to the filing of his initial decision, an Administrative Law Judge may reopen the proceeding for the reception of further evidence.

(2) Except for the correction of clerical errors or pursuant to an order of remand from the Commission, the jurisdiction of the Administrative Law

### 16 CFR Ch. I (1-1-06 Edition)

Judge is terminated upon the filing of his initial decision with respect to those issues decided pursuant to paragraph (c)(1) of this section.

[32 FR 8449, June 13, 1967, as amended at 35 FR 10656, July 1, 1970; 44 FR 62887, Nov. 1, 1979; 48 FR 52576, Nov. 21, 1983; 48 FR 54810, Dec. 7, 1983; 52 FR 22294, June 11, 1987; 61 FR 50650, Sept. 26, 1996; 66 FR 17631, Apr. 3, 2001]

### § 3.52 Appeal from initial decision.

(a) *Who may file; notice of intention.* Any party to a proceeding may appeal an initial decision to the Commission by filing a notice of appeal with the Secretary within ten (10) days after service of the initial decision. The notice shall specify the party or parties against whom the appeal is taken and shall designate the initial decision and order or part thereof appealed from. If a timely notice of appeal is filed by a party, any other party may thereafter file a notice of appeal within five (5) days after service of the first notice, or within ten (10) days after service of the initial decision, whichever period expires last.

(b) *Appeal brief.* (1) The appeal shall be in the form of a brief, filed within thirty (30) days after service of the initial decision, and shall contain, in the order indicated, the following:

(i) A subject index of the matter in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(ii) A concise statement of the case, which includes a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear, and accurate statement of the arguments made in the body of the brief, and which must not merely repeat the argument headings;

(iii) A specification of the questions intended to be urged;

(iv) The argument presenting clearly the points of fact and law relied upon in support of the position taken on each question, with specific page references to the record and the legal or other material relied upon; and

(v) A proposed form of order for the Commission's consideration instead of

## Federal Trade Commission

## § 3.52

the order contained in the initial decision.

(2) The brief shall not, without leave of the Commission, exceed 18,750 words, including all footnotes and other substantive matter but excluding the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(c) *Answering brief.* Within thirty (30) days after service of the appeal brief, the appellee may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto, as well as arguments in response to the appellant's appeal brief. However, if the appellee is also cross-appealing, its answering brief shall also contain its arguments as to any issues the party is raising on cross-appeal, including the points of fact and law relied upon in support of its position on each question, with specific page references to the record and legal or other material on which the party relies in support of its cross-appeal, and a proposed form of order for the Commission's consideration instead of the order contained in the initial decision. If the appellee does not cross-appeal, its answering brief shall not, without leave of the Commission, exceed 18,750 words. If the appellee cross-appeals, its brief in answer and on cross-appeal shall not, without leave of the Commission, exceed 26,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e).

(d) *Reply brief.* Within seven (7) days after service of the appellee's answering brief, the appellant may file a reply brief, which shall be limited to rebuttal of matters in the answering brief and shall not, without leave of the Commission, exceed 18,750 words. If the appellee has cross-appealed, any party who is the subject of the cross-appeal may, within thirty (30) days after serv-

ice of such appellee's brief, file a reply brief, which shall be limited to rebuttal of matters in the appellee's brief and shall not, without leave of the Commission, exceed 18,750 words. The appellee who has cross-appealed may, within seven (7) days after service of a reply to its cross-appeal, file an additional brief, which shall be limited to rebuttal of matters in the reply to its cross-appeal and shall not, without leave of the Commission, exceed 11,250 words. The word count limitations of this paragraph include all footnotes and other substantive matter but exclude the cover, table of contents, table of authorities, glossaries, proposed form of order, appendices containing only sections of statutes or regulations, and any attachment required by § 3.45(e). No further briefs may be filed except by leave of the Commission.

(e) *In camera information.* If a party includes in any brief to be filed under this section information that has been granted *in camera* status pursuant to § 3.45(b) or is subject to confidentiality provisions pursuant to a protective order, the party shall file two versions of the brief in accordance with the procedures set forth in § 3.45(e). The time period specified by this section within which a party may file an answering or reply brief will begin to run upon service on the party of the *in camera* or confidential version of a brief.

(f) *Signature.* (1) The original of each brief filed shall have a hand-signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association.

(2) Signing a brief constitutes a representation by the signer that he or she has read it; that to the best of his or her knowledge, information, and belief, the statements made in it are true; that it is not interposed for delay; that it complies all the applicable word count limitation; and that to the best of his or her knowledge, information, and belief, it complies with all the other rules in this part. If a brief is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the

proceeding may go forward as though the brief has not been filed.

(g) *Designation of appellant and appellee in cases involving cross-appeals.* In a case involving an appeal by complaint counsel and one or more respondents, any respondent who has filed a timely notice of appeal and as to whom the Administrative Law Judge has issued an order to cease and desist shall be deemed an appellant for purposes of paragraphs (b), (c), and (d) of this section. In a case in which the Administrative Law Judge has dismissed the complaint as to all respondents, complaint counsel shall be deemed the appellant for purposes of paragraphs (b), (c), and (d) of this section.

(h) *Oral argument.* All oral arguments shall be public unless otherwise ordered by the Commission. Oral arguments will be held in all cases on appeal to the Commission, unless the Commission otherwise orders upon its own initiative or upon request of any party made at the time of filing his brief. Oral arguments before the Commission shall be reported stenographically, unless otherwise ordered, and a member of the Commission absent from an oral argument may participate in the consideration and decision of the appeal in any case in which the oral argument is stenographically reported. The purpose of oral argument is to emphasize and clarify the written argument appearing in the briefs and to answer questions. Reading at length from the briefs or other texts is not favored.

(i) *Corrections in transcript of oral argument.* The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretary, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief “Order

Correcting Transcript” whenever a joint motion to correct transcript is received.

(j) *Briefs of amicus curiae.* A brief of an amicus curiae may be filed by leave of the Commission granted on motion with notice to the parties or at the request of the Commission, except that such leave shall not be required when the brief is presented by an agency or officer of the United States; or by a State, territory, commonwealth, or the District of Columbia, or by an agency or officer of any of them. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and state how a Commission decision in the matter would affect the applicant or persons it represents. The motion shall also state the reasons why a brief of an amicus curiae is desirable. Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed. A motion for an amicus curiae to participate in oral argument will be granted only for extraordinary reasons.

(k) *Extension of word count limitation.* Extensions of word count limitation are disfavored, and will only be granted where a party can make a strong showing that undue prejudice would result from complying with the existing limit.

[66 FR 17631, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

### §3.53 Review of initial decision in absence of appeal.

An order by the Commission placing a case on its own docket for review will set forth the scope of such review and the issues which will be considered and will make provision for the filing of briefs if deemed appropriate by the Commission.

### §3.54 Decision on appeal or review.

(a) Upon appeal from or review of an initial decision, the Commission will consider such parts of the record as are cited or as may be necessary to resolve