

(i) To join other parties and to amend the pleadings;

(ii) To file and hear motions; and

(iii) To complete discovery.

(2) The scheduling order also may include:

(i) The date or dates for conferences before hearing, a final prehearing conference, and hearing; and

(ii) Any other matters appropriate to the circumstances of the case.

(b) *Prehearing conference.* In addition to the prehearing procedures set forth in Rule 16 of the Federal Rules of Civil Procedure, the Judge may upon his own initiative or on the motion of a party direct the parties to confer among themselves to consider settlement, stipulation of facts, or any other matter that may expedite the hearing.

[57 FR 41685, Sept. 11, 1992, as amended at 70 FR 22788, May 3, 2005]

#### § 2200.52 General provisions governing discovery.

(a) *General*—(1) *Methods and limitations.* In conformity with these rules, any party may, without leave of the Commission or Judge, obtain discovery by one or more of the following methods:

(i) Production of documents or things or permission to enter upon land or other property for inspection and other purposes (§ 2200.53);

(ii) Requests for admission to the extent provided in § 2200.54; and

(iii) Interrogatories to the extent provided in § 2200.55. Discovery is not available under these rules through depositions except to the extent provided in § 2200.56. In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Rule 26(a) of the Federal Rules of Civil Procedure do not apply to Commission proceedings.

(2) *Time for discovery.* A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than seven days prior to the date set for hearing, unless the Judge orders otherwise.

(3) *Service of discovery papers.* Every paper relating to discovery required to be served on a party shall be served on all parties.

(b) *Scope of discovery.* The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discovery of admissible evidence, regardless of which party has the burden of proof.

(c) *Limitations.* The frequency or extent of the discovery methods provided by these rules may be limited by the Commission or Judge if it is determined that:

(1) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(2) The party seeking discovery has had ample opportunity to obtain the information sought by discovery in the action; or

(3) The discovery is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues in litigation.

(d) *Privilege*—(1) *Claims of privilege.* The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from Judge or the Commission, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or *ex parte*, that is, without the participation of parties and their representatives. The judge

may enter an order and impose terms and conditions on his or her examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be disclosed until after the examination is completed.

(2) *Upholding or rejecting claims of privilege.* If the Judge upholds the claim of privilege, the Judge may order and impose terms and conditions as justice may require, including a protective order. If the Judge overrules the claim, the person claiming the privilege may obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission. Interlocutory review of such an order shall be given priority consideration by the Commission.

(e) *Protective orders.* In connection with any discovery procedures and where a showing of good cause has been made, the Commission or Judge may make any order including, but not limited to, one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except persons designated by the Commission or Judge;
- (6) That a deposition after being sealed be opened only by order of the Commission or Judge;
- (7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission or Judge.

(f) *Failure to cooperate; Sanctions.* A party may apply for an order compelling discovery when another party refuses or obstructs discovery. For purposes of this paragraph, an evasive or incomplete answer is to be treated as a failure to answer. If a Judge enters an order compelling discovery and there is a failure to comply with that order, the Judge may make such orders with regard to the failure as are just. The orders may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party. The orders may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:

- (1) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;
- (2) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
- (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed; and
- (4) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(g) *Unreasonable delays.* None of the discovery procedures set forth in these rules shall be used in a manner or at a time which shall delay or impede the progress of the case toward hearing status or the hearing of the case on the date for which it is scheduled, unless, in the interests of justice, the Judge shall order otherwise. Unreasonable delays in utilizing discovery procedures may result in termination of the party's right to conduct discovery.

(h) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (f) of this section shall be served upon the affected party by certified mail, return receipt requested.

(i) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include

information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to:

(i) The identity and location of persons having knowledge of discoverable matters; and

(ii) The identity of each person expected to be called as an expert witness at the hearing, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which:

(i) The party knows that the response was incorrect when made; or

(ii) The party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to the hearing through new requests for supplementation of prior responses.

(j) *Filing of discovery.* Requests for production or inspection under § 2200.53, requests for admission under § 2200.54 and responses thereto, interrogatories under § 2200.55 and the answers thereto, and depositions under § 2200.56 shall be served upon other counsel or parties, but shall not be filed with the Commission or the Judge. The party responsible for service of the discovery material shall retain the original and become the custodian.

(k) *Relief from discovery requests.* If relief is sought under §§ 2200.101 or 2200.52(e), (f), or (g) concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers, or responses in dispute shall be filed with the Judge or Commission contemporaneously with any motion filed under §§ 2200.101 or 2200.52(e), (f), or (g).

(1) *Use at hearing.* If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the Judge or the Commission at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated.

(m) *Use on review or appeal.* When documentation of discovery not previously in the record is needed for review or appeal purposes, upon an application and order of the Judge or Commission the necessary discovery papers shall be filed with the Executive Secretary of the Commission.

[51 FR 32015, Sept. 8, 1986; 52 FR 13832, Apr. 27, 1987, as amended at 55 FR 22782, June 4, 1990; 57 FR 41686, Sept. 11, 1992; 70 FR 22788, May 3, 2005; 70 FR 25652, May 13, 2005]

#### § 2200.53 Production of documents and things.

(a) *Scope.* At any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, any party may serve on any other party a request to:

(1) Produce and permit the party making the request, or a person acting on his or her behalf, to inspect and copy any designated documents, or to inspect and copy, test, or sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served;

(2) Permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon.

(b) *Procedure.* The request shall set forth the items to be inspected, either by individual item or by category and describe each item and category with reasonable particularity. It shall specify a reasonable time, place and manner of making the inspection and performing related acts. The party upon whom the request is served shall serve a written response within 30 days after service of the request, unless the requesting party allows a longer time.