

§ 10.102

17 CFR Ch. I (4–1–07 Edition)

(a) *Scope of review.* The Commission will not review a ruling of the Administrative Law Judge prior to the Commission's consideration of the entire proceeding in the absence of extraordinary circumstances. An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) Appeal from an adverse ruling pursuant to § 10.8(b) on a motion to disqualify an Administrative Law Judge;

(2) Appeal from a ruling pursuant to § 10.11(b) suspending an attorney from participation in a particular proceeding.

(3) Appeal from a ruling pursuant to §§ 10.33 and 10.34 denying intervention or limited participation;

(4) Appeal from a ruling pursuant to § 10.68(b) requiring the appearance of an officer or employee of the Commission or another government agency or the production of Commission records;

(5) Upon a determination by the Administrative Law Judge, certified to the Commission either in writing or on the record, that

(i) A ruling sought to be appealed involves a controlling question of law or policy;

(ii) An immediate appeal may materially advance the ultimate resolution of the issues in the proceeding; and

(iii) Subsequent reversal of the ruling would cause unnecessary delay or expense to the parties.

(b) *Procedure to obtain interlocutory review*—(1) *In general.* An application for interlocutory review may be filed within five days after notice of the Administrative Law Judge's ruling on a matter described in paragraphs (a)(1), (a)(2), (a)(3) or (a)(4) of this section, except if a request for certification under paragraph (a)(5) of this section has been filed with the Administrative Law Judge within five days after notice of the Administrative Law Judge's ruling on the matter. If a request for certification has been filed, an Application for interlocutory review under paragraphs (a)(1) through (a)(5) of this section may be filed within five days after notification of the Administrative Law Judge's ruling on such request.

(2) An application for review shall:

(i) Designate the ruling or part thereof from which appeal is being taken;

(ii) Present the points of fact and law relied upon in support of the position taken; and

(iii) Not exceed 15 pages.

(3) Any party that opposes the application may file a response, not to exceed 15 pages, within five days after service of the application.

(4) The Commission will determine whether to grant a review based upon the application for review and the response thereto, without oral argument or further written presentation, unless the Commission shall otherwise direct.

(c) *Proceedings not stayed.* The filing of an application for review and the grant of review shall not stay proceedings before an Administrative Law Judge unless the Administrative Law Judge or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge and denied.

[41 FR 2511, Jan. 16, 1976, as amended at 63 FR 55794, Oct. 19, 1998; 64 FR 30903, June 9, 1999]

§ 10.102 Review of initial decisions.

(a) *Notice of appeal*—(1) *In general.* Any party to a proceeding may appeal to the Commission an initial decision or a dismissal or other final disposition of the proceeding by the Administrative Law Judge as to any party. The appeal shall be initiated by serving and filing with the Proceedings Clerk a notice of appeal within 15 days after service of the initial decision or other order terminating the proceeding; where service of the initial decision or other order terminating the proceeding is effected by mail or commercial carrier, the time within which the party served may file a notice of appeal shall be increased by 3 days.

(2) *Cross appeals.* If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within 15 days after service of the first notice or within 15 days after service of the initial decision or other order terminating the proceeding, whichever is later.

(3) *Confirmation of filing.* The Proceedings Clerk shall confirm the filing of a notice of appeal by mailing a copy thereof to each other party.

(b) *Briefs: Time for filing.* The appeal shall be perfected through the filing of an appeal brief.

(1) *Appeal brief.* The appeal brief shall be filed within 30 days after filing of the notice of appeal.

(2) *Answering brief.* Within 30 days after service of the appeal brief upon any other party that party may file an answering brief.

(3) *Reply brief.* Within 14 days after service of an answering brief, the party that filed the first brief may file a reply brief.

(4) No further briefs shall be permitted, unless so ordered by the Commission on its own motion.

(5) *Cross appeals.* In the event that any party files a notice of cross appeal pursuant to paragraph (a)(2) of this section, the Commission shall, to the extent practicable, adjust the briefing schedule and any page limitations otherwise applicable under this section so as to accommodate consolidated briefing by the parties.

If the appeal brief is not filed within the time specified the opposing party may move for dismissal of the appeal.

(c) *Briefs: Number of copies.* An original and 10 copies of all briefs submitted under this section shall be filed with the Proceedings Clerk.

(d) *Briefs: Content and form.* (1) The appeal brief should include, in the order indicated:

(i) A statement of the issues presented for review.

(ii) A statement of the case. The statement shall first indicate briefly the nature of the case. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record.

(iii) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the party to the appeal with respect to the issues presented, and the reasons therefor, and citations to supporting authorities, statutes and parts of the record.

(iv) A conclusion stating the precise relief sought.

(2) The answering brief generally shall follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the party does not dispute the

issues and statement of the case contained in the appeal brief. Any reply brief shall be confined to matters raised in the answering brief and shall be limited to 15 pages in length.

(3) Any matter not briefed shall be deemed waived, and may not be argued before the Commission.

(e) *Appendix to briefs*—(1) *Designation of contents of appendix.* At the time an appellant serves and files its appeal brief, it shall also serve and file a designation of those specific parts of the record to which it wishes to direct the particular attention of the Commission and that it wishes to have included in the appendix, including, but not necessarily limited to, particular pages of the transcript and portions of exhibits filed in the proceeding. The designation shall be set forth in a document wholly separate and apart from the brief, shall enumerate those specific parts of the record that the appellant wishes to have included in the appendix and shall not incorporate by reference citations to the record contained in its brief or in any other document. If an appellee deems it necessary to direct the particular attention of the Commission to specific parts of the record not designated by any appellant, it shall serve and file with its answering brief a designation of additional portions of the record for inclusion in the appendix. Any reply brief filed by the appellant may, if necessary, supplement the appellant's previous designation. In designating parts of the record for inclusion in the appendix, the principal parts of the record relied upon should be designated, but the parties shall have regard to the fact that the entire record is always available to the Commission for reference and examinations and shall not engage in unnecessary designation. The fact that a part of the record is not included in an appendix shall not prevent any party or the Commission from relying thereon.

(2) *Preparation of the appendix.* Within 15 days after the last answering brief or reply brief of a party was due to be filed, the Office of Proceedings shall prepare an appendix to the briefs which will contain a list of the relevant docket entries filed in the proceedings before the Administrative Law Judge, the

initial decision and order of the Administrative Law Judge, the pleadings filed on behalf of the parties who are participating in the appeal and such other parts of the record designated by the parties to the appeal in accordance with the procedures set forth in paragraph (e)(1) of this section. The Proceedings Clerk shall cause one copy of the appendix to be served on each of the parties to the appeal and shall cause ten copies of the appendix to be placed in the docket of the proceeding for the use of the Commission.

(3) *Objections to appendix.* Any party who believes that an error or omission has been made in the preparation of the appendix or that the appendix is misleading, prejudicial or otherwise inadequate may on that basis file a motion with the Commission to amend or supplement the appendix within 30 days of the date of the mailing of the appendix.

The Commission has determined that once an appeal goes to the Commission, it is in a better position than the Chief Administrative Law Judge to review motions objecting to the appendix or seeking to supplement the appendix. Consequently, upon the adoption of this amendment, the Commission and not the Chief Administrative Law Judge will consider any objection to the appendix pursuant to paragraph (e)(3) of this section. As provided by the amendment, a motion raising objections to the appendix must be filed within 30 days after the date of the mailing of the appendix.

(f) *Effect of failure to file an appeal.* Timely appeal to the Commission for review of an initial decision is mandatory as a prerequisite to seeking judicial review of a final decision entered pursuant to these Rules of Practice.

(7 U.S.C. Secs. 4a, 12a; 5 U.S.C. Sec. 10)

[41 FR 2511, Jan. 16, 1976, as amended at 41 FR 18071, Apr. 30, 1976; 41 FR 19932, May 14, 1976; 47 FR 5999, Feb. 10, 1982; 60 FR 54802, Oct. 26, 1995; 61 FR 21954, May 13, 1996; 63 FR 55794, Oct. 19, 1998; 63 FR 68829, Dec. 14, 1998; 64 FR 30903, June 9, 1999]

§ 10.103 Oral argument before the Commission.

(a) *Request.* Any party may file with the Proceedings Clerk a request in writing for the opportunity to present

oral argument before the Commission, which the Commission may in its discretion grant or deny. A request for oral argument must be made within the time provided for filing the initial briefs.

(b) *Time allowed.* Unless otherwise directed by the Commission, not more than one-half hour will be allowed for oral argument by any participant. Where the same or similar interests are represented by more than one participant, an aggregate of not more than one-half hour will be allowed the interests so represented irrespective of the number of participants, the time to be divided equally among such participants or as they may agree among themselves. In appropriate cases the Commission may, in its discretion, extend, shorten or reallocate the time prescribed herein.

(c) *Reporting and transcription.* Oral arguments before the Commission shall be reported and transcribed in written form unless the Commission shall direct otherwise.

(d) *Commissioners not present at oral argument.* A member of the Commission who was not present at the oral argument may participate in the decision of the proceeding. Any Commissioner participating in the decision who was not present at the argument will review the transcript of argument.

[41 FR 2511, Jan. 16, 1976, as amended at 60 FR 54802, Oct. 26, 1995]

§ 10.104 Scope of review; Commission decision.

(a) *Scope of review.* The Commission will ordinarily consider the whole record on review, and base its determination thereon. However, it may limit the issues to those presented in the statement of issues in the brief.

(b) *Decision on review.* On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial decision by the Administrative Law Judge and make any findings or conclusions which in its judgment are proper based on the record in the proceeding. The Commission's decision shall be contained in its opinion and order. In the event the Commission is equally divided as to its decision the