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Part VI

Federal Trade Commission

16 CFR Part 2, et al.

Rules of Practice Amendments; Final Rule

FEDERAL TRADE COMMISSION

16 CFR Parts 2, 3, and 4

Rules of Practice Amendments

AGENCY: Federal Trade Commission (FTC).

ACTION: Interim rules with request for comments.

SUMMARY: The FTC is amending its Rules of Practice for adjudicatory proceedings. The amendments are expected to reduce the cost, complexity, and length of FTC adjudicatory proceedings by clarifying and streamlining the agency procedures governing such proceedings.

DATES: These rule amendments are effective on September 26, 1996. Comments must be received on or before November 25, 1996. Dates of Applicability: These amendments will govern all Commission adjudicatory proceedings that are commenced on or after January 1, 1997. They will also govern all Commission adjudicatory proceedings that are currently pending and all proceedings that are commenced before January 1, 1997, except to the extent that, in the opinion of the Administrative Law Judge (ALJ) or the Commission, the application of one or more amended rules in a particular proceeding would not be feasible or would work injustice.

ADDRESSES: Written comments must be submitted in 20 copies to the Office of the Secretary, Room 159, Federal Trade Commission, 6th Street & Pennsylvania Avenue, N.W., Washington, D.C. 20580. Individuals filing comments need not submit multiple copies.

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SUPPLEMENTARY INFORMATION: On May 30, 1995, FTC Chairman Robert Pitofsky announced the formation of a special Task Force on Administrative Adjudication (''Task Force'') to review FTC rules and policies governing the conduct of administrative litigation at the Commission (''Part 3 Rules''). The Task Force developed recommendations for clarifying and streamlining current procedures for adjudication before the Commission.

As the Commission has previously recognized, unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program and law enforcement mission. The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of a proceeding. 16 CFR 3.1. Unnecessarily long proceedings waste Commission and private resources. Delay can extend legal uncertainty for respondents and third parties, and may reduce the efficacy of any remedies resulting from such proceedings. Delay may also lessen the quality of agency decisions when evidence becomes stale. The risk of lengthy proceedings may also undermine administrative adjudication as a valid alternative when parties are deciding whether to settle a matter. While some respondents may benefit, others may feel unduly pressured to settle if they believe that Part 3 litigation will entail a substantial commitment of time and resources. Similarly, the expectation of unnecessarily lengthy administrative litigation may lead Commission staff to recommend Commission acceptance of an unduly limited settlement. The length of time taken in FTC proceedings may also be a factor that some courts consider in deciding whether to grant a preliminary injunction pending the outcome of the Commission's administrative proceeding. *FTC* v. *Freeman Hosp.*, 1995–1, Trade Cas. (CCH) ¶ 71,037 at 74,893 n.8 (D. Mo. 1995), *aff'd*, 69 F. 3d 260 (8th Cir. 1995).

In light of such concerns, the Commission has made several efforts over the years to identify ways to make Part 3 proceedings more efficient without sacrificing the quality of decisionmaking or compromising the procedural rights of parties in such proceedings. In 1985, for example, the Commission adopted various rule changes specifically designed to improve prehearing case management and expedite Part 3 proceedings, including the existing requirement regarding the timely initiation of evidentiary hearings. 50 FR 41485 (Oct. 11, 1985).

More recently, the Commission has made further strides to reduce the time taken to render decisions in adjudicative proceedings.[1] In April 1994, the Commission set internal deadlines for the preparation and issuance of final orders and opinions in appeals from an initial decision. This schedule established deadlines for each of the principal stages of preparation of adjudicative opinions, including separate statements. Under the new schedule it is expected that the drafting process is the usual adjudicative proceeding should generally span approximately eight (8) months (following oral argument before the Commission). To ensure that its adjudicative decisionmaking remains on schedule, the Commission meets quarterly, or more often when necessary, to review the progress of each pending adjudicative matter on appeal before the Commission.

Since implementing a deadline schedule governing its own conduct in the preparation of final orders and opinions in adjudicative proceedings, the Commission has disposed of a backlog of cases pending when the schedule was adopted. Currently, there is one adjudicative proceeding pending before the Commission on appeal.

Building upon these past actions, the Commission has determined to adopt further procedural rule changes as set forth below. The Commission believes that these changes will advance its goal of assuring the public that administrative law enforcement proceedings will be resolved fairly and within a reasonable time.

The Commission also encourages the ALJs to consider implementing other techniques, besides the rule amendments announced in this notice, to expedite action in each adjudicatory proceeding. Efficient adjudication required affirmative case management, and ALJs have broad powers under Rule 3.42(c) that should be used fully to balance the interests in expedition and fairness.

Two techniques for expediting evidentiary hearings particularly merit attention by the ALJs. First, the Commission encourages the ALJs generally to conduct the evidentiary hearing by using consecutive, full trial days. Historical data for the past ten years indicate that while the average evidentiary trial spans over three (3) months, only thirty of those days are actual trial days. Normally conducting proceedings on consecutive days, in most cases, would enable the ALJ and the litigants to use the period designated for trial to its fullest advantage.

[1] In announcing institutional improvements at the agency, then-Chairman Steiger explained that the Commission had determined to take action to address criticisms of delay that were contained in a Task Force Report of the American Bar Association. See Prepared Remarks of Chairman Janet D. Steiger Before Section of Antitrust Law, American Bar Association (Apr. 8, 1994) (referring to Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST L.J. 43 (1989)).

Second, in appropriate cases the ALJs should encourage the parties to submit the direct examination of expert witnesses in writing, in lieu of live direct examination, reserving live testimony for the cross-examination. This practice would reduce the time necessary for the presentation of direct testimony but still allow the ALJ to assess the demeanor and credibility of expert witnesses. Submission of direct expert testimony in writing may result in more focused cross-examination and would afford both the parties and the ALJ an opportunity to identify in advance any questions raised by the expert's direct testimony.

The Commission also invites the ALJs to exercise their discretion in regulating the course of adjudicative proceedings in a manner that expedites proceedings, consistent with due process considerations. For instance, ALJs may wish to consider requiring that, in appropriate circumstances, proposed findings of fact and conclusions of law be submitted by the parties before, rather than after, trial. In certain proceedings, this practice could instill more rigor in the litigants' presentation of evidence at trial, while also aiding the ALJ in monitoring the introduction of evidence and in preparing findings of fact and conclusions of law after the evidentiary hearing. ALJs may wish to utilize an alternative procedure, either in conjunction with, or in lieu of, pretrial findings of fact and conclusions of law. For example, an ALJ may require the parties to submit proposed stipulations and contentions to further narrow the legal and factual issues to be presented during the evidentiary hearing. See *e.g., United States* v. *American Telephone & Telegraph Co.*, 552 F. Supp. 131, 140 (D.D.C. 1982).

As a further step in expediting administrative adjudication, the Commission has determined to establish an alternative ''fast track'' schedule that respondents may elect in appropriate administrative proceedings.[2] The option is available when a federal district court has granted a preliminary injunction in a collateral federal court proceeding, brought by the Commission to challenge some or all of the same conduct at issue in the administrative proceeding.[3] Under the fast track schedule, the Commission would issue a final order and opinion within thirteen (13) months after the latest of the following events (''triggering event''): (1) Issuance of an administrative complaint; (2) entry of a preliminary injunction by a federal district court; or (3) the date on which respondent elects the fast track. This deadline may be amended by the Commission only in the following two circumstances: (1) If the Commission's final order or opinion contains material or information designated for *in camera* treatment, thus obliging the agency to provide advance notification of the Commission's intent to disclose that information to submitters of such *in camera* material or information; or (2) if the Commission determines that adherence to the thirteen-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of the fast track proceeding.

When the Commission determines to authorize its staff to seek a preliminary injunction in federal court, the agency may also determine to advise the respondent that the respondent may elect the fast track schedule if the federal district court preliminarily enjoins the challenged conduct. Such notice will be provided to the prospective respondent at the time it is notified of the Commission's action authorizing the preliminary injunction motion. The Commission expects that the fast track procedure will be available to respondents in the typical merger challenge; however, certain cases may appear too complex at the outset to be designated as appropriate for the fast track schedule. In such instances, the Commission would not notify the respondent respecting an option to elect the fast track.

The new rule specifies the period of time within which a potential respondent must elect the fast track schedule. In administrative proceedings involving multiple respondents, the fast track schedule will be available only if all respondents elect it.

The Commission expects that the expedited deadlines imposed under the fast track procedures will require active management by the ALJ. Although the new fast track rule specifies certain interim deadlines, the time frames for other interim stages are left to the ALJ's discretion. Thus, the length of time to be allotted for discovery, the evidentiary hearing, and post-trial written submissions are to be set by the ALJ, in keeping with the fast track requirement that the ALJ must file the initial decision within one hundred ninety-five (195) days after the triggering event specified in new § 3.11A. The Commission anticipates that in a typical proceeding governed by the fast track schedule, discovery will be completed within three (3) months, the evidentiary hearing will span no longer than six weeks, and post-trial submissions will be submitted within four weeks following the conclusion of the evidentiary hearing.

The ALJ may in his discretion treat discovery from the preliminary injunction hearing and transcripts of testimony in the preliminary injunction proceeding as if the material had been discovered and presented in the administrative proceeding. The ALJ may limit the number of depositions, witnesses, or document production under his plenary authority. See 16 CFR 3.42(c)(6).

The fast track appellate procedure before the Commission differs from that governing the standard administrative adjudication. In addition to the shorter time frame required for issuance of the Commission's final order and opinion, the fast track procedure requires the simultaneous filing of the parties' initial appeal briefs (rather than the staggered cross-appeal procedure permitted under Rule 3.52(c)). The Commission's final order and opinion in the proceeding will be ready for issuance within one hundred ninety-five (195) days after the filing of the ALJ's initial decision.[4]

The thirteen (13) month deadline contemplated under the new procedural rule compares favorably with the schedules followed by federal district courts in a number of permanent injunction hearings involving mergers. Since 1986, the Department of Justice Antitrust Division has litigated eight merger enforcement actions on the merits in permanent injunction proceedings in federal court.[5] On average, these cases spanned approximately ten (10) months from filing of the complaint to issuance of the district court opinion.See generally *United States* v. *Mercy Health Services*, 902 F. Supp. 968 (N.D. Iowa 1995)—complaint to opinion: 141 days (including ten-day trial); *United States* v. *Nat. L.C.*, and *D.R. Partners D/B/A Donrey Media Group*, 892 F. Supp 1146 (W.D. Ark. 1995)—complaint to

[2] The new procedure could apply to any administrative adjudication specifically designated by the Commission in which the agency also seeks a preliminary injunction to enjoin the same conduct challenged in the administrative complaint. The Commission expects that most such cases will involve challenges to mergers and acquisitions.

[3] If the preliminary injunction is later vacated, the Commission, in its discretion, may take such action as it deems appropriate in the administrative adjudication.

[4] The Commission's final order and opinion will be ready for issuance within the specified time period, except that, if the Commission's order or opinion contains material or information that has been designated for *in camera* treatment, its issuance may be delayed to the extent necessary to provide the submitters of such material or information with advance notice of the Commission's intent to release such information in the final order or opinion in the proceeding.

[5] Some of these cases involved a consolidation of both the preliminary and permanent injunction proceedings.

opinion: ninety-four days (including eight-day trial); *United States* v. *United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991)—complaint to opinion: 422 days [1.2 years] (including six-day trial); *United States* v. *Baker Hughes, Inc.*, 731 F. Supp. 3 (D.D.C. 1990)—complaint to opinion: seventy days (including one-day trial); *United States* v. *The Rank Organisation plc*, 1990–2 Trade Cas. (CCH) ¶69,257 (C.D. Cal. 1990)—complaint to opinion: 141 days (including eight-day trial); *United States* v. *Rockford Memorial Corp.*, 717 F. Supp. 1251 (N.D. Ill. 1989)—complaint to opinion: 267 days (including nineteen-day trial); *United States* v. *Syufy Enterprises*, 712 F. Supp. 1386 (N.D. Cal 1989)—complaint to opinion: 973 days (2.6 years) (including eight-day trial); and *United States* v. *Carilion Health System*, 707 F. Supp. 840 (W.D. Va. 1989)—complaint to opinion: 262 days (including twenty-six day trial). The Commission's new procedures entail a slightly longer period of time than the instances cited, because they contemplate both a trial and an administrative appellate process. Because an initial decision by an ALJ is followed by *de novo* review of the initial decision by the Commission, the longer time frame is necessary. The Commission believes this expedited time frame is both realistic and a reasonable period within which such adjudications should be resolved.

In addition to the rule amendments announced today, the Commission has determined to implement the following two institutional improvements that are intended to make information more readily available to the public regarding both the agency's case management of its adjudicative docket and interlocutory rulings issued by ALJs in adjudicative proceedings. Neither procedure requires amendment to the agency's Rules of Practice. First, the Commission has directed that a quarterly status report reflecting the progress of pending adjudications before ALJs be made publicly available. Such reports would include, *inter alia*, the dates on which milestone events in a particular proceeding occurred (*e.g.*, filing of the administrative complaint, respondent's answer, scheduling conference before the ALJ, issuance of the ALJ's scheduling order, close of discovery, final pretrial conference, commencement and conclusion of the evidentiary hearing, and filing of the ALJ's initial decision). The Commission has concluded that disclosure of information about the agency's adjudication program caseload would increase awareness of the importance of the program and promote public confidence in its efficiency and fairness. Similar status reports are prepared to describe the status of cases pending in federal district courts, in keeping with the provisions of the Civil Justice Reform Act of 1990. 28 U.S.C. 476 (requiring semiannual reporting of, *inter alia*, bench trials and motions that have been submitted for more than six (6) months and the number of cases that have not been terminated within three years after filing).

Second, the Commission has determined to make ALJ interlocutory orders in adjudicative proceedings more readily available to the public. Currently, some, but not all, ALJ interlocutory orders are widely available to the public through legal research resources. Recent technological advances will soon enable the agency to make significant ALJ interlocutory orders available to the public through electronic means via the Internet. Accordingly, the Commission has committed itself to making such interlocutory orders available to the public through such means during the next fiscal year.

The specific rule amendments that the Commission is adopting at this time are as follows:

A. Imposing Tighter Deadlines

1. Rule 3.12(a) is being amended to shorten the dead-line for the filing of an answer after service of the administrative complaint. The rule currently allows thirty (30) days for the filing of the answer. The revised rule shortens this period to twenty (20) days, in conformity with the Federal Rules of Civil Procedure (''Federal Rules''). See Fed. R. Civ. P. 12(a)(1)(A). The Commission believes twenty (20) days should be adequate, since the Commission sees no reason why an FTC complaint should take any longer to answer than does a federal court complaint.

2. Rule 3.21 is being amended to require that the scheduling conference be held within seven (7) calendar days after filing of the answer, and that the scheduling order be issued by the ALJ within two (2) days thereafter. Since respondents in agency adjudications have already been on notice of the Commission's investigation, a week should be sufficient time for the parties to prepare for the preliminary matters to be discussed at the scheduling conference (e.g., general discovery plan, timetable for the proceeding). Similarly, no more than two (2) days, rather than the two (2) weeks currently allowed by the current rule, should be necessary for an ALJ to prepare and issue a scheduling order once the scheduling conference has concluded.

3. Rule 3.51(a) is being amended to require explicitly that the ALJ file an initial decision within one (1) year of service of the administrative complaint. The ALJ is being permitted, however, in extraordinary circumstances to extend this deadline by up to a two-month period, which may be extended upon expiration of that period by additional, consecutive periods of up to two (2) months, provided that for each such extension the ALJ finds that extraordinary circumstances continue to be present. The rule continues to require, however, that the ALJ issue an initial decision within ninety (90) days after the hearing record closes, or thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law, and order. Experience suggests that interim deadlines have not been completely successful in promoting the expeditious resolution of Part III cases. In the Commission's view, a one-year deadline for the initial decision is a realistic time frame for most adjudicative proceedings and would encourage ALJs to exercise more active control in managing cases from start to finish. The pendency of any collateral federal court proceeding that relates to the administrative adjudication will toll the one-year deadline for filing the initial decision. The administrative proceeding may be stayed until resolution of the collateral federal court proceeding.

4. Rules 3.21 and 3.22(d) are being amended to (a) clarify the standard for obtaining extensions of deadlines established in the scheduling order, and (b) prohibit the ALJ from ruling on *ex parte* motions to extend such deadlines. Currently, such modifications are permitted only under a ''good cause'' standard. The rule is being amended to provide further guidance on this standard. Specifically, all motions to extend any deadline or time specified in the scheduling order are required to set forth the total period of extensions previously obtained by the moving party. In making a determination on such motions, ALJs will consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. Currently, Rule 3.22(d) permits the ALJ to rule on *ex parte* motions for extensions of time. Such rulings would no longer be permitted on the basis of *ex parte* motions under the amendments to Rules 3.21 and 3.22(d), as set forth below.

B. Minimizing Discovery Delays

1. Rule 3.21 is being revised to promote greater use of prehearing and status conferences where such conferences are not otherwise explicitly required by the Commission's rules. The Commission believes that such conferences facilitate the overall adjudicatory process by focusing the parties on the issues that are material to the case, promoting the exchange of relevant information, forestalling unnecessary and time-consuming motions, and providing a forum for resolving discovery disputes and exploring settlement options.

2. Rule 3.21 is being amended to require that the counsel for the parties conduct a meeting (preferably, in person) with one another before the scheduling conference and also before their final prehearing conference with the ALJ. (The final prehearing conference is also a new requirement, as discussed *infra*.) The meeting before the scheduling conference is intended to provide the parties with an opportunity to discuss the possibility of settlement and to decide, if possible, on a proposed discovery schedule, the handling of pretrial motions, a preliminary estimate of the time required for the hearing, and a hearing date. This requirement is modeled upon Fed. R. Civ. P. 26(f), which requires that the parties meet before the scheduling conference and order. The meeting before the final prehearing conference is intended for the parties to discuss potential stipulations of law and fact, the admissibility of or objections to evidence, and the organization and exchange of exhibits, witness lists, and designated deposition testimony. This meeting should narrow the issues to be addressed at the final prehearing conference and help the ALJ plan an efficient evidentiary hearing.

3. Current Rule 3.21(a) is being deleted to abolish the requirement that the parties each file a nonbinding statement before the scheduling conference, stating the anticipated issues, theories, and proof of the case. The requirement that parties provide a preliminary assessment of their case theories has not, in practice, demonstrably fulfilled its originally intended purpose in helping the ALJ manage cases and control discovery. 50 FR 41485, 41487 (Oct. 11, 1985). Although nonbinding statements are no longer being required by rule, ALJs will continue to retain their discretion, under the plenary power set forth in Rule 3.42(c), to order that the parties file such statements if they would be useful in a particular case.

4. Rule 3.31 is being revised, after redesignating certain paragraphs, to add a new paragraph (b) requiring that the parties make certain initial disclosures within five (5) days after the answer, without waiting for a formal discovery request. These disclosures would be similar to the initial disclosures required by Fed. R. Civ. P. 26(a)(1) in federal court litigation. In particular, parties will be required to exchange the names, addresses, and telephone numbers of individuals likely to have discoverable information. The parties will also be required to exchange a copy, or a description by category and location, of all documents, data, and other tangible things in possession of the party that are relevant to disputed facts alleged in the pleadings. These initial disclosures are intended to expedite discovery by reducing the need for parties to request basic documents and other information.

5. Rules 3.31, 3.33, 3.34, 3.35, 3.36, 3.37, and other Part III provisions are being revised to eliminate in substantial part the requirement that ALJs pre-authorize requests and subpoenas for depositions, interrogatories, documents, and access for inspection and other purposes before a party may serve such a request or subpoena. The elimination of ALJ pre-authorization includes discovery requests for access to documents in the possession, custody, or control of the Federal Trade Commission or its employees or for subpoenas requesting the appearance of an official or employee of the Commission. Since Rule 3.31 already provides that parties may seek a protective order from a discovery or access request, and Rule 3.34 provides for motions to quash a subpoena, pre-authorization of discovery requests and subpoenas appears to be unnecessary to prevent abuse. See also 16 CFR 3.38A (withholding requested material). This revision is not intended to diminish the ALJ's authority to enlarge or limit the scope of discovery. See, *e.g., Maremont Corp.*, 76 F.T.C. 1061, 1062, (1969) (discovery is primarily the responsibility of the ALJ and the Commission ''ordinarily will not dispute his rulings thereon''). The Commission notes that the Federal Rules of Civil Procedure do not require parties to obtain such authorization before they may make a discovery request. See, *e.g.*, Fed. R. Civ. P. 30(a)(1) (taking testimony by deposition without leave of court). The Commission's rules will continue to require, however, that parties submit a written motion to the ALJ for subpoenas seeking the discovery of documents of other government agencies, or the appearance of employees of such agencies.[6] See 16 CFR 3.36. Likewise, parties must continue to seek the prior approval of the ALJ to compel the attendance of a person to testify at an adjudicative hearing. See 16 CFR 3.34(a).

6. Rule 3.31(b)(1) is being amended and redesignated as 3.31(c)(1) to strengthen the ALJs' authority to prevent abusive discovery tactics by limiting the frequency or extent of discovery under certain conditions (e.g., when it would be cumulative or duplicative). This amendment tracks in relevant part the language of Fed. R. Civ. P. 26(b)(2), which sets forth similar limitations on discovery.

7. Rule 3.31(a) is being amended to encourage simultaneous discovery by requiring its use whenever practicable. While the current rule does not preclude simultaneous discovery, it is practiced only sporadically in adjudicative proceedings. The Commission believes that simultaneous discovery prevents an unprepared party from hindering the overall progress of the case, while it allows a prepared party to move forward expeditiously.

8. Rule 3.31 is also being amended to redesignate existing paragraphs to allow for the addition of a new paragraph (e), explicitly requiring that a party supplement its response to a discovery request when circumstances render the party's previous response incomplete or incorrect. This requirement, which is modeled, in part, on similar requirements in Fed. R. Civ. P. 26(e), is intended to promote greater candor and cooperation among parties by placing an affirmative burden on each party to ensure that its original response remains accurate and complete. Failure to observe this requirement may result in sanctions or an order to comply issued by the ALJ under Rule 3.38.

9. The definition of the term ''documents'' in Rule 3.34(b) is being amended to incorporate technological advances in electronic communications and digital information storage.

10. Rule 3.35(a)(1) is being amended to limit each party to twenty-five (25) interrogatories, consistent with federal court practice. See Fed. R. Civ. P. 33. Limiting the number of interrogatories is intended to improve the efficiency of interrogatory practice and prevent the

[6] The amended Rule 3.36 will continue to require that motions for discovery from other government agencies make a specific showing that the information or material sought cannot reasonably be obtained by other means. By eliminating ALJ pre-approval of discovery from the Commission, the amended rule eliminates the requirement that this showing be made for subpoenas for records of the Commission or for the appearance of Commission employees.

overuse of interrogatories as a means of harassing another party or delaying discovery.

11. Rule 3.35(a)(2) is being amended to establish a uniform thirty-day period for parties to respond to interrogatories. Under the current rule, a respondent may take up to forty-five (45) days to respond from the date that the administrative complaint is served on that respondent, while other parties must respond within thirty (30) days from the date that the interrogatory is served. The amendment would eliminate the 45-day rule for respondents, which appears to have caused some confusion among practitioners. The amendment would also bring the Commission's rules in line with federal court practice, which requires that all parties, including the defendant, in a civil action respond within thirty (30) days of being served with an interrogatory. See Fed. R. Civ. P. 33(b)(3).

C. Minimizing Delay at Trial

1. Rule 3.21 is being amended to require that the ALJ hold a final prehearing conference as close to the commencement of trail as reasonably practicable. See Fed. R. Civ. P. 16(d). At this conference, counsel will be required to submit any proposed stipulations of law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. The ALJ will also be required to resolve any outstanding evidentiary matters or pending motions (except motions for summary decision), and to establish a final schedule for the evidentiary hearing. In requiring that ''counsel'' personally attend this conference, the Commission intends that at least one attorney for each party (preferably the attorney responsible for trying the case) appear; if not represented by an attorney, the party shall attend on the party's own behalf. Furthermore, as discussed earlier, counsel for the parties will be expected to consult with one another on these matters in a meeting (preferably, in person) prior to the final conference.

2. Rule 3.43(b) is being amended to incorporate relevant language in Rules 403 and 611 of the Federal Rules of Evidence regarding the exclusion of cumulative evidence. The amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ's ability to assemble a concise and manageable record.

3. Rule 3.21 is being amended to require that the ALJ's scheduling orders include specific instructions on how the parties shall mark their exhibits. Such guidance is currently contained only in the FTC Operating Manual, which is primarily used for staff guidance. Requiring that such specific instructions be included in the scheduling order is intended to make them more directly available to the parties.

D. Filing of Documents and Motions

1. Rule 3.22(a) is being amended to specify that copies of motions filed with the Secretary must also be provided promptly and directly to the ALJ. This amendment is intended to codify a practice that is well-established in many federal courts and that many FTC practitioners already appear to follow.

2. Rule 3.22(b) is being amended to require that all motions in adjudicative proceedings include the name, address, and telephone number of counsel, and attach a draft order containing the proposed relief. A conforming change is also being made to Rule 4.2, regarding filing requirements. The requirement that motions provide contact information and a draft order is intended to facilitate the administrative processing and disposition of motions, and is consistent with federal court practice. See, *e.g.*, Fed. R. Civ. P. 7(b)(1) & 11(a).

3. Rule 3.25(b), governing motions to settle and withdraw a matter from adjudication, is being amended to underscore the requirement that such motions, like all motions in adjudicatory proceedings, be filed with the Office of the Secretary, pursuant to Commission Rule 4.2(a). One ALJ has observed that counsel sometimes submit their Rule 3.25(b) motions directly to him without filing them with the Secretary as required. The amendment complements existing Rule 3.25(c), under which the withdrawal of a matter from adjudication is not triggered until the Secretary receives the appropriate motion.

4. Rule 3.24(a)(1) is being amended to require that a party moving for summary decision include a statement of the material facts as to which the party contends there is no genuine issue. The Commission notes that several local rules of federal courts require such statements. See, *e.g.*, D.D.C. Local Rule 108(h); S.D.N.Y. Local Rule 8(d); C.D. Cal. Local Rule 7.14; S.D. Fla. Local Rule 7.5. Changes are also being made in paragraphs (a)(2) and (a)(3) to make more explicit the existing requirement in paragraph (a)(3) that the opposing party provide a statement setting forth specific facts showing that there remains a genuine issue to be tried. See Fed. R. Civ. P. 56(e). Requiring that the moving and opposing parties provide statements is designed to expedite ALJ review of and rulings on summary decision motions.

5. Rule 3.24(a)(1) is also being amended to permit complaint counsel to move for summary decision in twenty (20), rather than thirty (30), days after the complaint is issued, as specified under the current rule. The change mirrors the proposed amendment to Rule 3.12(a), reducing the time to file an answer to the complaint from thirty (30) to twenty (20) days, as discussed earlier.

6. Rule 3.22(d) is being revised to remove the ALJ's discretion to rule on *ex parte* requests for extensions of time. This change is also reflected in revised Rule 3.21, regarding modification of scheduling orders.

E. Miscellaneous

1. Rule 3.11A is being added to establish an alternative ''fast track'' schedule that respondents in certain administrative proceedings may elect if a federal district court has granted a preliminary injunction in a collateral federal court proceeding brought by the Commission. Under the fast track schedule, the Commission shall, with limited exception, be prepared to issue a final order and opinion in such expedited proceedings within thirteen (13) months after the triggering event.

2. Rule 3.44 is being amended to add new paragraph (c), requiring that ALJs formally close the hearing record immediately upon the close of the evidentiary hearing. A conforming change is also being made to Rules 3.46(a) 3.51(a). The Commission believes that little, if any, useful purpose is served by allowing the record to remain open after completion of the trial, and believes that it may contribute to adjudicatory delay. In requiring that ALJs close the record promptly at the end of the trial, the Commission does not intend, however, to alter or interfere with the procedures under paragraph (b) of the existing rule for post-trial corrections to the record as may be necessary, even after it has closed.

3. Rules 2.8, 2.9, and 2.15 are being revised to terminate the currently prescribed use of ''presiding officials'' in investigational hearings. This practice is neither required by law nor necessary for the protection of witness' rights. By eliminating the use of presiding officials, the Commission seeks to avoid the erroneous perception that investigational hearings are conducted by persons with the same degree of authority and independence

that ALJs have in adjudicative proceedings.

4. Rule 3.55 is being amended to shorten the time period for filing a petition for reconsideration. The current rule allows a party to file such a petition within twenty (20) days after service of the Commission's decision. By comparison, Federal Rule of Appellate Procedure 40 allows only fourteen (14) days, and the Commission believes that this time period should also be adequate for parties to file for reconsideration in a Commission adjudication.

5. Rules 3.22(a) and 3.51 are being amended to delete language describing the procedure for filing documents containing *in camera* material and to substitute cross-references to Rule 3.45, which is also being amended to set forth the relevant *in camera* procedures and obligations in their entirety. These revisions are expected to reduce the confusion that may arise from duplicative instructions and to improve the litigants' understanding and observance of *in camera* procedures.

These rule revisions relate solely to agency practice and, thus, are not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(a)(2), nor to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2). The Paperwork Reduction Act does not apply to these requirements. 44 U.S.C. 3518(c)(ii). Although the rule revisions are effective as stated in the previous section, the Commission welcomes comment on them and will consider further revision, as appropriate.

List of Subjects

16 CFR Part 2

Administrative practice and procedure, Investigations, Reporting and recordkeeping requirements.

16 CFR Part 3

Administrative practice and procedure, Claims, Equal access to justice, Lawyers.

16 CFR Part 4

Administrative practice and procedure, Freedom of Information Act, Privacy Act, Sunshine Act.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter I, Subchapter A of the Code of Federal Regulations, as follows:

PART 2—NONADJUDICATIVE PROCEDURES

1. The authority for part 2 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46.

2. Section 2.8 is amended by revising the first sentence of paragraph (b) to read as follows:

§ 2.8 Investigational hearings.

* * * * *

(b) Investigational hearings shall be conducted by any Commission member, examiner, attorney, investigator, or other person duly designated under the FTC Act, for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation. * * *

* * * * *

3. Section 2.9 is amended by revising the last sentence of paragraph (b)(4), all of paragraph (b)(5), and the first and second sentences of paragraph (b)(6) to read as follows:

§ 2.9 Rights of witnesses in investigations.

* * * * *

(b) * * *

(4) * * * Copies of such petitions may be filed as part of the record of the investigation with the person conducting the investigational hearing, but no arguments in support thereof will be allowed at the hearing.

(5) Following completion of the examination of a witness, counsel for the witness may on the record request the person conducting the investigational hearing to permit the witness of clarify any of his or her answers. The grant or denial of such request shall be within the sole discretion of the person conducting the hearing.

(6) The person conducting the hearing shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language. Such person shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has allegedly refused to comply with his or her directions, or has allegedly engaged in disorderly, dilatory, obstructionist, or contumacious conduct, or contemptuous language in the course of the hearing. * * *

4. Section 2.15 is amended by revising the last sentence of paragraph (b) to read:

§ 2.15 Orders requiring witnesses to testify or provide other information and granting immunity.

* * * * *

(b) * * * The appeal shall not operate to suspend the hearing unless otherwise determined by the person conducting the hearing or ordered by the Commission.

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

5. The authority for part 3 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

6. Section 3.11A is added to read as follows:

§ 3.11A Fast Track Proceedings.

(a) *Availability of Fast Track Proceedings.* In certain administrative proceedings that have been designated by the Commission as appropriate for the fast track schedule, respondents may elect to have the proceeding adjudicated under the expedited schedule set forth in this section. In administrative proceedings involving multiple respondents, the fast track schedule shall be available only if all respondents elect it. The Commission shall designate whether the fast track schedule will be available at the time it authorizes Commission staff to seek a preliminary injunction in federal district court and shall provide notice of the defendant's option to elect the fast track procedures in the event that the Commission should initiate an administrative adjudication challenging some or all of the same conduct at issue in the federal court injunctive proceeding. Such notice shall be provided to the prospective respondent at the time it is notified of the Commission's action to authorize the filing of the preliminary injunction motion. In fast track proceedings, the Commission shall be prepared to issue a final order and opinion within thirteen (13) months after the latest of the following events (hereinafter ''triggering event''): Issuance of the Commission's administrative complaint; entry of a preliminary injunction by a federal court in a collateral proceeding against respondent brought by the Commission; or the date on which respondent elects the fast track procedure. The date for issuance of the Commission's final order and opinion in fast track proceedings may be amended by the Commission in the following circumstances: If the Commission's final order or opinion contains material or information designated for *in camera* treatment such that the agency is required to provide advance notification of such disclosure to submitters of *in camera* material or information; or if the Commission determines that adherence to the thirteen-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of the fast track

proceeding. Only administrative proceedings challenging conduct that has been preliminarily enjoined by a federal court in a collateral proceeding brought by the Commission shall be subject to the fast track schedule. In the event the preliminary injunction in the collateral federal court proceeding is vacated, the Commission, in its discretion, may take such action as it deems appropriate in the administrative adjudication. Except as modified by this section, the rules contained in Subparts A through I of Part 3 of this chapter shall govern fast track procedures in adjudicative proceedings.

(b) *Election of Fast Track Proceedings.* Respondents making an election under this section shall make such election by the later of either: Three (3) days after service of the administrative complaint challenging the merger or acquisition; or three (3) days after a federal district court grants the Commission's request for a preliminary injunction. Respondents electing fast track proceedings shall do so by filing a notice of election of such expedited proceedings with the Secretary.

(c) *Interim Deadlines in Fast Track Proceedings.* The following deadlines shall govern all fast tract proceedings covered by this section:

(1) The scheduling conference required by § 3.21(b) shall be held not later than three (3) days after the triggering event.

(2) Respondent's answer shall be filed within fourteen (14) days after the triggering event.

(3) The ALJ shall file an initial decision within fifty-six (56) days following the conclusion of the evidentiary hearing. The initial decision shall be filed no later than one hundred ninety-five (195) days after the triggering event, pursuant to paragraph (a) of this section.

(4) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three (3) days after service of the initial decision. The notice shall comply with § 3.52(a) in all other respects.

(5) The appeal shall be in the form of a brief, filed within twenty-one (21) days after service of the initial decision, and shall comply with § 3.52(b) in all other respects.

(6) Within fourteen (14) days after service of the appeal brief, the appellee may file an answering brief which shall comply with § 3.52(c). Cross-appeals, as permitted in § 3.52(c), may not be raised in an appellee's answering brief. All issues raised on appeal must be presented in the party's appeal brief and must be filed within the deadline specified in paragraphs (c)(4) and (c)(5) of this section.

(7) Within five (5) days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with § 3.52(d) in all other respects.

(d) *Discovery.* Discovery shall be governed by Subpart D of this part. The ALJ may establish limitations on the number of depositions, witnesses, or any document production, pursuant to his plenary authority under § 3.42(c)(6).

7. Section 3.12 is amended by revising the introductory text of paragraph (a) to read as follows:

§ 3.12 Answer to complaint.

(a) *Time for filing.* A respondent shall file an answer within twenty (20) days after being served with the complaint: *Provided, however,* That the filing of a motion for a more definite statement of the charges shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge: * * *

* * * * *

8. Section 3.21 is amended by redesignating paragraph (e) as new paragraph (g), revising paragraphs (a) through (d), and adding new paragraphs (e) and (f), to read as follows:

§ 3.21 Prehearing procedures.

(a) *Meeting of the parties before scheduling conference.* An early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to agree, if possible, on a proposed discovery schedule, a preliminary estimate of the time required for the hearing, and a proposed hearing date, and on any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than seven (7) days after the answer is filed by the last answering respondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) *Prehearing scheduling order.* (1) Not later than two (2) days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference and of the evidentiary hearing.

(2) The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence, exchange exhibit and witness lists, and designate testimony to be presented by deposition. At this conference, the Administrative Law Judge shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(f) *Additional prehearing conferences and orders.* The Administrative Law Judge shall hold additional prehearing and status conferences or enter additional orders as may be needed to ensure the orderly and expeditious disposition of a proceeding. Such conferences shall be held in person to the extent practicable.

(g) *Public access and reporting.* * * *

9. Section 3.22 is amended by revising paragraphs (a) and (d), the last sentence of paragraph (e), and the first full sentence of paragraph (f), to read as follows:

§ 3.22 Motions.

(a) *Presentation and disposition.* During the time a proceeding is before an Administrative Law Judge, all motions therein, except those filed under § 3.26, § 3.42(g), or § 4.17, shall be addressed to and ruled upon, if within his or her authority, by the Administrative Law Judge. The Administrative Law Judge shall certify to the Commission any motion upon which he or she has no authority to rule, accompanied by any recommendation that he or she may deem appropriate. Such recommendation may contain a proposed disposition of the motion or other relevant comments. The Commission may order the ALJ to submit a recommendation or an amplification thereof. Rulings or recommendations containing information granted *in camera* status pursuant to § 3.45 shall be filed in accordance with § 3.45(f). All written motions shall be filed with the Secretary of the Commission, and all motions addressed to the Commission shall be in writing. The moving party shall also provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

* * * * *

(d) *Motions for extensions.* The Administrative Law Judge or the Commission may waive the requirements of this section as to motions for extensions of time; however, the Administrative Law Judge shall have no authority to rule on *ex parte* motions for extensions of time.

(e) *Rules on motions for dismissal.* * * * When a motion to dismiss is made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a *prima facie* case, the Administrative Law Judge may defer ruling thereon until immediately after all evidence has been received and the hearing record is closed.

(f) *Statement.* Each motion to quash filed pursuant to § 3.34(c), each motion to compel or determine sufficiency pursuant to § 3.38(a), each motion for sanctions pursuant to § 3.38(b), and each motion for enforcement pursuant to § 3.38(c) shall be accompanied by a signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement. * * *

10. Section 3.24 is amended by revising paragraph (a)(1) and adding a sentence between the existing first and second sentences of paragraph (a)(2) to read as follows:

§ 3.24 Summary decisions.

(a) *Procedure.* (1) Any party to an adjudicatory proceeding may move, with or without supporting affidavits, for a summary decision in the party's favor upon all or any part of the issues being adjudicated. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is not genuine issue. Counsel in support of the complaint may so move at any time after twenty (20) days following issuance of the complaint and any party respondent may so move at any time after issuance of the complaint. Any such motion by any party, however, shall be filed in accordance with the scheduling order issued pursuant to § 3.21, but in any case at least twenty (20) days before the date fixed for the adjudicatory hearing.

(2) * * * The opposing party shall include a separate and concise statement of those material facts as to which the opposing party contends there exists a genuine issue for trial, as provided in § 3.24(a)(3). * * *

* * * * *

11. Section 3.25 is amended by adding a new sentence between the first and second sentences of paragraph (b) to read:

§ 3.25 Consent agreement settlements.

* * * * *

(b) * * * Such motion shall be filed with the Secretary of the Commission, as provided in § 4.2. * * *

* * * * *

12. Section 3.31 is amended by: adding a new sentence to the end of paragraph (a); redesignating paragraphs (b), (c), (d), and (e) as paragraphs (c), (d), (f), and (g), respectively; adding new paragraphs (b) and (e); revising newly redesignated paragraphs (c)(1), (c)(2), the first full sentence of (c)(3), the introductory text of newly redesignated paragraph (c)(4)(i), and newly redesignated paragraph (c)(4)(iii); revising the paragraph heading and adding a new sentence at the end of newly redesignated paragraph (d)(1); and revising newly redesignated paragraph (g), to read as follows:

§ 3.31 General provisions.

(a) * * * The parties shall, to the greatest extent practicable, conduct discovery simultaneously; the fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(b) *Initial disclosures.* Complaint counsel and respondent's counsel shall, within five (5) days of receipt of a respondent's answer to the complaint and without awaiting a discovery request, provide to each other:

(1) The name, and, if known, the address and telephone number of each individual likely to have discoverable information relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1);

(2) A copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody, or control of the Commission or respondent(s) that are relevant to the allegations of the Commission's complaint, to the proposed relief, or to the defenses of the respondent, as set forth in § 3.31(c)(1); unless such information or materials are privileged as defined in § 3.31(c)(2), pertain to hearing preparation as defined in § 3.31(c)(3), pertain to experts as defined in § 3.31(c)(4), or are obtainable from some other source that is more convenient, less burdensome, or less expensive. A party shall make its disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation.

(c) *Scope of discovery.* * * *

(1) *In general; limitations.* Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent. Such information may include the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having any knowledge of any discoverable matter. Information may not be withheld from discovery on grounds that the information will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the Administrative Law Judge if he determines that:

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

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

(iii) The burden and expense of the proposed discovery outweigh its likely benefit.

(2) *Privilege.* The Administrative Law Judge may enter a protective order denying or limiting discovery to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing preparations: Materials.* Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including the party's attorney, consultant, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of its case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. * * *

(4) *Hearing preparation: Experts.* (i) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for hearing, may be obtained only as follows: * * *

(ii) * * *

(iii) The Administrative Law Judge may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 unless the parties have stipulated a higher amount, for time spent in responding to discovery under paragraphs (c)(4)(i)(B) and (c)(4)(ii) of this section.

(d) *Protective orders; order to preserve evidence.* (1) * * * Such an order may also be issued to preserve evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing.

(2) * * *

(e) *Supplementation of disclosures and responses.* A party who has made an initial disclosure under § 3.31(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the Administrative Law Judge or in the following circumstances:

(1) A party is under a duty to supplement at appropriate intervals its initial disclosures under § 3.31(b) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect.

(f) *Stipulations.* * * *

(g) *Ex parte rulings on applications for compulsory process.* Applications for the issuance of subpoenas to compel testimony at an adjudicative hearing pursuant to § 3.34 may be made *ex parte,* and, if so made, such applications and rulings thereon shall remain *ex parte* unless otherwise ordered by the Administrative Law Judge or the Commission.

13. Section 3.33 is amended by revising paragraph (a), the first and second full sentences of paragraph (c), and the introductory text of paragraph (e), and by removing and reserving paragraph (b), to read as follows:

§ 3.33 Depositions.

(a) *In general.* Any party may take a deposition of a named person or of a person or persons described with reasonable particularity, provided that such deposition is reasonably expected to yield information within the scope of discovery under § 3.31(c)(1). Such party may, by motion, obtain from the Administrative Law Judge an order to preserve relevant evidence upon a showing that there is substantial reason to believe that such evidence would not otherwise be available for presentation at the hearing. Depositions may be taken before any person having power to administer oaths, either under the law of the United States or of the state or other place in which the deposition is taken, who may be designated by the party seeking the deposition, provided that such person shall have no interest in the outcome of the proceeding. The party seeking the deposition shall serve upon each person whose deposition is sought and upon each party to the proceeding reasonable notice in writing of the time and place at which it will be taken, and the name and address of each person or persons to be examined, if known, and if the name is not known, a description sufficient to identify them.

(b) [Reserved]

(c) *Notice to corporation or other organization.* A party may name as the deponent a public or private corporation, partnership, association, governmental agency other than the Federal Trade Commission, or any bureau or regional office to the Federal Trade Commission, and describe with reasonable particularity the matters on which examination is requested. The organization so names shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. * * *

* * * * *

(e) *Depositions upon written questions.* A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating: * * *

* * * * *

14. Section 3.34 is amended by revising paragraphs (a) and (b), and by revising the paragraph heading and adding a new sentence to the end of existing paragraph (c), to read as follows:

§ 3.34 Subpoenas.

(a) *Subpoenas ad testificandum*—(1) *Prehearing.* The Secretary of the Commission shall issue a subpoena, signed but otherwise in blank, requiring a person to appear and give testimony at the taking of a deposition to a party requesting such subpoena, who shall complete it before service.

(2) *Hearing.* Application for issuance of a subpoena commanding a person to attend and give testimony at an adjudicative hearing shall be made in writing to the Administrative Law Judge. Such subpoena may be issued upon a showing of the reasonable relevancy of the expected testimony.

(b) *Subpoenas duces tecum; subpoenas to permit inspection of premises.* The Secretary of the Commission, upon request of a party, shall issue a subpoena, signed but otherwise in blank, commanding a person to produce and permit inspection and copying of designated books, documents, or tangible things, or commanding a person to permit inspection of premises, at a time and place therein specified. The subpoena shall specify with reasonable particularity the material to be produced. The person commanded by the subpoena need not appear in person at the place of production or inspection unless commanded to appear for a deposition or hearing pursuant to paragraph (a) of this section. As used herein, the term ''documents'' includes writings, drawings, graphs, charts, handwritten notes, film, photographs, audio and video recordings and any such representations stored on a computer, a computer disk, CD–ROM, magnetic or electronic tape, or any other

means of electronic storage, and other data compilations from which information can be obtained in machine-readable form (translated, if necessary, into reasonably usable form by the person subject to the subpoena). A subpoena *duces tecum* may be used by any party for purposes of discovery, for obtaining documents for use in evidence, or for both purposes, and shall specify with reasonable particularity the materials to be produced.

(c) *Motions to quash; limitation on subpoenas to other government agencies.* * * * Nothing in paragraphs (a) and (b) of this section authorizes the issuance of subpoenas requiring the appearance of, or the production of documents in the possession, custody, or control of, an official or employee of a governmental agency other than the Commission, which may be authorized only in accordance with § 3.36.

15. Section 3.35 is amended by revising the first sentence of paragraph (a)(1), the third sentence of paragraph (a)(2), and paragraph (b)(1) to read as follows:

§ 3.35 Interrogatories to parties.

(a) *Availability; procedures for use.* (1) Any party may serve upon any other party written interrogatories, not exceeding twenty-five (25) in number, including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation, partnership, association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. * * *

(2) * * * The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within thirty (30) days after the service of the interrogatories. * * *

(b) *Scope; use at hearing.* (1) Interrogatories may relate to any matters that can be inquired into under § 3.31(c)(1), and the answers may be used to the extent permitted by the rules of evidence.

* * * * *

16. Section 3.36 is revised to read as follows:

§ 3.36 Applications for subpoenas for records, or appearances by officials or employees, of governmental agencies other than the Commission.

(a) *Form.* An application for issuance of a subpoena for the production of documents, as defined in § 3.34(b), or for the issuance of a subpoena requiring access to documents or other tangible things, for the purposes described in § 3.37(a), in the possession, custody, or control of a governmental agency other than the Commission or the officials or employees of such other agency, or for the issuance of a subpoena requiring the appearance of an official or employee of another governmental agency, shall be made in the form of a written motion filed in accordance with the provisions of § 3.22(a). No application for records pursuant to § 4.11 of this chapter or the Freedom of Information Act may be filed with the Administrative Law Judge.

(b) *Content.* The motion shall satisfy the same requirements for a subpoena under § 3.34 or a request for production or access under § 3.37, together with a specific showing that:

(1) the material sought is reasonable in scope;

(2) if for purposes of discovery, the material falls within the limits of discovery under § 3.31(b)(1), or, if for an adjudicative hearing, the material is reasonably relevant; and

(3) the information or material sought cannot reasonably be obtained by other means.

17. Section 3.37 is revised to read as follows:

§ 3.37 Production of documents and things; access for inspection and other purposes.

(a) *Availability; procedures for use.* Any party may serve on another party a request: to produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy any designated documents, as defined in § 3.34(b), or to inspect and copy, test, or sample any tangible things which are within the scope of § 3.31(c)(1) and in the possession, custody or control of the party upon whom the request is served; or to permit entry upon designated land or other property in the possession or control of the party upon whom the order would be served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of § 3.31(c)(1). Each such request shall specify with reasonable particularity the documents or things to be inspected, or the property to be entered. Each such request shall also specify a reasonable time, place, and manner of making the inspection and performing the related acts. A party shall make documents available as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in § 3.34.

(b) *Response; objections.* The response of the party upon whom the request is served shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under § 3.38(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

18. Section 3.38 is amended by revising the section heading and paragraph (a) to read as follows:

§ 3.38 Motion for order compelling disclosure or discovery; sanctions.

(a) *Motion for order to compel.* A party may apply by motion to the Administrative Law Judge for an order compelling disclosure or discovery, including a determination of the sufficiency of the answers or objections with respect to the initial disclosures required by § 3.31(b), a request for admission under § 3.32, a deposition under § 3.33, or an interrogatory under § 3.35.

(1) *Initial disclosures; requests for admission; depositions; interrogatories.* Unless the objecting party sustains its burden of showing that the objection is justified, the Administrative Law Judge shall order that an answer be served or disclosure otherwise be made. If the Administrative Law Judge determines that an answer or other response by the objecting party does not comply with the requirements of these rules, he may order either that the matter is admitted or that an amended answer or response be served. The Administrative Law Judge may, in lieu of these orders, determine that final disposition may be made at a prehearing conference or at a designated time prior to trial.

(2) *Requests for production or access.* If a party fails to respond to or comply as requested with a request for production or access made under § 3.37(a), the discovering party may move for an order to compel production or access in accordance with the request.

* * * * *

19. Section 3.38A is amended by revising the first sentence of paragraph (a) to read as follows:

§ 3.38A Withholding requested material.

(a) Any person withholding material responsive to a subpoena issued pursuant to § 3.34, written interrogatories requested pursuant to § 3.35, a request for production or access pursuant to § 3.37, or any other request for the production of materials under this part, shall assert a claim of privilege or any similar claim not later than the date set for production of the material.
* * *

* * * * *

20. Section 3.43 is amended by revising paragraph (b) to read as follows:

§ 3.43 Evidence.

* * * * *

(b) *Admissibility; exclusion of relevant evidence; mode and order of interrogation and presentation.* Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The Administrative Law Judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to

(1) make the interrogation and presentation effective for the ascertainment of the truth,

(2) avoid needless consumption of time, and

(3) protect witnesses from harassment or undue embarrassment.

* * * * *

21. Section 3.44 is amended by adding a new paragraph (c) to read as follows:

§ 3.44 Record.

* * * * *

(c) *Closing of the hearing record.* Immediately upon completion of the evidentiary hearing, the Administrative Law Judge shall issue an order closing the hearing record. The Administrative Law Judge shall retain the description to permit or order correction of the record as provided in § 3.44(b).

22. Section 3.45 is amended by adding a new paragraph (f) to read as follows:

§ 3.45 In camera orders.

* * * * *

(f) *When in camera information is included in rulings or recommendations of the Administrative Law Judge.* If the Administrative Law Judge includes in any ruling or recommendation information that has been granted *in camera* status pursuant to § 3.45(b), the Administrative Law Judge shall file two versions of the ruling or recommendation. A complete version shall be marked ''*In Camera*'' on the first page and shall be serve upon the parties. The complete version will be placed in the *in camera* record of the proceeding. An expurgated version, to be filed within five (5) days after the filing of the complete version, shall omit the *in camera* information that appears in the complete version, shall be marked ''Public Record'' on the first page, shall be served upon the parties, and shall be included in the public record of the proceeding.

23. Section 3.46 is amended by revising the first full sentence of paragraph (a) to read as follows:

§ 3.46 Proposed findings, conclusions, and order.

(a) *General.* Upon the closing of the hearing record, or within a reasonable time thereafter fixed by the Administrative Law Judge, any party may file with the Secretary of the Commission for consideration of the Administrative Law Judge proposed findings of fact, conclusions of law, and rule or order, together with reasons therefor and briefs in support thereof.
* * *

* * * * *

24. Section 3.51 is amended by revising paragraph (a) and paragraph (c)(1) to read as follows:

§ 3.51 Initial decision.

(a) *When filed and when effective.* The Administrative Law Judge shall file an initial decision within ninety (90) days after closing the hearing record pursuant to § 3.44(c), or within thirty (30) days after a default or the granting of a motion for summary decision or waiver by the parties of the filing of proposed findings of fact, conclusions of law and order, or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge. In no event shall the initial decision be filed any later than one (1) year after the issuance of the administrative compliant, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days. Such extension, upon its expiration, may be continued for additional consecutive periods of up to sixty (60) days, provided that each additional period is based upon a finding by the Administrative Law Judge that extraordinary circumstances are still present. The pendency of any collateral federal court proceeding that relates to the administrative adjudication shall toll the one-year deadline for filing the initial decision. The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding. Once issued, the initial decision shall become the decision of the Commission thirty (30) days after service thereof upon the parties or thirty (30) days after the filing of a timely notice of appeal, whichever shall be later, unless a party filing such a notice shall have perfected an appeal by the timely filing of an appeal brief or the Commission shall have issued an order placing the case on its own docket for review or staying the effective date of the decision.

(b) * * *

(c) *Content.* (1) 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).

* * * * *

25. Section 3.55 is amended by revising the first sentence to read as follows:

§ 3.55 Reconsideration.

Within fourteen (14) days after completion of service of a Commission decision, any party may file with the Commission a petition for reconsideration of such decision, setting forth the relief desired and the grounds in support thereof. * * *

PART 4—MISCELLANEOUS RULES

26. The authority for Part 4 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721; 15 U.S.C. 46.

27. Section 4.2 is amended by adding a new sentence at the end of paragraph (c) and a new sentence at the end of paragraph (e)(1) to read as follows:

§ 4.2 Requirements as to form, and filing of documents other than correspondence.

* * * * *

(c) *Copies.* * * * With respect to motions under § 3.22, the moving party shall provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

* * * * *

(e) *Signature.* (1) * * * In addition, motions filed pursuant to § 3.22 shall include the name, address, and telephone number of counsel.

By direction of the Commission.

Donald S. Clark,

Secretary.

Concurring Statement of Commissioner Mary L. Azcuenaga

Amendment of the Commission's Procedural Rules Governing Adjudicative Proceedings

The Commission today amends its procedural rules governing administrative adjudications. I welcome the amended rules as a first step in reforming the Commission's adjudicative process. Some of the amendments seem clearly to be good ideas and the others may be worth a try to help expedite the Commission's adjudicative proceedings. Whether they will result in net benefits remains to be seen. Although rule changes to expedite adjudications are a starting point for improving the adjudicative process, reform ultimately should focus on improving the quality of the adjudicative record and of adjudicative decisions to help ensure that they meet the test of appeal.

I support further examination of the entire process, including how to focus discovery and hearings more precisely on the pertinent facts, and how best to prepare the record for efficient use in formulating reasoned and well supported decisions. I look forward to the next installment of this effort.

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