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the hearing on the dispute and must notify the participants not less than 5 days before the hearing.

(2) Any participant wishing that there be a record of the hearing must:

(i) Prepare the record;

(ii) Notify the other participants and the arbitrator of the preparation of the record;

(iii) Furnish copies to all identified participants and the arbitrator; and

(iv) Pay all costs for the record, unless the participants agree otherwise or the arbitrator determines that the costs should be apportioned.

(3)(i) Participants to the arbitration are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing to the same extent as in a proceeding under Subpart E of this part;

(ii) The arbitrator may, with the consent of the participants, conduct all or part of the hearing by telephone, television, computer, or other electronic means, if each participant has an opportunity to participate.

(iii) The hearing must be conducted expeditiously and in an informal manner.

(iv) The arbitrator may receive any oral or documentary evidence, except that irrelevant, immaterial, unduly repetitious, or privileged evidence may be excluded by the arbitrator.

(v) The arbitrator will interpret and apply relevant statutory and regulatory requirements, legal precedents, and policy directives.

(4) No interested person will make or knowingly cause to be made to the arbitrator an unauthorized *ex parte* communication relevant to the merits of the proceeding, unless the participants agree otherwise. If a communication is made in violation of this prohibition, the arbitrator will ensure that a memorandum of the communication is prepared and made a part of the record, and that an opportunity for rebuttal is allowed. Upon receipt of such communication, the arbitrator may require the offending participant to show cause why the claim of the participant should not be resolved against the participant as a result of the improper conduct.

(5) The arbitrator will make the award within 30 days after the close of the hearing or the date of the filing of any briefs authorized by the arbitrator, whichever date is later, unless the participants and the arbitrator agree to some other time limit.

(e) *Arbitration awards.* (1)(i) The award in an arbitration proceeding under Subpart F of this chapter will include a brief, informal discussion of the factual and legal basis for the award.

(ii) The prevailing participants must file the award with the Commission, along with proof of service on all participants.

(2) The award in an arbitration proceeding will become final 30 days after it is served on all parties.

(3) A final award is binding on the participants to the arbitration proceeding.

(4) An award may not serve as an estoppel in any other proceeding for any issue that was resolved in the proceeding. The award also may not be used as precedent or otherwise be considered in any factually unrelated proceeding or in any other arbitration proceeding.

[Order 578, 60 FR 19507, Apr. 19, 1995, as amended by Order 602, 64 FR 17099, Apr. 8, 1999]

§ 385.606 Confidentiality in dispute resolution proceedings (Rule 606).

(a) Except as provided in paragraphs (d) and (e) of this section, a neutral in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication or any communication provided in confidence to the neutral, unless:

(1) All participants in the dispute resolution proceeding and the neutral consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public, but a neutral should make the communication public only if no other person is reasonably available to disclose the communication; or

(4) A court determines that the testimony or disclosure is necessary to:

- (i) Prevent a manifest injustice;
- (ii) Help establish a violation of law;

or

(iii) Prevent harm to the public health or safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential.

(b) A participant in a dispute resolution proceeding shall not voluntarily disclose, or through discovery or compulsory process be required to disclose, any information concerning any dispute resolution communication, unless:

(1) All participants to the dispute resolution proceeding consent in writing;

(2) The dispute resolution communication has otherwise already been made public;

(3) The dispute resolution communication is required by statute to be made public;

(4) A court determines that the testimony or disclosure is necessary to:

- (i) Prevent a manifest injustice;
- (ii) Help establish a violation of law;

or

(iii) Prevent harm to the public health and safety of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of participants in future cases that their communications will remain confidential; or

(5) The dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of the agreement or award.

(c) Any dispute resolution communication that is disclosed in violation of paragraphs (a) or (b) of this section shall not be admissible in any proceeding.

(d)(1) The participants may agree to alternative confidential procedures for disclosures by a neutral. The participants must inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of paragraph (a) of

this section that will govern the confidentiality of the dispute resolution proceeding. If the participants do not so inform the neutral, paragraph (a) of this section shall apply.

(2) To qualify for the exemption established under paragraph (1) of this section, an alternative confidential procedure under this paragraph may not provide for less disclosure than confidential procedures otherwise provided under this rule.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a participant regarding a dispute resolution communication, the participant will make reasonable efforts to notify the neutral and the other participants of the demand. Any participant who receives the notice and within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information waives any objection to the disclosure.

(f) Nothing in Rule 606 prevents the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding. See sections 385.410 and 388.112 of this chapter.

(g) Paragraphs (a) and (b) of this section do not preclude disclosure of information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Paragraphs (a) and (b) of this section do not prevent the gathering of information for research and educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the participants and the specific issues in controversy are not identifiable.

(i) Paragraphs (a) and (b) of this section do not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a participant in the proceeding, so long as the communication is disclosed only to the extent necessary to resolve the dispute.

(j) Nothing in this section precludes parties from seeking privileged treatment for documents under section 388.112 of this chapter.

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(k) Where disclosure is authorized by this section, nothing in this section precludes use of a protective agreement or protective orders.

(l) A dispute resolution communication that may not be disclosed under this rule shall also be exempt from disclosure under 5 U.S.C. 552(b)(3).

[Order 578, 60 FR 19508, Apr. 19, 1995, as amended by Order 602, 64 FR 17099, Apr. 8, 1999]

Subpart G—Decisions

§ 385.701 Applicability (Rule 701).

This subpart applies to decisions in proceedings set for hearing under subpart E of this part, including any decision on a certified question, interlocutory appeal, or reopening, and to any decision on rehearing, except that:

(a) The provisions of this subpart, other than those relating to rehearing or reopening, do not apply to consideration of an offer of settlement; and

(b) This subpart applies to summary disposition only to the extent provided in Rule 217.

§ 385.702 Definitions (Rule 702).

For purposes of this subpart:

(a) *Initial decision* means any decision rendered by a presiding officer in accordance with Rule 708;

(b) *Final decision* means any decision referred to in Rule 713.

[Order 225, 47 FR 19022, May 3, 1982, as amended by Order 375, 49 FR 21315, May 21, 1984; Order 575, 60 FR 4860, Jan. 25, 1995]

§ 385.703 Contents of decisions (Rule 703).

Any decision in a proceeding is part of the record of that proceeding and will contain:

(a) A ruling on each exception presented and any finding or conclusion, with supporting reasons, on any material issue of fact, law, or discretion presented on the record; and

(b) The appropriate rule, order, sanction, relief, or a denial of any rule, order, motion, or relief.

§ 385.704 Rights of participants before initial decision (Rule 704).

After testimony is taken in a proceeding, or phase of a proceeding, the

presiding officer will afford every participant an opportunity to:

(a) Submit written initial briefs in accordance with Rule 706, except that the presiding officer may provide an opportunity for oral argument in lieu of, or in addition to, initial briefs; and

(b) Submit written reply briefs in accordance with Rule 706, except that the presiding officer may:

(1) Provide an opportunity for oral reply argument in lieu of, or in addition to, reply briefs; or

(2) For good cause, deny opportunity for reply or limit the issues which may be addressed in any reply.

§ 385.705 Additional powers of presiding officer with respect to briefs (Rule 705).

(a) *Limitations on briefs.* A presiding officer, with due regard to the nature of the proceeding, may limit the length of any brief to be filed under Rule 706.

(b) *Additional briefs and other filings.* If appropriate, the presiding officer may permit or require briefs or other filings in addition to those provided for in Rule 706.

§ 385.706 Initial and reply briefs before initial decision (Rule 706).

(a) *When filed.* The presiding officer will prescribe a time for filing initial or reply briefs and for service of such briefs, giving due regard to the nature of the proceeding, the extent of the record, and the number and complexity of the issues. Unless the presiding officer otherwise orders, the time prescribed in a proceeding for filing briefs will be the same for all initial briefs and the same for all reply briefs.

(b) *Contents.* (1) An initial brief filed with the presiding officer must include:

(i) A concise statement of the case;

(ii) A separate section containing proposed findings and conclusions, unless waived by the presiding officer;

(iii) Arguments in support of the participant's position; and

(iv) Any other matter required by the presiding officer.

(2)(i) A reply brief filed with the presiding officer must be limited to a response to any arguments and issues raised in the initial briefs.

(ii) The presiding officer may impose limits on the reply brief in addition to