

Commodity Futures Trading Commission**§ 12.300**

received, the Judgment Officer shall make the initial decision, which he shall forthwith file with the Proceedings Clerk. Upon filing of an initial decision, the Proceedings Clerk shall immediately serve upon the parties a copy of the initial decision and a notification of the effect of a party's failure timely to appeal the initial decision to the Commission, as provided in paragraphs (d) and (e) of this section, as well as the effect of a failure by a party who has been ordered to pay a reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision in a summary decisional proceeding, the Judgment Officer shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, the amount of punitive damages, if any, for which respondent is liable to complainant, which shall not exceed \$30,000, exclusive of interest and costs; and the amount, if any, for which complainant is liable to respondents based on counterclaims, which, in aggregate, shall not exceed \$30,000, exclusive of interest and costs; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs; prejudgment interest.* The Judgment Officer may, in the initial decision, award costs (including the costs of instituting the proceeding, and if appropriate, reasonable attorneys' fees) and, if warranted as a matter of law under the circumstances of the

particular case, prejudgment interest to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision shall become the final decision and order of the Commission thirty (30) days after service thereof, except:

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission in accordance with § 12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

Subpart E—Rules Applicable to Formal Decisional Proceedings**§ 12.300 Scope and applicability of rules.**

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to § 12.26(c) of the Reparation Rules. The rules in subpart B permitting discovery are applicable in a formal decisional proceeding, as supplemented by § 12.301. Unless specifically made applicable, the rules prescribed in subparts C and D shall not apply to formal decisional proceedings. Parties to a proceeding forwarded pursuant to § 12.26(c) may, by written agreement filed at any time prior to the issuance of an initial decision, or of any other order disposing of all issues in the proceeding, elect to have all issues in the proceeding decided pursuant to the voluntary decisional procedure. Upon receiving a timely filed stipulation signed by all parties evidencing such an election, the Administrative Law

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Judge shall conduct the proceeding and render a decision pursuant to subpart C of these rules.

§§ 12.301-12.302 [Reserved]

§ 12.303 Pre-decision conferences.

During the time period permitted for discovery pursuant to § 12.30(d), and thereafter, the Administrative Law Judge may, in his discretion, conduct one or more pre-decision conferences to be held in Washington, DC or by telephone, with all parties for the purposes of:

- (a) Discussing the advisability of electing the voluntary decisional procedure;
- (b) Encouraging a settlement of the entire case, or any part thereof (such discussions may be *ex parte* with the consent of all parties);
- (c) Simplifying or clarifying issues;
- (d) Obtaining stipulations, admissions of fact and of authenticity of documents;
- (e) Discussing amendments or supplements to the pleadings;
- (f) Encouraging an early settlement of disputes relating to discovery; and
- (g) Discussing any matters of relevance in the proceeding.

At or following the conclusion of a pre-decision conference, the Administrative Law Judge may serve a pre-decision memorandum and order setting forth the agreements reached by the parties, any procedural determinations made by him, and the issues for resolution not disposed of by admissions or agreements by the parties. Such an order shall control the subsequent course of the proceeding unless modified to prevent injustice.

[49 FR 6621, Feb. 22, 1984, as amended at 57 FR 20638, May 14, 1992]

§ 12.304 Functions and responsibilities of the Administrative Law Judge.

Once he has been assigned the case, the Administrative Law Judge shall be responsible for the fair and orderly conduct of a formal decisional proceeding and shall have the authority:

- (a) To issue such orders as are described in § 12.34 of these rules;
- (b) To issue subpoenas pursuant to §§ 12.34, 12.36, and 12.313 of these rules;

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(c) To take such action as is appropriate pursuant to § 12.35 if a party fails to comply with a discovery order, or an order issued pursuant to § 12.34 of these rules;

(d) [Reserved]

(e) In his discretion, to conduct pre-decision conferences, for the purposes prescribed in § 12.303, at any time after a proceeding has commenced pursuant to § 12.26(c);

(f) To issue pre-hearing orders as required by § 12.312(a);

(g) To certify interlocutory matters to the Commission for its determination in accordance with § 12.309;

(h) To issue orders of dismissal pursuant to § 12.308;

(i) To issue default orders for good cause against parties who fail to participate in the proceeding, or to comply with these rules;

(j) If appropriate, to issue orders for summary disposition in the manner prescribed by § 12.310;

(k) If an oral hearing is ordered, to preside at the oral hearing, which shall include the authority to receive relevant evidence, to administer oaths and affirmations, to examine witnesses, and to rule on offers of proof;

(l) To make the initial decision; and

(m) To issue such orders, and take any other actions as are required to give effect to these rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984; 49 FR 17750, Apr. 25, 1984, as amended at 57 FR 20637, May 14, 1992]

§ 12.305 Disqualification of Administrative Law Judge.

(a) *At his own request.* An Administrative Law Judge may withdraw from a formal decisional proceeding when he considers himself to be disqualified on the grounds of personal bias, conflict of interest, or similar bases. In such event, he shall immediately notify the Commission and each of the parties of his withdrawal and of his basis for such action.

(b) *Upon the request of a party.* Any party may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict of interest, or similar bases. Interlocutory

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review of an order denying such a request may be sought without certification of the matter by an Administrative Law Judge, only in accordance with the procedures set forth in § 12.309 of these rules.

§ 12.306 Filing of documents; subscription; service.

Except as otherwise specifically provided in these rules, all documents filed in a formal decisional proceeding including, but not limited to, amended or supplemental pleadings, motions, discovery notices or requests, and responses thereto, documents filed or produced pursuant to § 12.34 of these rules, and submissions of proof, shall meet the requirements of §§ 12.11 and 12.12 of the rules as to form, and shall be filed and served in accordance with § 12.10 of the Reparation Rules.

§ 12.307 Amended and supplemental pleadings.

(a) *Amendments to pleadings.* At any time before the parties have concluded their submissions of proof, the Administrative Law Judge may allow amendments of the pleadings either upon written consent of the parties or for good cause shown. Any party may file a response to a motion to amend the pleadings within ten (10) days after the date of service upon him of the motion.

(b) *Supplemental pleadings.* At any time before the parties have concluded their submissions of proof, and upon such terms as are just, an Administrative Law Judge may, upon motion by a party, permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleadings sought to be supplemented and which are relevant to the issues in the proceeding. Any party may file a response to a motion to supplement the pleadings with ten (10) days after the date of service upon him of the motion.

(c) *Pleadings to conform to the evidence.* When issues not raised by the pleadings but reasonably within the scope of a formal decisional proceeding are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

§ 12.308 Motions.

(a) *In general.* An application for a form of relief not otherwise specifically provided for in this subpart E shall be made by a motion, which shall be in writing (unless made on the record during an oral hearing). The motion shall state the relief sought and the basis for the relief and may set forth the authority relied upon. All motions, unless otherwise provided in these rules, shall be directed to the Administrative Law Judge before the initial decision is filed, and to the Commission after the initial decision is filed.

(b) *Answer to motions.* Any party may serve and file a written response to a motion within ten (10) days after service of the motion upon him, or within such longer or shorter period as established by these rules, or as the Administrative Law Judge or the Commission may direct.

(c) *Dismissal—(1) By the Administrative Law Judge.* The Administrative Law Judge, acting on his own motion, may, at any time after he has been assigned the case:

(i) Dismiss the entire proceeding, without prejudice to counterclaims, if he finds that none of the matters alleged in the complaint state a claim that is cognizable in reparations; or

(ii) Order dismissal of any claim, counterclaim, or party from the proceeding if he finds that such claim or counterclaim (by itself, or as applied to a party) is not cognizable in reparations.

(2) *Motion for dismissal by a party.* Any party who believes that grounds exist for dismissal of the entire complaint, of any claim therein, of any counterclaim, or of a party from the proceeding, may file a motion for dismissal specifying the claims, counter-claims, or parties to be dismissed and the reasons therefor. Upon consideration of the whole record, the Administrative Law Judge may grant or deny such motion, in whole or in part.

(3) *Content and effect of order of dismissal.* Any order of dismissal entered pursuant to this rule shall contain a brief statement of the findings and conclusions which serve as the basis for the order. An order of dismissal of the entire proceeding pursuant to this rule

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shall have the effect of an initial decision which may be appealed to the Commission in accordance with the requirements set forth in § 12.401 of these rules.

(d) *Motions for procedural orders.* Motions for procedural orders, including motions for extensions of time, may be acted on at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(e) *Dilatory motions.* Repetitive or numerous motions dealing with the same subject matter shall not be permitted.

§ 12.309 Interlocutory review by the Commission.

Interlocutory review by the Commission of a ruling on a motion by an Administrative Law Judge may be sought only as prescribed in this rule:

(a) *When interlocutory appeal may be taken.* An interlocutory appeal may be permitted, in the discretion of the Commission, under the following circumstances:

(1) The appeal is from a ruling pursuant to § 12.102, § 12.202, or § 12.305 refusing to grant a motion to disqualify a Judgment Officer or Administrative Law Judge;

(2) The appeal is from a ruling pursuant to § 12.9 suspending an attorney from participation in a reparation proceeding;

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

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

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

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

(4) The appeal is from a ruling which satisfies the conditions of paragraphs (a)(3) (i)–(iii) of this section, despite the absence of certification, and extraordinary circumstances are shown to exist.

(b) *Procedure to obtain interlocutory review.* An application for interlocutory review may be served and filed within

ten (10) days after service of a ruling described in paragraphs (a)(1), (a)(2), and (a)(4) of this section or of notice that a determination has been made pursuant to paragraph (a)(3) of this section. The application for interlocutory review shall contain:

(1) A statement of the facts necessary to an understanding of the controlling questions determined by the Administrative Law Judge, and to an understanding of the extraordinary circumstances warranting interlocutory review by the Commission;

(2) A statement of the question or issue involved in the ruling upon which the application for review is based;

(3) A statement of the reasons why, in the opinion of the party requesting review, the ruling was erroneous and should be reversed or modified; and

(4) A copy of all papers filed by the parties that relate to the subject matter of the ruling at issue, including the order containing the ruling.

Within seven (7) days after service of the application for interlocutory review, any party may file a response in opposition to the application.

(c) *Standard for review.* In the absence of extraordinary circumstances, the Commission will not review a ruling of an Administrative Law Judge prior to the Commission's consideration of the proceeding pursuant to subpart F of these rules. A Commission denial of an application for interlocutory review shall be without prejudice to the applying party's right to raise any argument made in the application as an issue in an appeal taken pursuant to subpart F of these rules.

(d) *Proceedings not stayed.* The filing of an application for interlocutory review and a grant of review shall not stay proceedings before an Administrative Law Judge (or a Judgment Officer, if applicable) unless that official or the Commission shall so order. The Commission will not consider a motion for a stay unless the motion shall have first been made to the Administrative Law Judge (or, if applicable, the Judgment Officer) and denied.

(e) *Interlocutory review by the Commission on its own motion.* Nothing in this rule should be construed as restricting the Commission from acting on its own motion to review on an interlocutory

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basis any ruling of an Administrative Law Judge, Proceedings Officer or a Judgment Officer in any proceeding commenced pursuant to §12.26 of these rules.

§ 12.310 Summary disposition.

(a) *Filing of motions, answers.* Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law concerning all issues of liability in the proceeding may file a motion for summary disposition at any time before a determination is made by the Administrative Law Judge to order an oral hearing in the proceeding. Any adverse party, within ten (10) days after service of the motion, may file and serve opposing papers or may countermove for summary disposition.

(b) *Supporting papers.* A motion for summary disposition shall include a statement of all material facts as to which the moving party contends that there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, admissions, stipulations, and interrogatories. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, unless otherwise ordered by the Administrative Law Judge, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits and other verified material. He may also submit a brief of points and authorities.

(c) *Oral argument.* Oral argument may be heard at the discretion of the Administrative Law Judge and shall be heard in Washington, DC, or by telephonic conference call. Such argument shall be recorded, and written transcripts shall be made in the event that a grant or denial of summary disposition is reviewed by the Commission.

(d) *Summary disposition upon motion of the Administrative Law Judge.* If the Administrative Law Judge believes that there may be no genuine issue of material fact to be determined and that one

of the parties may be entitled to a decision as a matter of law, he may direct the parties to submit papers in support of and in opposition to summary disposition, and may hear oral argument, substantially as provided in paragraphs (a), (b) and (c) of this section.

(e) *Ruling on summary disposition.* The Administrative Law Judge shall grant summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions, stipulations, and matters of official notice, show that (1) there is no genuine issue as to any material fact; (2) there is no necessity that further facts be developed in the record; and (3) a party is entitled to a decision as a matter of law.

(f) *Review of ruling; appeal.* An application for interlocutory review of an order denying a motion for summary disposition shall not be allowed. Interlocutory review of an order granting summary disposition which disposes of less than all of the issues in the proceeding may be sought only in accordance with §12.309 of these rules. An order granting summary disposition which is dispositive of all issues, and as to all parties, in the proceeding may be appealed to the Commission in accordance with the requirements set forth in §12.401 of these rules.

§ 12.311 Disposition of proceeding or issues without oral hearing.

If the Administrative Law Judge determines that the documentary proof and other tangible forms of proof submitted by the parties are sufficient to permit resolution of some or all of the factual issues in the proceeding without the need for oral testimony, he may order that all proof relating to such issues be submitted in documentary and tangible form, and dispose of such issues without an oral hearing. In such an event, proof in support of the complaint, answer, and reply, may be found in those verified documents, in depositions on written interrogatories, in admissible documents obtained through discovery, in other verified statements of fact, documents and tangible evidence.

§ 12.312 Oral hearing.

(a) *Notification; prehearing order.* If and when the proceeding has reached

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the stage of an oral hearing, the Administrative Law Judge, giving due regard for the convenience of the parties, shall set a time for hearing, as well as a location prescribed by paragraph (b) of this section, and shall file with the Proceedings Clerk, for immediate service upon the parties:

(1) An order requiring the parties to file and serve, within fifteen days after service of the order, a prehearing memorandum setting forth briefly:

(i) A statement of all issues to be tried at the hearing;

(ii) An identification of each witness expected to be called by that party;

(iii) A summary of the testimony each witness is expected to provide; and

(2) A notice stating the time and location of the hearing.

Prior to the hearing, the Administrative Law Judge may issue an order based on the contents of the parties' memoranda filed pursuant to paragraph (a)(1) of this section, which, unless modified to prevent injustice, shall control the scope of matters to be tried at the oral hearing. If any change in the time or place of the hearing becomes necessary, it shall be made by the Administrative Law Judge, who, in such event, shall file with the Proceedings Clerk a notice of the change. Such notice shall be served upon the parties, unless it is made during the course of an oral hearing and made a part of the transcript. Hearings shall proceed expeditiously and, absent extraordinary circumstances, shall be held in one location and shall continue, without suspension, until concluded.

(b) *Location of hearing.* Unless the Director of the Office of Proceedings for reasons of administrative economy or practical necessity determines otherwise, and except as provided in this subparagraph, the location of an oral hearing shall be in one of the following cities: Albuquerque, N.M.; Atlanta, Ga.; Boston, Mass.; Chicago, Ill.; Cincinnati, Ohio; Columbia, S.C.; Denver, Colo.; Houston, Tex.; Kansas City, Mo.; Los Angeles, Cal.; Minneapolis, Minn.; New Orleans, La.; New York, N.Y.; Oklahoma City, Okla.; Phoenix, Ariz.; San Diego, Cal.; San Francisco, Cal.; Seattle, Wash.; St. Petersburg, Fla.; and Washington, DC. The Administra-

tive Law Judge may, in any case where a party avers, in an affidavit, that none of the foregoing cities is located within 300 miles of his principal residence, waive this paragraph and, upon giving due regard for the convenience of all of the parties, order that the hearing be held in a more convenient locale.

(1) *Who may appear.* The parties may appear in person, by counsel, or by other representatives of their choosing, subject to the provisions of § 12.9 of these rules concerning practice before the Commission.

(2) *Effect of failure to appear.* If any party to the proceeding fails to appear at the hearing, or at any part thereof, he shall to that extent be deemed to have waived the opportunity for an oral hearing in the proceeding. The Administrative Law Judge, for just cause, may take such action as is appropriate pursuant to § 12.35 of these rules against a party who fails to appear at the hearing. In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present may present his evidence, in whole or in part, in the form of affidavits or by oral testimony, before the Administrative Law Judge.

(c) *Public hearings.* All oral hearings shall be public except that upon application of a party or affected witness the Administrative Law Judge may direct that specific documents or testimony be received and retained non-publicly in order to prevent unwarranted disclosure of trade secrets or sensitive commercial or financial information or an unwarranted invasion of personal privacy.

(d) *Conduct of the hearing.* Subject to paragraph (e) of this section, and except as otherwise provided, at an oral hearing every party shall be entitled to:

(1) *Conduct direct and cross-examination of parties and witnesses.* All witnesses at a hearing for the purpose of taking evidence shall testify under oath or affirmation, which shall be administered by the Administrative Law Judge. Unless otherwise ordered by the Administrative Law Judge, parties shall be entitled to present oral direct testimony and other documentary proof, and to conduct direct examination and cross examine adverse parties

and witnesses. To expedite the hearing, the Administrative Law Judge may, in his discretion, order that the direct testimony of the parties and their witnesses be presented in documentary form, by affidavit, interrogatory, and other documents. In any event, the Administrative Law Judge, in his discretion, may permit cross examination, without regard to the scope of direct testimony, as to any matter which is relevant to the issues in the proceeding;

(2) *Introduce exhibits.* The original of each exhibit introduced in evidence or marked for identification shall be filed unless the Administrative Law Judge permits the substitution of copies for the original documents. A copy of each exhibit introduced by a party or marked for identification at his request shall be supplied by him to the Administrative Law Judge and to each other party to the proceeding. Exhibits shall be maintained by the reporter who shall serve as custodian of the exhibits until they are transmitted to the Proceedings Clerk pursuant to paragraph (f) of this section;

(3) *Make objections.* A party shall timely and briefly state the grounds relied upon for any objection made to the introduction of evidence. Formal exception to an adverse ruling shall not be required; and

(4) *Make offers of proof.* When an objection to a question propounded to a witness is sustained, the examiner may make a specific offer of what he expects to prove by the answer of the witness. Rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

(e) *Admissibility of evidence.* Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.

(f) *Record of an oral hearing.* Oral hearings for the purpose of taking evidence shall be recorded and shall be transcribed in written form under the supervision of the Administrative Law Judge by a reporter employed by the Commission for that purpose. The original transcript shall be a part of the record and shall be the sole official

transcript. Copies of transcripts, except those portions granted non-public treatment, shall be available from the reporter at rates not to exceed the maximum rates fixed by the contract between the Commission and the reporter. As soon as practicable after the close of the hearing, the reporter shall transmit to the Proceedings Clerk the transcript of the testimony and the exhibits introduced in evidence at the hearing, except such portions of the transcript and exhibits as shall have already been delivered to the Administrative Law Judge.

(g) *Proposed findings of fact and conclusions law; briefs.* An Administrative Law Judge, upon his own motion or upon motion of a party, may permit the filing of post-hearing proposed findings of fact and conclusions of law. Absent an order permitting such findings and conclusions, none shall be allowed. Unless otherwise ordered by the Administrative Law Judge and for good cause shown, the proposed findings and conclusions (including briefs in support thereof), shall not exceed twenty-five (25) pages and shall be filed not later than forty-five (45) days after the close of the oral hearing.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.313 Subpoenas for attendance at an oral hearing.

(a) *In general—(1) Application for issuance of subpoenas.* An application for a subpoena requiring a party or other person to appear and testify at an oral hearing (subpoena *ad testificandum*) or to appear and testify and to produce specified documentary or tangible evidence at the hearing (subpoena *duces tecum*), shall (unless made orally at a hearing) be filed in writing and in duplicate, but need not be served upon other parties. The application shall be accompanied by the original and one copy of the subpoena.

(2) *Standards for issuance or denial of subpoenas.* The Administrative Law Judge considering any application for a subpoena shall issue the subpoena if he is satisfied the application complies with this rule and the request is not unreasonable, oppressive, excessive in scope or unduly burdensome. In the

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event the Administrative Law Judge determines that a requested subpoena or any of its terms is unreasonable, oppressive, excessive in scope, or unduly burdensome, he may refuse to issue the subpoena, or may issue it only upon such conditions as he determines fairness requires.

(b) *Special requirements relating to application for an issuance of subpoenas for the appearance of commission employees*—
(1) *Form.* An application for the issuance of a subpoena shall be made in the form of a written motion served upon all other parties, if the subpoena would require the appearance of a Commissioner or an official or employee of the Commission.

(2) *Content.* The motion shall specifically describe the material to be produced, the information to be disclosed, or the testimony to be elicited from the witness, and shall show

(i) The relevance of the material, information, or testimony to the matters at issue in the proceeding;

(ii) The reasonableness of the scope of the proposed subpoena; and

(iii) That such material, information, or testimony is not available from other sources.

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge and his order shall provide such terms and conditions for the production of the material, the disclosure of the information, or the appearance of the witnesses as may appear necessary and appropriate for the protection of the public interest.

(c) *Service of subpoenas*—
(1) *How effected.* Service of a subpoena upon a party shall be made in accordance with § 12.10 of these rules. Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (c) (2) or (3) of this section, and by tendering to him the fees for one day's attendance and the mileage as specified in paragraph (e) of this section. When the subpoena is issued at the instance of any officer or agency of the United States, fees and mileage need not be tendered at the time of service.

(2) *Service upon a natural person.* Delivery of a copy of a subpoena and tender of fees and mileage to a natural person may be effected by (i) handing

them to the person; (ii) leaving them at his office with the person in charge thereof or, if there is no one in charge, by leaving the subpoena in a conspicuous place therein; (iii) leaving them at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein; (iv) mailing them by registered or certified mail to him at his last known address; or (v) any other method whereby actual notice is given to him and the fees and mileage are timely made available.

(3) *Service upon other persons.* When the person to be served is not a natural person, delivery of a copy of the subpoena and tender of the fees and mileage may be effected by

(i) Handing them to a registered agent for service, or to any officer, director, or agent in charge of any office of such person;

(ii) Mailing them by registered or certified mail to any such representative at his last known address;

(iii) Any other method whereby actual notice is given to any such representative and the fees and mileage are timely made available.

(d) *Motion to quash subpoena.* At or any time before the time specified in the subpoena for compliance therewith, a person upon whom a subpoena has been served may file a motion to quash or modify the subpoena with the Administrative Law Judge who issued the subpoena, and serve a copy of the motion on the party who requested the subpoena. Such motion shall include a brief statement of the reasons therefor. After due notice to the person upon whose request the subpoena was issued, and an opportunity for that person to respond, the Administrative Law Judge may (1) quash or modify the subpoena, or (2) condition denial of the application to quash or modify the subpoena upon just and reasonable terms, including, on the case of a subpoena *duces tecum*, a requirement that the person on whose behalf the subpoena was issued shall advance the reasonable cost of producing documentary or other tangible evidence.

(e) *Attendance and mileage fees.* Persons summoned to testify at a hearing under requirement of subpoenas are entitled to the same fees and mileage as

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are paid to witnesses in the courts of the United States. Fees and mileage shall be paid by the party at whose instance the persons are subpoenaed or called.

(f) *Enforcement of subpoenas.* Upon failure of any person to comply with a subpoena issued at the request of a party, that party may petition the Commission, in its discretion, to institute an action in an appropriate U.S. District Court for enforcement of the subpoena.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.314 Initial decision.

(a) *In general.* The Administrative Law Judge as soon as practicable after the parties have completed their submissions of proof, or after the conclusion of an oral hearing if one is held, shall render the initial decision, which he shall forthwith file with the Proceedings Clerk, and a copy of which shall be served immediately by the Proceedings Clerk upon each of the parties. The Proceedings Clerk shall also serve a notice, to accompany the initial decision, of the effect of a party's failure timely to appeal to the Commission the initial decision, as provided in paragraphs (d) and (e) of this section, and the effect of a failure of a party who has been ordered to pay a reparation award timely to file the documents required by § 12.407(c).

(b) *Content of initial decision.* In the initial decision the Administrative Law Judge shall:

(1) Include a brief statement of his findings as to the facts, with references to those portions of the record which support his findings;

(2) Make a determination whether or not the respondent has violated any provision of the Commodity Exchange Act, or rule, regulation or order thereunder;

(3) Make a determination whether the complainant is liable to any respondent who has made a counterclaim in the proceeding;

(4) Determine the amount of damages, if any, that the complainant has sustained as a result of respondent's violations, the amount of punitive damages if warranted, and the amount, if any, for which complainant is liable

to a respondent based on a counter-claim; and

(5) Include an order directing either the respondent or the complainant, depending upon whose liability is greater, to pay an amount based on the difference in the amounts determined pursuant to paragraph (b)(4) of this section, on or before a date fixed in the order.

(c) *Costs, prejudgment interest.* Except as provided in §§ 12.30(c) and 12.315 of these rules, the Administrative Law Judge may, in the initial decision, award costs (including the cost of instituting the proceeding and, if appropriate, reasonable attorney's fees) and, if warranted as a matter of law under the circumstances of the particular case, prejudgment interest, to the party in whose favor a judgment is entered.

(d) *Effect of initial decision.* The initial decision and order shall become the final decision and order of the Commission, without further order by the Commission, thirty (30) days after service thereof, except that:

(1) The initial decision shall not become the final decision as to a party who shall have timely filed and perfected an appeal thereof to the Commission, in accordance with § 12.401 of these rules; and

(2) The initial decision shall not become final as to any party to the proceeding if, within thirty (30) days after service of the initial decision, the Commission itself shall have placed the case on its own docket for review or stayed the effective date of the initial decision.

(e) *Effect of failure to file and perfect an appeal to the Commission.* Unless the Commission takes review of an initial decision on its own motion, the timely filing and perfection of an appeal to the Commission of the initial decision is mandatory as a prerequisite to appellate judicial review of a final decision and order entered pursuant to these rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

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§ 12.315 Consequences of overstating damages claims not in excess of \$30,000.

If a party, who has claimed damages in excess of \$30,000, is adjudged to be entitled to recover less than the sum or value of \$30,000, computed without regard to a damage award to which an opposing party may be adjudged to be entitled, and exclusive of interest and costs, the Administrative Law Judge may assess such party the cost of the transcript of an oral hearing, if such a hearing is held, and, depending upon whether such party paid any part of the filing fee for the proceeding, deny the party such costs or impose such costs on that party.

[49 FR 6621, Feb. 22, 1984, as amended at 59 FR 9638, Mar. 1, 1994]

Subpart F—Commission Review of Decisions

§ 12.400 Scope and applicability of rules.

The rules set forth in this subpart are applicable to proceedings forwarded pursuant to § 12.26 (b) and (c) of these rules. Except as provided in §§ 12.106(e) and 12.403(b) of these rules, the rules set forth in this subpart are not applicable to proceedings forwarded pursuant to § 12.26(a) of the Reparation Rules.

[49 FR 6621, Feb. 22, 1984; 49 FR 15070, Apr. 17, 1984]

§ 12.401 Appeal to the Commission.

(a) *How effected.* Any aggrieved party to a proceeding forwarded pursuant to § 12.26 (b) or (c) of these rules may appeal to the Commission an initial decision or other disposition of the entire proceeding by complying with the requirements of this section. An appealing party shall serve upon all parties and file with the Proceedings Clerk a notice of appeal within fifteen (15) days after service of the initial decision or other order disposing of the entire proceeding. The notice need consist only of a brief statement indicating the filing party's intent to appeal the initial decision, and shall include the date upon which the initial decision was rendered, the names of all parties, and the docket number of the proceeding. A

non-refundable appellate filing fee in the amount of \$50 shall be paid at the time of filing a notice of appeal. The failure of a party timely to file and serve a notice of appeal, and to pay the appellate filing fee, in accordance with this paragraph, or to perfect the appeal in accordance with paragraph (b) of this section, shall constitute a voluntary waiver of any objection to the initial decision, or other order disposing of the proceeding, and of all further administrative or judicial review under these rules and the Commodity Exchange Act.

(b) *Perfecting the appeal; appeal brief.* An appeal shall be perfected by the appealing party by timely filing with the Proceedings Clerk an appeal brief which meets the requirements of paragraphs (b) and (d) of this section. An original and one copy of the appeal brief shall be filed within thirty (30) days after filing of the notice of appeal. By motion of the appealing party, the Commission may, for good cause shown, extend the time for filing the appeal brief. If the appeal brief is not filed within the time prescribed in this subparagraph, the Commission may, upon its own motion or upon motion by a party, dismiss the appeal, in which event the initial decision shall become the final decision and order of the Commission, effective upon service of the order of dismissal.

(c) *Answering brief.* Any party upon whom the appealing party serves a brief may, within thirty (30) days after service of the appeal brief, file an original and one copy of an answering brief, and serve one copy thereof, unless the time limit is extended by the Commission upon motion of the party and for good cause shown.

(d) *Briefs.* Parties filing an appeal brief or answering brief pursuant to this section shall meet the requirements of § 12.11 of these rules as to form. The content of briefs shall satisfy the requirements of § 10.102(d) of the Commission's regulations, 17 CFR 10.102(d), except that any party, with leave of the Commission, may file an informal document in lieu of a brief. No brief shall exceed thirty-five (35) pages in length without leave of the Commission.