

§ 2200.41 [Reserved]

Subpart D—Prehearing Procedures and Discovery

§ 2200.50 [Reserved]

§ 2200.51 Prehearing conferences and orders.

(a) *Scheduling conference.* (1) The Judge may, upon the Judge's discretion, consult with the attorneys, non-attorney party representatives, and any self-represented parties, by a scheduling conference, telephone, mail, or other suitable means, and within 30 days after the filing of the answer, enter a scheduling order that limits the time:

- (i) To join other parties and to amend the pleadings;
- (ii) To file and hear motions; and
- (iii) To complete discovery.

(2) The scheduling order also may include:

- (i) The date or dates for conferences before hearing, a final prehearing conference, and hearing; and
- (ii) Any other matters appropriate to the circumstances of the case.

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

(c) *Compliance.* Parties must fully prepare for a useful discussion of all procedural and substantive issues involved in prehearing conferences and shall participate in such conferences in good faith. Parties failing to do so may be subject to sanctions under §§ 2200.101 and 2200.104.

§ 2200.52 General provisions governing discovery.

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

- (i) Production of documents or things or permission to enter upon land or other property for inspection and other

purposes to the extent provided in § 2200.53;

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

(iii) Interrogatories to the extent provided in § 2200.55.

(iv) Discovery is not available under these rules through depositions except to the extent provided in § 2200.56.

(v) In the absence of a specific provision, discovery procedures shall be in accordance with the Federal Rules of Civil Procedure, except that the provisions of Federal Rule of Civil Procedure 26(a) do not apply to Commission proceedings. This exception does not preclude any prehearing disclosures (including disclosure of expert testimony and written reports) directed in a scheduling order entered under § 2200.51.

(2) *Time for discovery.* A party may initiate all forms of discovery in conformity with these Rules at any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss. Discovery shall be initiated early enough to permit completion of discovery no later than 14 days prior to the date set for hearing, unless the Judge orders otherwise.

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

(4) *Stipulations about discovery procedures.* Unless the Commission or the Judge orders otherwise, the parties may stipulate that:

- (i) A deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition; and

(ii) Other procedures governing or limiting discovery may be modified—but a stipulation extending the time for any form of discovery must be approved by the Commission or the Judge if it would interfere with the time set forth for completing discovery, for hearing a motion, or for hearing.

(b) *Scope of discovery.* The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the

pending case and proportional to the needs of the case, considering the importance of the issues at stake, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

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

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

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

(3) The proposed discovery is outside the scope permitted by paragraph (b) of this section.

(d) *Privilege*—(1) *Claims of privilege.* The initial claim of privilege shall specify the privilege claimed and the general nature of the material for which the privilege is claimed. In response to an order from the Commission or the Judge, or in response to a motion to compel, the claim shall: Identify the information that would be disclosed; set forth the privilege that is claimed; and allege the facts showing that the information is privileged. The claim shall be supported by affidavits, depositions, or testimony and shall specify the relief sought. The claim may be accompanied by a motion for a protective order or by a motion that the allegedly privileged information be received and the claim ruled upon in camera, that is, with the record and hearing room closed to the public, or ex parte, that is, without the participation of parties and their representatives. The Judge may enter an order and impose terms and conditions on the Judge's examination of the claim as justice may require, including an order designed to ensure that the allegedly privileged information not be dis-

closed until after the examination is completed.

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

(3) *Resolving claims of privilege outside of discovery proceedings.* A Judge may utilize the procedures set forth in paragraphs (d) and (e) of this section outside of discovery proceedings, including during the hearing.

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

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the Commission or the Judge;

(6) That a deposition after being sealed be opened only by order of the Commission or the Judge;

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be

opened as directed by the Commission or the Judge.

(f) *Failure to cooperate; motions to compel; sanctions*—(1) *Motions to compel discovery*. A party may file a motion conforming to §2200.40 for an order compelling discovery when another party refuses or obstructs discovery. In considering a motion to compel, the Judge shall treat an evasive or incomplete answer as a failure to answer.

(2) *Sanctions*. If a party fails to comply with an order compelling discovery, the Judge may enter an order to redress the failure. Such order may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party conforming to §2200.40. The order may include any sanction stated in Federal Rule of Civil Procedure 37, including the following:

(i) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;

(ii) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses or prohibiting it from introducing designated matters in evidence;

(iii) An order striking pleadings or parts of pleadings or staying further proceedings until the order is obeyed; and

(iv) An order dismissing the action or proceeding or any part of the action or proceeding or rendering a judgment by default against the disobedient party.

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

(h) *Show cause orders*. All show cause orders issued by the Commission or the Judge under paragraph (f) of this section shall be served in a manner prescribed in §2200.7(o).

(i) *Supplementation of responses*. A party that has responded to a request

for discovery with a response that was complete when made is under no duty to supplement the response to include information subsequently acquired, except as follows:

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

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

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

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

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

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

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

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

(k) *Relief from discovery requests*. If relief is sought under §2200.101 or §2200.52(e), (f), or (g) concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories, or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers, or responses

§ 2200.53

in dispute shall be filed with the Commission or the Judge contemporaneously with any motion filed under § 2200.101 or § 2200.52(e), (f), or (g).

(l) *Use at hearing.* If interrogatories, requests, answers, responses, or depositions are to be used at the hearing or are necessary to a prehearing motion which might result in a final order on any claim, the portions to be used shall be filed with the Commission or the Judge at the outset of the hearing or at the filing of the motion insofar as their use can be reasonably anticipated. Section 2200.56(f) prescribes additional procedures pertaining to the use of depositions at a hearing.

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

§ 2200.53 Production of documents and things.

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

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

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

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

a written response within 30 days after service of the request, unless the requesting party allows a longer time. The Commission or the Judge may allow a shorter time or a longer time, should the requesting party deny an extension. The response 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 whole or in part, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, that part shall be specified. To obtain a ruling on an objection by the responding party, the requesting party shall file a motion conforming to § 2200.40 with the Judge and shall annex its request to the motion, together with the response and objections, if any.

§ 2200.54 Request for admissions.

(a) *Scope and procedure—(1) Scope.* Any time after the filing of the first responsive pleading or motion that delays the filing of an answer, such as a motion to dismiss, a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of § 2200.52(b) relating to:

(i) Facts, the application of law to fact, or opinions about either; and

(ii) The genuineness of any described documents.

(2) *Form; copy of a document.* Each matter must be separately stated. The number of requested admissions shall not exceed 25, including subparts, except upon the agreement of the parties or by order of the Commission or the Judge. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying.

(3) *Time to respond; effect of not responding.* A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its representative. A shorter or longer time for responding may be provided by