

DEPARTMENT OF ENERGY

10 CFR Part 1003

RIN 1901-AA55

Office of Hearings and Appeals
Procedural Regulations

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) amends its regulations by adding a new part to contain procedural regulations governing proceedings before the Office of Hearings and Appeals (OHA), a quasi-judicial branch of the DOE, pertaining to matters within the jurisdiction of that Office. These rules streamline and distill the procedures governing the conduct of proceedings before the OHA and update pertinent filing information. They will be used by OHA in most cases that do not involve the former federal petroleum price and allocation control regulations.

EFFECTIVE DATE: These rules become effective April 20, 1995.

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SUPPLEMENTARY INFORMATION:

- I. Discussion
- II. Procedural Requirements

I. Discussion

The Office of Hearings and Appeals (OHA) is a quasi-judicial body reporting to the Secretary of Energy. It is responsible for conducting most informal adjudicative proceedings of DOE where there is provision for separation of functions, other than those which are subject to the jurisdiction of the Federal Energy Regulatory Commission. In connection with these duties, OHA holds hearings, receives evidence, develops the record, and issues final agency determinations, which are subject to review in the federal courts. Except for regulations governing proceedings before the Board of Contract Appeals and other procurement and financial assistance appeals boards in DOE (which are independent components of the Office of Hearings and Appeals and governed by their own rules), procedural regulations governing OHA practice generally have appeared before today in

part 205 of title 10 of the Code of Federal Regulations. Part 205 is a part of chapter II, subchapter A of the DOE regulations, and was designed to apply to matters involving the former oil price and allocation control regulations which were in effect during the period 1973 through January 1981. Part 205 will be retained until the remaining oil-related proceedings are completed. Because those oil-related proceedings are winding down, and the OHA is conducting a variety of other informal adjudications for the Department, it is now appropriate that the OHA procedural regulations should appear in chapter X of title 10, which contains the general provisions of DOE regulations. The rules issued today will be organized as a new part 1003 within chapter X, and will be used by OHA in most cases that do not involve the former federal petroleum regulations. At the same time, these new procedures governing the conduct of proceedings before the OHA have been streamlined, and pertinent filing information has been updated.

A Notice of Proposed Rulemaking was published in the **Federal Register** on July 7, 1994 (59 FR 34767). No comments were received.

Apart from general filing procedures, the regulations issued today set forth OHA procedures for adjudicating various applications, petitions, motions and related requests filed by the public. These regulations include procedures for the filing of: (1) Applications for Exception from a DOE rule, regulation or action having the effect of a rule as defined by 5 U.S.C. 551(4); (2) Appeals of DOE orders; (3) Applications for Stay of DOE orders; (4) Motions for Modification or Rescission of OHA orders; (5) Requests for Conferences and Hearings before OHA; and (6) Petitions for Special Redress or Other Relief.

These rules are not intended to grant by themselves any new authority to the Office of Hearings and Appeals to conduct informal adjudications. They are designed to provide standard procedural rules that may be used to cover a variety of situations that may be encountered by the many different programs that the Department implements.

There are two ways these regulations become applicable. First, the procedures outlined in these rules become applicable where program rules specifically reference them and state that a member of the public can make a request for relief under these rules. For example, the program regulations that the Department promulgated in the Energy Conservation Program for

Consumer Products state that any person receiving an order may file an appeal with the Office of Hearings and Appeals using that Office's appellate rules. See 10 CFR 430.27(n).¹

Second, these rules may be applicable where a statute requires or authorizes the Department to provide procedures that permit the public to seek redress, and the appropriate departmental official has delegated the responsibility to implement that requirement to the Office of Hearings and Appeals. For example, section 504 (42 U.S.C. 7194) of the Department of Energy Organization Act (DOE Act) (42 U.S.C. 7101 *et seq.*) requires the Secretary of Energy to provide for the making of adjustments to a rule or regulation issued under four statutes—the Emergency Petroleum Allocation Act of 1973 (since expired), the Federal Energy Administration Act of 1974 (FEAA), the Energy Supply and Environmental Coordination Act of 1974, and the Energy Policy and Conservation Act—as may be necessary to prevent special hardship, inequity, or unfair distribution of burdens. The Secretary has delegated that responsibility to the Office of Hearings and Appeals, which is promulgating procedures in subpart B today by which members of the public may seek an exception from rules or regulations issued under the three named statutes which remain in effect.² (See also part 205, subpart D, for exception provisions applicable to the oil program.)

Despite the establishment of standard procedures in these rules, there may be situations where the Office of Hearings and Appeals needs to use procedures specific to the particular needs of a program. In those situations, DOE program regulations themselves contain procedures governing OHA proceedings conducted under authority of those particular regulations, rather than a reference to OHA procedural rules. For example, the DOE Contractor Employee Protection Program contains procedural rules governing OHA proceedings under 10 CFR part 708. Similarly, procedural

¹ Elsewhere in today's **Federal Register**, DOE is changing existing references in program rules from part 205 to part 1003. For instance, the DOE is modifying section 430.27(n) of 10 CFR part 430 (DOE Energy Conservation Program for Consumer Products) to provide that an aggrieved person filing an appeal under that part shall proceed under subpart C of the new part 1003, in place of subpart H of part 205. Future rulemakings which invoke OHA's adjudicatory authority will refer to the rules contained in part 1003 as the operative administrative process.

² Similarly under delegation to OHA, persons may petition for relief under subpart G (Private Grievances and Redress) with respect to those program functions assigned to DOE under the FEAA which are not oil related. (See FEAA section 21, 15 U.S.C. 780.)

rules governing OHA proceedings involving eligibility for access to classified matter or special nuclear material are contained in 10 CFR part 710. Under these circumstances, the rules in the program rules would govern OHA proceedings in those matters, and the rules in part 1003 would not apply.

With the exception of the regulations governing the filing and adjudication of an Application for Exception, the rules promulgated today correspond to nearly identical procedural rules contained in 10 CFR part 205, which were promulgated in the 1970's to adjudicate matters relating to the federal oil regulations. Regulations concerning the filing and adjudication of an Application for Exception have been revised and are contained in 10 CFR part 1003, subpart B. Generally, an Application for Exception may be filed by a person seeking an exception from a DOE regulatory requirement, where such relief is authorized by the pertinent regulations or underlying statute. Similar to the regulations appearing in 10 CFR part 205, subpart D, the rules promulgated today provide that an aggrieved person may file an Application for Exception from a DOE regulation on the basis that the specific regulatory requirement results in a serious hardship, gross inequity or unfair distribution of burdens. The rules set forth in part 1003, subpart B, present a simpler procedure than the rules in part 205, subpart D, by (1) eliminating the issuance of a Proposed Decision and Order and related procedures prior to issuance of a final Decision and Order, and (2) providing for an administrative appeal of the final Decision and Order by an aggrieved party directly to OHA, except in exception proceedings brought under section 504 of the DOE Act which will continue to be appealable to the Federal Energy Regulatory Commission. The rules make the adjudication of Applications for Exception more effective since they are more practicable than the more complex procedures of part 205, subpart D, which were formulated in contemplation of the federal oil regulations.

It is the intent of DOE to require parties to pursue an administrative appeal prior to seeking judicial review. The Supreme Court has interpreted section 10(c) of the Administrative Procedure Act (APA) (5 U.S.C. 704) to provide that, with respect to actions brought under the APA, an administrative appeal is a prerequisite to judicial review only when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. *Darby*

v. Cisneros, 113 S. Ct. 2539, 125 L. Ed. 2d 113 (1993). Accordingly, new 10 CFR 1003.30 provides that a person aggrieved by a DOE order appealable under subpart C of these regulations has not exhausted administrative remedies until an appeal has been filed and an order granting or denying the appeal has been issued. In addition, section 1003.30 provides that a person filing an appeal must also file an "Application for Stay" under subpart D of part 1003 if the grant of such a stay is necessary to render the administrative action inoperable and thus preclude judicial review pending final OHA action on the appeal.

II. Procedural Requirements

A. Executive Order 12866

Today's regulatory action has been determined not to be a "significant regulatory action" under Executive Order 12866, "Regulatory Planning and Review" (58 FR 51735, October 4, 1993). Accordingly, today's action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Executive Order 12612

Executive Order 12612 requires that regulations or rules be reviewed for direct effects on States, on the relationship between the national government and the States, or in the distribution of power among various levels of government. If there are sufficient substantial direct effects, then Executive Order 12612 requires preparation of a federalism assessment to be used in all decisions involved in promulgating or implementing a regulation or rule.

Today's regulations do not affect any traditional State function. There are therefore no substantial direct effects requiring evaluation or assessment under Executive Order 12612.

C. Regulatory Flexibility Analysis

These regulations were reviewed under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) which requires preparation of a regulatory flexibility analysis for any regulations that will have a significant economic impact on a substantial number of small entities. This action essentially recodifies existing procedural regulations. DOE, accordingly, certifies that there will not be a significant and adverse economic impact on a substantial number of small entities and that preparation of a regulatory flexibility analysis is not warranted.

D. National Environmental Policy Act

The rules issued today are strictly procedural in nature. Preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*) is not required for such rules under Appendix A to subpart D of 10 CFR part 1021. More specifically, DOE has determined that this rule is covered under the Categorical Exclusion found in paragraph A.6 of Appendix A to subpart D of part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Paperwork Reduction Act

There will be no additional paperwork burden imposed by the rules issued today. Therefore, the goals of the Paperwork Reduction Act are not diminished by the rules.

F. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable effort to ensure that the regulation specifies clearly any preemptive effect, effect on existing federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. The DOE certifies that today's rule meets the requirements of sections 2(a) and (b)(2) of Executive Order 12778.

List of Subjects in 10 CFR Part 1003

Administrative practice and procedure, Appeal procedures, Hearing and appeal procedures, Practice and procedure.

Issued in Washington, DC, on March 14, 1995.

George B. Breznay,

Director, Office of Hearings and Appeals.

For the reasons set forth in the preamble, title 10, chapter X of the CFR is amended by adding a new part 1003 to read as set forth below:

**PART 1003—OFFICE OF HEARINGS
AND APPEALS PROCEDURAL
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Authority: 15 U.S.C. 761 *et seq.*; 42 U.S.C. 7101 *et seq.*

Subpart A—General Provisions

§ 1003.1 Purpose and scope.

This part establishes the procedures to be utilized and identifies the sanctions that are available in most proceedings before the Office of Hearings and Appeals of the Department of Energy. These procedures provide standard rules of practice in a variety of informal adjudications when jurisdiction is vested in the Office of Hearings and Appeals. Any or all of the procedures contained in this part may be incorporated by reference in another DOE rule or regulation which invokes the adjudicatory authority of the Office of Hearings and Appeals. The procedures may also be made applicable at the direction of an appropriate DOE official if incorporated by reference in the delegation. These rules do not apply in instances in which DOE regulations themselves contain procedures governing OHA proceedings conducted under authority of those particular regulations. (E.g., 10 CFR part 708—DOE Contractor Employee Protection Program; 10 CFR part 710—Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.) These rules also do not apply to matters which relate specifically to the federal oil regulations (10 CFR parts 210, 211, and 212) and which are governed by the procedures contained in 10 CFR part 205, or to matters before the DOE Board of Contract Appeals or other procurement and financial assistance appeals boards, which are governed by their own rules.

§ 1003.2 Definitions.

(a) As used in this part:

Action means an order issued, or a rulemaking undertaken, by the DOE.

Aggrieved, with respect to a person, means adversely affected by an action of the DOE.

Conference means an informal meeting between the Office of Hearings and Appeals and any person aggrieved by an action of the DOE.

Director means the Director of the Office of Hearings and Appeals or duly authorized delegate.

DOE means the Department of Energy, created by the Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*).

Duly authorized representative means a person who has been designated to appear before the Office of Hearings and Appeals in connection with a proceeding on behalf of a person

interested in or aggrieved by an action of the DOE. Such appearance may consist of the submission of a written document, a personal appearance, verbal communication, or any other participation in the proceeding.

Exception means the waiver or modification of the requirements of a rule, regulation or other DOE action having the effect of a rule as defined by 5 U.S.C. 551(4) under a specific set of facts, pursuant to subpart B of this part.

Federal legal holiday means the first day of January, the third Monday of January, the third Monday of February, the last Monday of May, the fourth day of July, the first Monday of September, the second Monday of October, the eleventh day of November, the fourth Thursday of November, the twenty-fifth day of December, or any other calendar day designated as a holiday by federal statute or Executive order.

OHA means the Office of Hearings and Appeals of the Department of Energy.

Order means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of DOE in a matter other than rulemaking but including licensing. This definition does not include internal DOE orders and directives issued by the Secretary of Energy or delegate in the management and administration of departmental elements and functions.

Person means any individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, governmental unit or instrumentality thereof, or a charitable, educational or other institution, and includes any officer, director, owner or duly authorized representative thereof.

Proceeding means the process and activity, and any part thereof, instituted by the OHA, either on its own initiative or in response to an application, complaint, petition or request submitted by a person, that may lead to an action by the OHA.

SRO means a special report order issued pursuant to § 1003.8(b) of this part.

(b) Throughout this part the use of a word or term in the singular shall include the plural, and the use of the male gender shall include the female gender.

§ 1003.3 Appearance before the OHA.

(a) A person may make an appearance, including personal appearances in the discretion of the OHA, and participate in any proceeding described in this part on his own behalf or by a duly authorized representative.

Any application, appeal, petition, or request filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. Falsification of such certification will subject such person to the sanctions stated in 18 U.S.C. 1001.

(b) *Suspension and disqualification.* The OHA may deny, temporarily or permanently, the privilege of participating in proceedings, including oral presentation, to any individual who is found by the OHA—

(1) To have made false or misleading statements, either verbally or in writing;

(2) To have filed false or materially altered documents, affidavits or other writings;

(3) To lack the specific authority to represent the person seeking an OHA action; or

(4) To have engaged in or to be engaged in contumacious conduct that substantially disrupts a proceeding.

§ 1003.4 Filing of documents.

(a) Any document filed with the OHA must be addressed as required by § 1003.11, and should conform to the requirements contained in § 1003.9. All documents and exhibits submitted become part of an OHA file and will not be returned.

(b) A document submitted in connection with any proceeding transmitted by first class United States mail and properly addressed is considered to be filed upon mailing.

(c) Hand-delivered documents to be filed with the OHA shall be submitted to Room 1E-234 at 1000 Independence Avenue, S.W., Washington, D.C., on business days between the hours of 2:00 p.m. and 4:30 p.m.

(d) Documents hand delivered or received electronically after regular business hours are deemed filed on the next regular business day.

§ 1003.5 Computation of time.

(a) *Days.* (1) Except as provided in paragraph (b) of this section, in computing any period of time prescribed or allowed by these regulations or by an order of the OHA, the day of the act, event, or default from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or a federal legal holiday.

(2) Saturdays, Sundays and federal legal holidays shall be excluded from the computation of time when the

period of time allowed or prescribed is 7 days or less.

(b) *Hours.* If the period of time prescribed in an order issued by the OHA is stated in hours rather than days, the period of time shall begin to run upon actual notice of such order, whether by verbal or written communication, to the person directly affected, and shall run without interruption, unless otherwise provided in the order, or unless the order is stayed, modified, suspended or rescinded. When a written order is transmitted by verbal communication, the written order shall be served as soon thereafter as is feasible.

(c) *Additional time after service by mail.* Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under this part within a prescribed period of time after issuance to such person of an order, notice or other document and the order, notice or other document is served solely by mail, 3 days shall be added to the prescribed period.

§ 1003.6 Extension of time.

When a document is required to be filed within a prescribed time, an extension of time to file may be granted by the OHA upon good cause shown.

§ 1003.7 Service.

(a) All documents required to be served under this part shall be served personally or by first class United States mail, except as otherwise provided.

(b) Service upon a person's duly authorized representative shall constitute service upon that person.

(c) Official United States Postal Service receipts from certified mailing shall constitute evidence of service.

§ 1003.8 Subpoenas, special report orders, oaths, witnesses.

(a) In accordance with the provisions of this section and as otherwise authorized by law, the Director may sign, issue and serve subpoenas; administer oaths and affirmations; take sworn testimony; compel attendance of and sequester witnesses; control dissemination of any record of testimony taken pursuant to this section; subpoena and reproduce books, papers, correspondence, memoranda, contracts, agreements, or other relevant records or tangible evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

(b) The Director may issue a Special Report Order requiring any person subject to the jurisdiction of the OHA to

file a special report providing information relating to the OHA proceeding, including but not limited to written answers to specific questions. The SRO may be in addition to any other reports required.

(c) The Director, for good cause shown, may extend the time prescribed for compliance with the subpoena or SRO and negotiate and approve the terms of satisfactory compliance.

(d) Prior to the time specified for compliance, but in no event more than 10 days after the date of service of the subpoena or SRO, the person upon whom the document was served may file a request for review of the subpoena or SRO with the Director. The Director then shall provide notice of receipt to the person requesting review, may extend the time prescribed for compliance with the subpoena or SRO, and may negotiate and approve the terms of satisfactory compliance.

(e) If the subpoena or SRO is not modified or rescinded within 10 days of the date of the Director's notice of receipt:

(1) The subpoena or SRO shall be effective as issued; and

(2) The person upon whom the document was served shall comply with the subpoena or SRO within 20 days of the date of the Director's notice of receipt, unless otherwise notified in writing by the Director.

(f) There is no administrative appeal of a subpoena or SRO.

(g) A subpoena or SRO shall be served upon a person named in the document by delivering a copy of the document to the person named.

(h) Delivery of a copy of a subpoena or SRO to a natural person may be made by:

(1) Handing it to the person;

(2) Leaving it at the person's office with the person in charge of the office;

(3) Leaving it at the person's dwelling or usual place of abode with a person of suitable age and discretion who resides there;

(4) Mailing it to the person by certified mail, at his last known address; or

(5) Any method that provides the person with actual notice prior to the return date of the document.

(i) Delivery of a copy of a subpoena or SRO to a person who is not a natural person may be made by:

(1) Handing it to a registered agent of the person;

(2) Handing it to any officer, director, or agent in charge of any office of such person;

(3) Mailing it to the last known address of any registered agent, officer, director, or agent in charge of any office of the person by certified mail; or

(4) Any method that provides any registered agent, officer, director, or agent in charge of any office of the person with actual notice of the document prior to the return date of the document.

(j) A witness subpoenaed by the OHA may be paid the same fees and mileage as paid to a witness in the district courts of the United States.

(k) If in the course of a proceeding a subpoena is issued at the request of a person other than an officer or agency of the United States, the witness fees and mileage shall be paid by the person who requested the subpoena. However, at the request of the person, the witness fees and mileage may be paid by the OHA if the person shows:

(1) The presence of the subpoenaed witness will materially advance the proceeding; and

(2) The person who requested that the subpoena be issued would suffer a serious hardship if required to pay the witness fees and mileage.

(l) If any person upon whom a subpoena or SRO is served pursuant to this section refuses or fails to comply with any provision of the subpoena or SRO, an action may be commenced in the appropriate United States District Court to enforce the subpoena or SRO.

(m) Documents produced in response to a subpoena shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom the subpoena was directed or his authorized agent that:

(1) A diligent search has been made for each document responsive to the subpoena; and

(2) To the best of his knowledge, information, and belief each document responsive to the subpoena is being produced.

(n) Any information furnished in response to an SRO shall be accompanied by the sworn certification, under penalty of perjury, of the person to whom it was directed or his authorized agent who actually provides the information that:

(1) A diligent effort has been made to provide all information required by the SRO; and

(2) All information furnished is true, complete, and correct.

(o) If any document responsive to a subpoena is not produced or any information required by an SRO is not furnished, the certification shall include a statement setting forth every reason for failing to comply with the subpoena or SRO. If a person to whom a subpoena or SRO is directed withholds any document or information because of a claim of attorney-client or other privilege, the person submitting the

certification required by paragraph (m) or (n) of this section also shall submit a written list of the documents or the information withheld indicating a description of each document or information, the date of the document, each person shown on the document as having received a copy of the document, each person shown on the document as having prepared or been sent the document, the privilege relied upon as the basis for withholding the document or information, and an identification of the person whose privilege is being asserted.

(p) If testimony is taken pursuant to a subpoena, the Director shall determine whether the testimony shall be recorded and the means by which the testimony is recorded.

(q) A witness whose testimony is recorded may procure a copy of his testimony by making a written request for a copy and paying the appropriate fees. However, the Director may deny the request for good cause. Upon proper identification, any witness or his attorney has the right to inspect the official transcript of the witness' own testimony.

(r) The Director may sequester any person subpoenaed to furnish documents or give testimony. Unless permitted by the Director, neither a witness nor his attorney shall be present during the examination of any other witnesses.

(s) A witness whose testimony is taken may be accompanied, represented and advised by his attorney as follows:

(1) Upon the initiative of the attorney or witness, the attorney may advise his client, in confidence, with respect to the question asked his client, and if the witness refuses to answer any question, the witness or his attorney is required to briefly state the legal grounds for such refusal; and

(2) If the witness claims a privilege to refuse to answer a question on the grounds of self-incrimination, the witness must assert the privilege personally.

(t) The Director shall take all necessary action to regulate the course of testimony and to avoid delay and prevent or restrain contemptuous or obstructionist conduct or contemptuous language. OHA may take actions as the circumstances may warrant in regard to any instances where any attorney refuses to comply with directions or provisions of this section.

§ 1003.9 General filing requirements.

(a) *Purpose and scope.* The provisions of this section shall apply to all documents required or permitted to be filed with the OHA. One copy of each

document must be filed with the original, except as provided in paragraph (f) of this section. A telefax filing of a document will be accepted only if immediately followed by the filing by mail or hand-delivery of the original document.

(b) *Signing.* Any document that is required to be signed, shall be signed by the person filing the document. Any document filed by a duly authorized representative shall contain a statement by such person certifying that he is a duly authorized representative. (A false certification is unlawful under the provisions of 18 U.S.C. 1001.) The signature by the person or duly authorized representative constitutes a certificate by the signer that the signer has read the document and that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact, warranted under existing law, and submitted in good faith and not for any improper purpose such as to harass or to cause unnecessary delay. If a document is signed in violation of this section, OHA may impose the sanctions specified in section 1003.3 and other sanctions determined to be appropriate.

(c) *Labeling.* An application, petition, or other request for action by the OHA should be clearly labeled according to the nature of the action involved both on the document and on the outside of the envelope in which the document is transmitted.

(d) *Obligation to supply information.* A person who files an application, petition, appeal or other request for action is under a continuing obligation during the proceeding to provide the OHA with any new or newly discovered information that is relevant to that proceeding. Such information includes, but is not limited to, information regarding any other application, petition, appeal or request for action that is subsequently filed by that person with any DOE office.

(e) *The same or related matters.* A person who files an application, petition, appeal or other request for action by the OHA shall state whether, to the best knowledge of that person, the same or related issue, act or transaction has been or presently is being considered or investigated by any other DOE office, other federal agency, department or instrumentality; or by a state or municipal agency or court; or by any law enforcement agency, including, but not limited to, a consideration or investigation in connection with any proceeding described in this part. In addition, the person shall state whether contact has been made by the person or

one acting on his behalf with any person who is employed by the DOE with regard to the same issue, act or transaction or a related issue, act or transaction arising out of the same factual situation; the name of the person contacted; whether the contact was verbal or in writing; the nature and substance of the contact; and the date or dates of the contact.

(f) *Request for confidential treatment.*

(1) If any person filing a document with the OHA claims that some or all of the information contained in the document is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (5 U.S.C. 552), is information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure, and if such person requests the OHA not to disclose such information, such person shall file together with the document two copies of the document from which has been deleted the information for which such person wishes to claim confidential treatment. The person shall indicate in the original document that it is confidential or contains confidential information and must file a statement specifying the justification for non-disclosure of the information for which confidential treatment is claimed. If the person states that the information comes within the exception codified at 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, such person shall include a statement specifying why such information is privileged or confidential. If the person filing a document does not submit two copies of the document with the confidential information deleted, the OHA may assume that there is no objection to public disclosure of the document in its entirety.

(2) The OHA retains the right to make its own determination with regard to any claim of confidentiality, under criteria specified in 10 CFR 1004.11. Notice of the decision by the OHA to deny such claim, in whole or in part, and an opportunity to respond shall be given to a person claiming confidentiality of information no less than five days prior to its public disclosure.

(g) Each application, petition or request for OHA action shall be submitted as a separate document, even if the applications, petitions, or requests deal with the same or a related issue, act or transaction, or are submitted in connection with the same proceeding.

§ 1003.10 Effective date of orders.

Any order issued by the OHA under this part is effective as against all persons having actual or constructive

notice thereof upon issuance, in accordance with its terms, unless and until it is stayed, modified, suspended, or rescinded. An order is deemed to be issued on the date, as specified in the order, on which it is signed by the Director of the OHA or his designee, unless the order provides otherwise.

§ 1003.11 Address for filing documents.

All applications, requests, petitions, appeals, written communications and other documents to be submitted to or filed with the OHA, as provided in this part or otherwise, shall be addressed to the Office of Hearings and Appeals, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585. The OHA has facilities for the receipt of transmissions via FAX, at FAX Number (202) 586-4972.

§ 1003.12 Ratification of prior directives, orders and actions.

All orders and other directives issued, all proceedings initiated, and all other actions taken in accordance with 10 CFR part 205 prior to the effective date of this part, are hereby confirmed and ratified, and shall remain in full force and effect as if issued under this part, unless or until they are altered, amended, modified or rescinded in accordance with the provisions of this part.

§ 1003.13 Public reference room.

There shall be maintained at the OHA, 1000 Independence Avenue, S.W., Washington, D.C., a public reference room in which shall be made available for public inspection and copying, during business hours from 1:00 p.m. to 5:00 p.m.:

(a) A list of all persons who have applied for an exception, or filed an appeal or petition, and a digest of each application;

(b) Each Decision and Order, with confidential information deleted, issued in response to an application for an exception, petition or other request, or at the conclusion of an appeal; and

(c) Any other information in the possession of OHA which is required by statute to be made available for public inspection and copying, and any other information that the OHA determines should be made available to the public.

§ 1003.14 Notice of proceedings.

At regular intervals, the OHA shall publish in the **Federal Register** a digest of the applications, appeals, petitions and other requests filed, and a summary of the Decisions and Orders issued by the OHA, pursuant to proceedings conducted under this part.

Subpart B—Exceptions

§ 1003.20 Purpose and scope.

(a) This subpart establishes the procedures for applying for an exception, as provided for in section 504 (42 U.S.C. 7194) of the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), from a rule, regulation or DOE action having the effect of a rule as defined by 5 U.S.C. 551(4), based on an assertion of serious hardship, gross inequity or unfair distribution of burdens, and for the consideration of such application by the OHA. The procedures contained in this subpart may be incorporated by reference in another DOE rule or regulation which invokes the adjudicatory authority of the Office of Hearings and Appeals. The procedures may also be made applicable to proceedings undertaken at the direction of an appropriate DOE official if incorporated by reference in the delegation.

(b) The filing of an application for an exception shall not constitute grounds for noncompliance with the requirements from which an exception is sought, unless a stay has been issued in accordance with subpart D of this part.

§ 1003.21 What to file.

A person seeking relief under this subpart shall file an "Application for Exception," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.22 Where to file.

All applications for exception shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.23 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this

paragraph and shall include the names and addresses of each person to whom a copy of the application was sent.

(b) Notwithstanding the provision of paragraph (a) of this section, if an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and practicable to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **Federal Register**.

(c) The OHA shall serve notice on any other person readily identified by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of such notice.

(d) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.24 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction; a description of the acts or transactions that would be affected by the requested OHA action; and a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the application. Copies of all relevant contracts, agreements, leases, instruments, and other documents shall be submitted with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference or hearing

regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the particular action sought therein.

(d) The application shall specify the exact nature and extent of the relief requested.

§ 1003.25 OHA evaluation.

(a) (1) OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may consider any other source of information. The OHA on its own initiative may convene a hearing or conference, if, in its discretion, it considers that such hearing or conference will advance its evaluation of the application. The OHA may issue appropriate orders as warranted in the proceeding.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 1003.23, the OHA may dismiss the application without prejudice.

(b)(1) The OHA shall consider an application for an exception only when it determines that a more appropriate proceeding is not provided by DOE regulations.

(2) An application for an exception may be granted to alleviate or prevent serious hardship, gross inequity or unfair distribution of burdens.

(3) An application for an exception shall be decided in a manner that is, to the extent possible, consistent with the disposition of previous applications for exception.

§ 1003.26 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during

the proceeding, the OHA shall issue an order granting or denying the application, in whole or in part.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the order. The Decision and Order shall provide that any person aggrieved thereby may file an appeal in accordance with § 1003.27.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

§ 1003.27 Appeal of exception order.

(a) Except as provided in paragraph (b) of this section, any person aggrieved by an order issued by the OHA under this subpart may file an appeal with the OHA in accordance with subpart C of this part. Any appeal filed under this paragraph must be filed within 30 days of service, or constructive service under § 1003.14, of the order from which the appeal is taken.

(b) Any person aggrieved or adversely affected by the denial of a request for exception relief filed pursuant to § 504 of the Department of Energy Organization Act (42 U.S.C. 7194) may appeal to the Federal Energy Regulatory Commission, in accordance with the Commission's regulations.

Subpart C—Appeals

§ 1003.30 Purpose and scope.

This subpart establishes the procedures for the filing of an administrative appeal of a DOE order and for the consideration of the appeal by the Office of Hearings and Appeals. Unless a program rule or regulation or a DOE delegation of authority provides otherwise, a person aggrieved by a DOE order appealable under this subpart has not exhausted his or her administrative remedies until an appeal has been filed under this subpart and an order granting or denying the appeal has been issued. A person filing an appeal must also file an "Application for Stay" under subpart D of this part if the grant of a stay is necessary under Section 10(c) of the Administrative Procedure Act (5 U.S.C. 704) to preclude judicial review pending final action on the appeal.

§ 1003.31 Who may file.

Any person may file an appeal under this subpart who is so authorized by § 1003.27, a program rule or regulation, or a DOE delegation of authority.

§ 1003.32 What to file.

A person filing under this subpart shall file an "Appeal of Order" which should be clearly labeled as such both on the appeal and on the outside of the envelope in which the appeal is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.33 Where to file.

The appeal shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.34 Notice.

(a) The appellant shall send by United States mail a copy of the appeal and any subsequent amendments or other documents relating to the appeal, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the appellant as a person who would be aggrieved by the OHA action sought, including those who participated in the process that led to the issuance of the order from which the appeal has been taken. The copy of the appeal shall be accompanied by a statement that the person may submit comments regarding the appeal to the OHA within 10 days. The appeal filed with the OHA shall include certification to the OHA that the appellant has complied with the requirements of this paragraph and shall include the names and addresses of each person to whom a copy of the appeal was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if any appellant determines that compliance with paragraph (a) of this section would be impracticable, the appellant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the appeal a description of the persons or class or classes of persons to whom notice was not sent. The OHA may require the appellant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **Federal Register**.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the appeal will be accepted if filed within 10 days of the service of that notice.

(d) Any person submitting written comments to the OHA with respect to an appeal filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the appellant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.35 Contents.

(a) The appeal shall contain a concise statement of grounds upon which it is brought and a description of the relief sought. It shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeals and exceptions relied upon to support the appeal. If the appeal includes a request for relief based on significantly changed circumstances, there shall be a complete description of the events, acts, or transactions that comprise the significantly changed circumstances, and the appellant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order from which the appeal has been taken. For purposes of this subpart, the term "significantly changed circumstances" shall mean—

(1) The discovery of material facts that were not known or could not have been known at the time of the process that led to the issuance of the order from which the appeal has been taken;

(2) The discovery of a law, rule, regulation, order or decision on an appeal or any exception that was in effect at the time of the process that led to the issuance of the order from which the appeal has been taken, and which, if such had been made known to DOE, would have been relevant and would have substantially altered the outcome; or

(3) A substantial change in the facts or circumstances upon which an outstanding and continuing order affecting the appellant was issued, which change has occurred during the interval between issuance of the order and the date of the appeal and was caused by forces or circumstances beyond the control of the appellant.

(b) A copy of the order that is the subject of the appeal shall be submitted with the appeal.

(c) The appellant shall state whether he requests or intends to request that there be a conference or hearing

regarding the appeal. Any request not made at the time the appeal is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

§ 1003.36 OHA evaluation.

(a) (1) The OHA may initiate an investigation of any statement in an appeal and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any appeal provided that the appellant is afforded an opportunity to respond to all third person submissions. In evaluating an appeal, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference or hearing if, in its discretion, it considers that such conference or hearing will advance its evaluation of the appeal.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the appeal with leave to refile within a specified time. If the failure to supply additional information is repeated or willful, the OHA may dismiss the appeal with prejudice. If the appellant fails to provide the notice required by § 1003.34, the OHA may dismiss the appeal without prejudice.

(b) The OHA may issue an order summarily denying the appeal if—

(1) It is not filed in a timely manner, unless good cause is shown; or

(2) It is defective on its face for failure to state, and to present facts and legal argument in support thereof, that the DOE action was erroneous in fact or in law, or that it was arbitrary or capricious.

(c) The OHA may deny any appeal if the appellant does not establish that—

(1) The appeal was filed by a person aggrieved by a DOE action;

(2) The DOE's action was erroneous in fact or in law; or

(3) The DOE's action was arbitrary or capricious.

§ 1003.37 Decision and Order.

(a) Upon consideration of the appeal and other relevant information received or obtained during the proceeding, the OHA shall enter an appropriate order, which may include the modification of the order that is the subject of the appeal.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. The Decision and Order shall state that it is a final

order of the DOE of which the appellant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the appellant, any other person who participated in the proceeding, and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart D—Stays

§ 1003.40 Purpose and scope.

(a) This subpart establishes the procedures for applying for a stay. It also specifies the nature of the relief which may be effectuated through the approval of a stay.

(b) An application for a stay will be considered if it is incident to a submission over which OHA has jurisdiction. An application for stay may also be considered if the stay is requested pending judicial review of an order issued by the OHA.

(c) All applicable DOE rules, regulations, orders, and generally applicable requirements shall be complied with unless and until an application for a stay is granted.

§ 1003.41 What to file.

A person filing under this subpart shall file an "Application for Stay" which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted. The application shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.42 Where to file.

An Application for Stay shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.43 Notice.

(a) An applicant for stay shall notify each person readily identifiable as one who will be directly aggrieved by the OHA action sought that it has filed an Application for Stay. The applicant shall serve the application on each identified person and shall notify each such person that the OHA will receive and endeavor to consider, subject to time constraints imposed by the urgency of the proceeding, written comments on the application that are submitted immediately.

(b) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the

applicant. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

(c) The OHA shall require the applicant to take reasonable measures depending on the circumstances and urgency of the case to notify each person readily identified as one that would be directly aggrieved by the OHA action sought of the date, time and place of any hearing or other proceedings in the matter. However, if the Director of the OHA concludes that the circumstances presented by the applicant justify immediate action, the OHA may issue a Decision on the Application for Stay prior to receipt of written comments or the oral presentation of views by adversely affected parties.

§ 1003.44 Contents.

(a) An Application for Stay shall contain a full and complete statement of all relevant facts pertaining to the act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include, but not be limited to, all information that relates to satisfaction of the criteria in § 1003.45(b).

(b) The application shall include a description of the proceeding incident to which the stay is being sought. This description shall contain a discussion of all DOE actions relevant to the proceeding.

(c) The applicant shall state whether he requests that a conference or hearing be convened regarding the application, as provided in subpart F of this part.

§ 1003.45 OHA evaluation.

(a) (1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may order the submission of additional information, and may solicit and accept submissions from third persons relevant to an application provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application, the OHA may also consider any other source of information, and may conduct hearings or conferences either in response to requests by parties in the proceeding or on its own initiative.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request additional information is not submitted by the applicant, the OHA may dismiss

the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice.

(3) The OHA shall process applications for stay as expeditiously as possible. When administratively feasible, the OHA shall grant or deny an Application for Stay within 10 business days after receipt of the application.

(4) Notwithstanding any other provision of the DOE regulations, the OHA may make a decision on any Application for Stay prior to the receipt of written comments.

(b) The criteria to be considered and weighed by the OHA in determining whether a stay should be granted are:

(1) Whether a showing has been made that an irreparable injury will result in the event that the stay is denied;

(2) Whether a showing has been made that a denial of the stay will result in a more immediate hardship or inequity to the applicant than a grant of the stay would cause to other persons affected by the proceeding;

(3) Whether a showing has been made that it would be desirable for public policy reasons to grant immediate relief pending a decision by OHA on the merits;

(4) Whether a showing has been made that it is impossible for the applicant to fulfill the requirements of an outstanding order or regulatory provision; and

(5) Whether a showing has been made that there is a strong likelihood of success on the merits.

§ 1003.46 Decision and Order.

(a) In reaching a decision with respect to an Application for Stay, the OHA shall consider all relevant information in the record. An Application for Stay may be decided by the issuance of an order either during the course of a hearing or conference in which an official transcript is maintained or in a separate written Decision and Order. Any such order shall include a statement of the relevant facts and the legal basis of the decision. The approval or denial of a stay is not an order of the OHA that is subject to administrative or judicial review.

(b) In its discretion and upon a determination that it would be desirable to do so in order to further the objectives stated in the regulations or in the statutes the DOE is responsible for administering, the OHA may order a stay on its own initiative.

Subpart E—Modification or Rescission

§ 1003.50 Purpose and scope.

This subpart establishes the procedures for the filing of an

application for modification or rescission of a DOE order. An application for modification or rescission is a summary proceeding that will be initiated only if the criteria described in § 1003.55(b) are satisfied.

§ 1003.51 What to file.

A person filing under this subpart shall file an "Application for Modification (or Rescission)," which should be clearly labeled as such both on the application and on the outside of the envelope in which the application is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.52 Where to file.

The application shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.53 Notice.

(a) The applicant shall send by United States mail a copy of the application and any subsequent amendments or other documents relating to the application, from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the applicant as a person who would be aggrieved by the OHA action sought, including persons who participated in the process that led to the issuance of the order for which the modification or rescission is sought. The copy of the application shall be accompanied by a statement that the person may submit comments regarding the application to the OHA within 10 days. The application filed with the OHA shall include certification to the OHA that the applicant has complied with the requirements of this paragraph and shall include the names and addresses of all persons to whom a copy of the application was sent.

(b) If an applicant determines that compliance with paragraph (a) of this section would be impracticable, the applicant shall:

(1) Comply with the requirements of paragraph (a) of this section with regard to those persons whom it is reasonable and possible to notify; and

(2) Include with the application a description of the persons or class or classes of persons to whom notice was not sent. The OHA may require the applicant to provide additional or alternative notice, may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **Federal Register**.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the application will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA with respect to an application filed under this subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the applicant. The person shall certify to the OHA that he has complied with the requirement of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.54 Contents.

(a) The application shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the application and to the OHA action sought. Such facts shall include the names and addresses of all affected persons (if reasonably ascertainable), a complete statement of the business or other reasons that justify the act or transaction, a description of the acts or transactions that would be affected by the requested action, and a full description of the pertinent provisions and relevant facts contained in any relevant documents. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the application shall be submitted to the OHA upon its request. A copy of the order of which modification or rescission is sought shall be included with the application.

(b) The applicant shall state whether he requests or intends to request that there be a conference regarding the application. Any request not made at the time the application is filed shall be made as soon thereafter as possible. The request and the OHA determination on the request shall be made in accordance with subpart F of this part.

(c) The applicant shall fully describe the events, acts, or transactions that comprise the significantly changed circumstances, as defined in § 1003.55(b)(2), upon which the application is based. The applicant shall state why, if the significantly changed circumstance is new or newly discovered facts, such facts were not or could not have been presented during the process that led to the issuance of the order for which modification or rescission is sought.

(d) The application shall include a discussion of all relevant authorities, including, but not limited to, DOE rules, regulations, and decisions on appeal and exceptions relied upon to support the action sought therein.

§ 1003.55 OHA evaluation.

(a)(1) The OHA may initiate an investigation of any statement in an application and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and accept submissions from third persons relevant to any application for modification or rescission provided that the applicant is afforded an opportunity to respond to all third person submissions. In evaluating an application for modification or rescission, the OHA may convene a conference, on its own initiative, if, in its discretion, it considers that such conference will advance its evaluation of the application.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if upon request the necessary additional information is not submitted, the OHA may dismiss the application without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the application with prejudice. If the applicant fails to provide the notice required by § 1003.53, the OHA may dismiss the application without prejudice.

(b)(1) An application for modification or rescission of an order shall be processed only if—

(i) The application demonstrates that it is based on significantly changed circumstances; and

(ii) The period within which a person may file an appeal has lapsed or, if an appeal has been filed, a final order has been issued.

(2) For purposes of this subpart, the term "significantly changed circumstances" shall mean—

(i) The discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based;

(ii) The discovery of a law, rule, regulation, order or decision on appeal or exception that was in effect at the time of the proceeding upon which the application is based and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome; or

(iii) There has been a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting

the applicant was issued, which change has occurred during the interval between issuance of such order and the date of the application and was caused by forces or circumstances beyond the control of the applicant.

§ 1003.56 Decision and Order.

(a) Upon consideration of the application and other relevant information received or obtained during the proceeding, the OHA shall issue a Decision and Order granting or denying the application.

(b) The Decision and Order shall include a written statement setting forth the relevant facts and the legal basis of the Decision and Order. When appropriate, the Decision and Order shall state that it is a final order of which the applicant may seek judicial review.

(c) The OHA shall serve a copy of the Decision and Order upon the applicant, any other person who participated in the proceeding and upon any other person readily identifiable by the OHA as one who is aggrieved by such Decision and Order.

Subpart F—Conferences and Hearings

§ 1003.60 Purpose and scope.

This subpart establishes the procedures for requesting and conducting an OHA conference or hearing. Such proceedings shall be convened in the discretion of the OHA, consistent with OHA requirements.

§ 1003.61 Conferences.

(a) The OHA in its discretion may direct that a conference be convened, on its own initiative or upon request by a person, when it appears that such conference will materially advance the proceeding. The determination as to who may attend a conference convened under this subpart shall be in the discretion of the OHA, but a conference will usually not be open to the public.

(b) A conference may be requested in connection with any proceeding of the OHA by any person who would be aggrieved by that proceeding. The request may be made in writing or verbally, but must include a specific showing as to why such conference will materially advance the proceeding. The request shall be addressed to the OHA, as provided in § 1003.11.

(c) A conference may only be convened after actual notice of the time, place and nature of the conference is provided to the person who requested the conference.

(d) When a conference is convened in accordance with this section, each person may present views as to the

issues involved. Documentary evidence may be presented at the conference, but will be treated as if submitted in the regular course of the proceeding. A transcript of the conference will not usually be prepared. However, the OHA in its discretion may have a verbatim transcript prepared.

(e) Because a conference is solely for the exchange of views incident to a proceeding, there will be no formal reports or findings unless the OHA in its discretion determines that such would be advisable.

§ 1003.62 Hearings.

(a) The OHA in its discretion may direct that a hearing be convened on its own initiative or upon request by a person, when it appears that such hearing will materially advance the proceeding. All hearings convened pursuant to this subpart shall be conducted by the Director of the OHA or his designee. The determination as to who may attend a hearing convened under this subpart shall be in the discretion of OHA. Hearings will be open to the public, but may be closed at the discretion of OHA if the reason is put in the record.

(b) A hearing may be requested by an applicant, appellant, or any other person who would be aggrieved by the OHA action sought. The request shall be in writing and shall include a specific showing as to why such hearing will materially advance the proceeding. The request shall be addressed to the OHA at the address provided in § 1003.11.

(c) A hearing may be convened only after actual notice of the time, place, and nature of the hearing is provided both to the applicant or appellant and to any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action involved. The notice shall include, as appropriate:

(1) A statement that such person may participate in the hearing; or

(2) A statement that such person may request a separate conference or hearing regarding the application or appeal.

(d) When a hearing is convened in accordance with this section, each person may present views as to the issue or issues involved. Documentary evidence may be presented at the hearing, but will be treated as if submitted in the regular course of the proceeding. A transcript of the hearing will be prepared.

(e) If material factual issues remain in dispute after an application or appeal has been filed, the Director of the OHA or his designee may issue an order convening an evidentiary hearing in which witnesses shall testify under oath, subject to cross-examination, for

the record and in the presence of a Presiding Officer. A Motion for Evidentiary Hearing should specify the type of witness or witnesses whose testimony is sought, the scope of questioning that is anticipated, and the relevance of the questioning to the proceeding. A motion may be summarily denied for lack of sufficient specificity, because an evidentiary hearing would place an undue burden on another person or the DOE, or because an evidentiary hearing would cause undue delay.

(f) A Motion for Evidentiary Hearing must be served on any person from whom information is sought and on parties to the underlying administrative action. Any person who wishes to respond to a Motion for Evidentiary Hearing must do so within ten days of service.

(g) In reaching a decision with respect to a request for a hearing or motion filed under this subpart, the OHA shall consider all relevant information in the record. If an order is issued granting a hearing or evidentiary hearing, in whole or in part, the order shall specify the parties, any limitations on the participation of a party, and the issues to be considered. An order of the OHA issued under this section is an interlocutory order which is subject to further administrative review or appeal only upon issuance of a final Decision and Order in the proceeding concerned.

(h) At any evidentiary hearing, the parties shall have the opportunity to present material evidence that directly relates to a particular issue set forth for hearing. The Presiding Officer may administer oaths or affirmations, rule on objections to the presentation of evidence, receive relevant material, require the advance submission of documents offered as evidence, dispose of procedural requests, determine the format of the hearing, modify any order granting a Motion for Evidentiary Hearing, direct that written motions, documents or briefs be filed with respect to issues raised during the course of the hearing, ask questions of witnesses, issue subpoenas, direct that documentary evidence be served upon other parties (under protective order if such evidence is deemed confidential) and otherwise regulate the conduct of the hearing.

Subpart G—Private Grievances and Redress

§ 1003.70 Purpose and scope.

The OHA shall receive and consider petitions that seek special redress relief or other extraordinary assistance as provided for in the Federal Energy

Administration Act of 1974, Section 21 (15 U.S.C. 780), apart from or in addition to the other proceedings described in this part. This subpart may also apply if cross referenced in another DOE rule or regulation, or in a DOE delegation of authority. Petitions under this subpart shall include those seeking special assistance based on an assertion that DOE is not complying with its rules, regulations, or orders.

§ 1003.71 Who may file.

Any person may file a petition under this subpart who is adversely affected by any DOE rule, regulation or order subject to 15 U.S.C. 780 or who is so authorized by a program rule or regulation or a DOE delegation of authority.

§ 1003.72 What to file.

The person seeking relief under this subpart shall file a "Petition for Special Redress or Other Relief," which shall be clearly labeled as such both on the petition and on the outside of the envelope in which it is transmitted, and shall be in writing. The general filing requirements stated in § 1003.9 shall be complied with in addition to the requirements stated in this subpart.

§ 1003.73 Where to file.

A petition shall be filed with the OHA at the address provided in § 1003.11.

§ 1003.74 Notice.

(a) The person filing the petition, except a petition that asserts that the DOE is not complying with agency rules, regulations, or orders, shall send by United States mail a copy of the petition and any subsequent amendments or other documents relating to the petition, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to each person who is reasonably ascertainable by the petitioner as a person who would be aggrieved by the OHA action sought. The copy of the petition shall be accompanied by a statement that the person may submit comments regarding the petition to the OHA within 10 days. The copy filed with the OHA shall include certification that the requirements of this paragraph have been complied with and shall include the names and addresses of each person to whom a copy of the petition was sent.

(b) Notwithstanding the provisions of paragraph (a) of this section, if the petitioner determines that compliance with paragraph (a) of this section would be impracticable, the petitioner shall:

(1) Comply with the requirements of paragraph (a) of this section with regard

to those persons whom it is reasonable and practicable to notify; and

(2) Include with the petition a description of the persons or class or classes of persons to whom notice was not sent.

(3) The OHA may require the petitioner to provide additional or alternative notice, or may determine that the notice required by paragraph (a) of this section is not impracticable, or may determine that notice should be published in the **Federal Register**.

(c) The OHA shall serve notice on any other person readily identifiable by the OHA as one who would be aggrieved by the OHA action sought and may serve notice on any other person that written comments regarding the petition will be accepted if filed within 10 days of service of that notice.

(d) Any person submitting written comments to the OHA regarding a petition filed under his subpart shall send a copy of the comments, or a copy from which confidential information has been deleted in accordance with § 1003.9(f), to the petitioner. The person shall certify to the OHA that he has complied with the requirements of this paragraph. The OHA may notify other persons participating in the proceeding of such comments and provide an opportunity for such persons to respond.

§ 1003.75 Contents.

The petition shall contain a full and complete statement of all relevant facts pertaining to the circumstances, act or transaction that is the subject of the petition and to the OHA action sought. Such facts shall include, but not be limited to, the names and addresses of all affected persons (if reasonably ascertainable); a complete statement of the business or other reasons that justify the act or transaction, if applicable; a description of the act or transaction, if applicable; a description of the acts or transactions that would be affected by the requested action; a full discussion of the pertinent provisions and relevant facts contained in the documents submitted with the petition, and an explanation of how the petitioner is aggrieved by DOE's position. Copies of all contracts, agreements, leases, instruments, and other documents relevant to the petition shall be submitted to the OHA upon its request.

§ 1003.76 OHA evaluation of request.

(a) (1) The OHA may initiate an investigation of any statement in a petition and utilize in its evaluation any relevant facts obtained by such investigation. The OHA may solicit and

accept submissions from third persons relevant to any petition provided that the petitioner is afforded an opportunity to respond to all third person submissions. In evaluating a petition, the OHA may consider any other source of information. The OHA on its own initiative may convene a conference, if, in its discretion, it considers that such will advance its evaluation of the petition.

(2) If the OHA determines that there is insufficient information upon which to base a decision and if, upon request, the necessary additional information is not submitted, the OHA may dismiss the petition without prejudice. If the failure to supply additional information is repeated or willful, the OHA may dismiss the petition with prejudice. If the petitioner fails to provide the notice required by § 1003.74, the OHA may dismiss the petition without prejudice.

(b) (1) The OHA will dismiss without prejudice a "Petition for Special Redress or Other Relief" if it determines that another more appropriate proceeding is provided by this part.

(2) The OHA will dismiss with prejudice a "Petition for Special Redress or Other Relief" filed by a person who has exhausted his administrative remedies with respect to any proceeding provided by this part, and received a final order therefrom that addresses the same issue or transaction.

§ 1003.77 Decision and Order.

(a) Upon consideration of the petition and other relevant information received or obtained during the proceeding, the OHA will issue a Decision and Order granting or denying the petition.

(b) The Decision and Order denying or granting the petition shall include a written statement setting forth the relevant facts and legal basis for the Decision and Order. Such Decision and Order shall state that it is a final order of the DOE of which the petitioner may seek judicial review.

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DEPARTMENT OF ENERGY

10 CFR Parts 430, 765, and 766

Payments Equal to Taxes Provisions of the Nuclear Waste Policy Act of 1982, As Amended, Interpretation and Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Final rule; technical amendments.
