

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****14 CFR Parts 300 and 302**

[Docket No. OST-97-2090; Notice No. 97-2]

RIN 2105-AC48

**Rules of Practice in Proceedings****AGENCY:** Office of the Secretary, Department of Transportation.**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** In his Regulatory Reinvention Initiative Memorandum of March 4, 1995, President Clinton directed Federal agencies to conduct a page-by-page review of all of their regulations and to "eliminate or revise those that are outdated or otherwise in need of reform." In response to that directive, the Department has undertaken a review of its aviation economic regulations as contained in 14 CFR Chapter II. We have thus far identified a number of regulations that were outdated or contained references that were obsolete. This rulemaking proposes to modify various provisions in 14 CFR part 302—Rules of Practice in Proceedings by eliminating redundancies, excess verbiage, and obsolete provisions; by making technical changes necessary to make the rules current; and by reorganizing and renumbering subparts in a more logical order and to place a greater emphasis on procedures used in written as opposed to oral proceedings. As part of the reorganization, one provision in part 302 would be relocated to part 300 of this chapter—Rules of Conduct in DOT Proceedings under this Chapter, and all currently reserved subparts would be removed. The rulemaking also proposes to shorten some of the time periods for filing responsive documents in licensing cases, and to include procedures for slot exemptions at high density airports.

**DATES:** Comments must be received on or before April 4, 1997.

**ADDRESSES:** Comments should be directed to Department of Transportation Dockets, Docket OST-97-2090, 400 Seventh Street, SW., Room PL-401, Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** Patricia L. Thomas or Carol A. Woods, Office of Aviation Analysis, X-56, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, DC 20590, (202) 366-9721.

**SUPPLEMENTARY INFORMATION:****Comments Invited**

Interested persons are invited to participate in this rulemaking action by

submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions. Communications should identify the regulatory docket number and be submitted in duplicate to the address listed above. Commenters wishing the Department to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: Comments on Docket No. OST-97-2090. The postcard will be date/time stamped and returned to the commenter. All communications on or before the specified closing date will be considered by the Assistant Secretary for Aviation and International Affairs before taking action on any further rulemaking. Also, this proposal may be changed in light of comments received. All comments submitted will be available for examination in Docket OST-97-2090. A report summarizing each substantive public contact with DOT personnel concerned with this rulemaking will be filed in the docket.

**Background**

The Department of Transportation has reviewed its existing regulations in order to determine whether changes should be made to promote economic growth, create jobs, or eliminate unnecessary costs or other burdens on the economy. In the course of this review, the Department determined that references in various regulations were obsolete and that technical and editorial changes to the regulations are necessary to make them current.

Title 14 CFR part 302—Rules of Practice in Proceedings contains the regulations that govern the conduct of all aviation economic proceedings before the Department of Transportation. These rules have not been comprehensively reviewed and updated since 1985 when the aviation economic functions of the Civil Aeronautics Board (CAB) were transferred to the Department as a result of the CAB's "sunset."

**The Changes**

General. Part 302 is extensive, with different subparts governing different types of proceedings. Because of the extent and number of changes being made, we propose to reissue part 302 in its entirety. The particular provisions proposed to be eliminated, relocated, or revised, and the reasons therefor are discussed for each subpart separately below. In general, however, the changes would include reorganizing and

renumbering of subparts; eliminating redundancies, obsolete provisions or excess verbiage; and resequencing sections within subparts to place them in a more logical order to "track" the course of a particular type of proceeding and to place a greater emphasis on procedures used in written proceedings (*i.e.*, non-oral evidentiary proceedings) which are used in the majority of cases handled. Thus, some sections would be rewritten to indicate that written procedures, such as show-cause procedures, would generally be employed, and that *if* an administrative law judge were assigned to a case, the judge would preside over or have responsibility for various decisions, but that in all other cases the DOT decisionmaker would have such powers and responsibilities. Some sections would be separated or combined and titles added or revised for clarity and ease in locating specific provisions.

A number of the subparts would be reordered so that the rules of general applicability (new Subpart A) would, as now, come first, followed by rules pertaining to the Department's "permanent" licensing functions, *i.e.*, issuance of U.S. air carrier certificates and foreign air carrier permits (new Subpart B, current Subparts I and Q), rules pertaining to "temporary" licensing functions, *i.e.*, exemptions (new Subpart C, current Subpart D), rules on enforcement of those licenses and other Department regulations (new Subpart D, current Subpart B), and rules on rates, fares, and charges, *i.e.*, prices for foreign air transportation (revised Subpart E), airport fees (Subpart F), and mail rates and contracts (new Subpart G, current Subparts C and O).

Current Subpart J (Rules Applicable to Proceedings Involving Charter Air Carriers) would be removed. This subpart contains procedural rules for the immediate suspension of a charter air carrier's certificate. To our knowledge, this rule has never been used. Moreover, the procedures prescribed in Subpart J, if utilized, would subject a charter air carrier that failed to comply with the insurance and/or continuing fitness requirements of sections 41110(e) and 41112 of the Statute to more severe treatment than an air carrier with scheduled passenger or scheduled cargo authority that failed to comply with these same sections of the Statute. In the interest of treating all certificated air carriers equally, Subpart J should be eliminated. We will

continue to have powers under the provisions of §§ 204.7 and 302.211 of this chapter, and sections 41104, 41110, and 41112 of the Statute to suspend a charter carrier's certificate when necessary.

Subparts G, H, K, L, M, N, and P, which are currently "reserved," would be removed.

Two technical changes would be applicable to all subparts: (1) the correction of definitions and other terminology necessitated by the revision and recodification of the Federal Aviation Act within Subtitle VII of Title 49 of the United States Code (Transportation) ("the Statute") by action of Pub. L. 103-272, enacted July 5, 1994; and (2) the correction of the obsolete title "Assistant Secretary for Policy and International Affairs" to read "Assistant Secretary for Aviation and International Affairs".

At the time we issue a final rule in this rulemaking proceeding, we will also amend all rules in Chapter II containing what will then be incorrect references to sections in part 302.

Subpart A—Rules of General Applicability currently sets forth the general rules that apply to all proceedings before the Department. The changes to Subpart A would include the addition of a definitions section (§ 302.2) which would include definitions drawn from other sections of the current rule (e.g., DOT decisionmaker) as well as new definitions (e.g., party, non-hearing case) or revised definitions. Thus, the definition of "administrative law judge" is changed to remove the reference to presiding officers to avoid confusion as to whether a presiding officer is an administrative law judge appointed pursuant to 5 U.S.C. 3105. The Secretary may appoint, on an *ad hoc* basis, presiding officers to govern proceedings that do not require administrative law judges. Appointment of a presiding officer could be made in an order instituting a proceeding. The definition of "hearing case" is changed to remove reference to 5 U.S.C. 556 and 557, since an official who is not an administrative law judge might preside over an oral evidentiary hearing that is not conducted pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

Some sections in Subpart A would be reorganized. For example, requirements for filing documents (§ 302.3) would contain provisions on the prohibition and dismissal of certain documents and on motions for leave to file otherwise unauthorized documents that are presently contained in the general requirements for documents (§ 302.4).

Provisions would be added to specify when an application may be amended when the application has not been set for hearing—e.g., prior to the issuance of an order establishing further procedures or disposing of the application (§ 302.5).

Service of documents (new § 302.7) would allow for service by facsimile.

The definition of "party" would be expanded to include any DOT staff designated to participate in the proceeding in an oral evidentiary hearing (new §§ 302.2 and 302.10(a)).

A provision would be added in the section on objections to the public disclosure of information (new § 302.12) to allow limited disclosure of such information to the parties in a proceeding upon submission of affidavits by those parties swearing to protect the confidentiality of the documents at issue during the pendency of a motion to withhold.

All of the paragraphs that pertain only to oral evidentiary hearings would be moved to the end of the subpart (§§ 302.17–302.37) to alleviate confusion over the procedures that are applicable only to those types of proceedings and those applicable to non-hearing cases, which now comprise the bulk of the proceedings that the Department handles.

The section on administrative law judges (new § 302.17) would be revised to specify the powers of each judge and to include the delegation of authority to each judge to make decisions in hearing proceedings (current § 302.27(a)).

The section on the DOT decisionmaker (new § 302.18) would be revised to reflect the change in title of the Assistant Secretary for Policy and International Affairs to Assistant Secretary for Aviation and International Affairs, and to reorder the text to eliminate duplication and to reflect that the majority of cases are decided by the Assistant Secretary using non-hearing proceedings.

New sections on evidence (§ 302.24) and transcripts of hearings (§ 302.28) would contain provisions from current § 302.24. The list of officially noticeable documents, included in the evidence section, would be updated and reorganized so that documents filed with or compiled by the Department, including the Federal Aviation Administration, would be listed first followed by documents filed with or compiled by other government agencies and then private organizations (§ 302.24(g)).

The provisions now contained in the section on subpoenas (current § 302.19(g)) governing the attendance of DOT employees and the production of documentary evidence in their custody

at a hearing would be revised to state that such matters would be governed by 49 CFR parts 9 and 7 (new § 302.25(g)).

Provisions relating to the amount of attendance and mileage fees payable to witnesses in hearing cases (new § 302.27(c)) would be simplified to remove specific dollar amounts and to specify that such witnesses will be paid in accordance with regulations in effect at the time for U.S. courts or government per diem rates. Text on the payment of such fees to witnesses as well as other rights of witnesses (currently found in paragraphs (b) and (c) of § 302.11) would be combined in new § 302.27. In addition, a separate section on appearances (currently in § 302.11(a)) would be established (new § 302.21).

A provision would be added stating that one of the considerations for determining whether to order a "daily transcript" of a hearing, in lieu of an "ordinary transcript", is cost to the Department (new § 302.29(b)(3)).

A new section specifying the actions that can be taken by administrative law judges after a hearing, including issuing initial or recommended decisions (which would be defined in the rule) or certifying the record to the DOT decisionmaker would be established (§ 302.31). A provision would be added stating that, in the case of a recommended decision, unless a petition for discretionary review, exceptions, or a notice by the DOT decisionmaker taking review was filed, the judge's decision would be forwarded to the President for review under 49 U.S.C. 41307 as the Department's final order.

Some sections would be removed from this subpart if they pertain only to specific types of cases (e.g., § 302.13, joinder of complaints or complainants, has been moved to new Subpart D concerning enforcement proceedings), or if they more logically belong in other rules (e.g., § 302.18(a–1)—motions to disqualify DOT employees in review of hearing matters—would be redesignated § 300.18 in part 300 of this chapter, which covers rules of conduct in DOT proceedings).

Subpart B—Rules Applicable to U.S. Air Carrier Certificate and Foreign Air Carrier Permit Licensing Proceedings would replace and revise current Subparts I and Q with respect to licensing procedures for new U.S. certificated and foreign air carriers and the conduct of international route proceedings.

Current Subpart I (Rules Applicable to Route Proceedings under Sections 401 and 402 of the Federal Aviation Act) would be eliminated. These rules set

forth procedures under which the Department may initiate route proceedings under sections 41102 and 41302 of the Statute (formerly sections 401 and 402 of the Federal Aviation Act). These procedures were used by the former CAB prior to the promulgation of current Subpart Q of this part. Today, these types of route cases are handled under the expedited provisions of Subpart Q rather than Subpart I procedures. Thus, a special set of rules applicable to route proceedings initiated by the Department is no longer needed.

Current Subpart Q (Expedited Procedures for Processing Licensing Cases) would also be removed. These rules contain the procedures used for the filing and processing of applications requesting action (e.g., issuance, modification, transfer) involving certificates of public convenience and necessity or foreign air carrier permits.

The new Subpart B would be organized to indicate more clearly what evidence requirements and filing and review procedures would be followed in each type of licensing case. Thus, current § 302.1720, which applies to certificate cases in general, contains provisions on filing conforming applications or motions to modify the scope of a proceeding that are applicable to international route cases but not typically applicable to initial fitness certification cases. Provisions pertaining solely to international route cases would be contained in § 302.212; those pertaining to initial or continuing

fitness cases for U.S. carriers would be found in § 302.211; and those pertaining to foreign air carrier permit cases would be located in § 302.213.

A provision would be added (§ 302.202(a)) stating that in those cases involving the initial or continuing fitness of a U.S. air carrier, any application filed should also contain the supporting fitness information required by part 204 of this chapter.

The requirement to serve copies of pleadings on other parties would be revised for proceedings involving foreign air carrier permit applications to conduct scheduled operations to include the airport authority of any U.S. airport that the applicant initially proposes to serve (new § 302.203(b)(2)(C)). Service on such parties is already required in U.S. air carrier certificate application proceedings (new § 302.203(b)(1)).

We are also proposing to eliminate the separate regulatory procedures and time periods for responsive pleadings for certificate restriction removal cases (current § 302.1730). Such cases are rare and can be handled under the same rules and timeframes as international route award cases. If different procedures or timetables are required in a specific case, the Department can establish those in a procedural order at the outset of such proceeding.

We are adding a provision to specifically allow for the filing of replies to answers in licensing cases (new § 302.204(b)). Replies are routinely filed

in such cases (accompanied by a motion for leave to file), are permitted in response to answers to show cause orders issued in such proceedings, and are of benefit to the Department in analyzing the information and allegations in any filed answer.

In most cases, the time periods for filing responsive pleadings would be decreased in an effort to expedite the processing of licensing cases (new §§ 302.204 and 302.212) (see chart below). In this regard, answers to U.S. air carrier certificate applications (both initial fitness and international route award) and foreign air carrier permit applications or amendments to any of those types of applications would be due in 21 days, rather than 28 days. Petitions for oral hearing of the application would be due at the same time that answers to the application would be due (i.e., within 21 days), rather than 14 days later as is currently the case for foreign air carrier permits (current § 302.1712(c)(3)) or 24 days later (i.e., 52 days after the original application) as is the case for certificate cases (current § 302.1712(c)(1)). In international route cases, conforming applications and/or motions to modify the scope of the proceeding would be due at the same time that answers are filed—within 21 days after the original application. Answers to conforming applications or motions would be due 14 days later, i.e., 35 days after the original application, rather than 42 days.

PROPOSED CHANGES IN TIME PERIODS FOR FILING RESPONSIVE PLEADINGS

	Number of days from date original application filed	
	Current	Proposed
U.S. air carrier certificate applications (both initial fitness and international route award) and foreign air carrier permit applications, or amendments to any of these:		
Answers to the application .....	28	21
Replies to answers .....	NA	35
Conforming applications or motions to modify scope .....	28	21
Answers to conforming applications or motions to modify scope .....	42	35
Petitions for oral hearing of application:		
Certificate cases .....	52	21
Foreign air carrier permits .....	42	21
Restriction removal cases:		
Answers to application .....	14	21
Conforming applications .....	14 days	21
Answers to conforming applications .....	XL28	35
Petitions for oral hearing of application .....	35	21

The time period for the Department to defer further processing of an incomplete application (current § 302.1713) would be increased from 21 to 28 days to allow for the review of any answers filed in response to the application (new § 302.209).

With respect to DOT's issuance of an order establishing further procedures, the only change would be to specify that, in U.S. air carrier certificate cases, the order would be issued in 90 days after a complete application is filed (new §§ 302.211(b) and 302.212(e)). This

clarification, which reflects the provision in current § 302.1713 (as contained in new § 302.209) that the time periods contained in the subpart would not begin to run until the application is complete, is intended to alleviate any confusion over when a

DOT order taking action on an application would be issued, since many certificate applications are not complete when submitted and must be deferred pending receipt of supplementary information.

The section on the disposition of applications (new § 302.210) would be reorganized to reflect the current practices employed in the majority of application cases of using show-cause procedures or dismissing the application by final order, rather than instituting an oral evidentiary hearing.

A provision would be added to current § 302.1757 to clarify that if the DOT decisionmaker did not act within 90 days of the issuance of an initial decision by an administrative law judge, that decision would become the final decision of the Department (new § 302.220(b)(2)).

In addition, current § 302.1760, which pertains to internal procedures of the Department, would be eliminated as unnecessary.

Subpart C—Rules Applicable to Exemption Proceedings would replace and revise current Subpart D, which sets forth procedural standards for U.S. and foreign air carriers to follow in applying for exemption authority under section 40109 of the Statute. It adds proceedings for slot exemptions at high density airports under section 41714 of the Statute to its scope. It also gives needed guidance to U.S. and foreign air carrier applicants on the specific information they must file.

In new Subpart C, new § 302.302(b) would revise the names of the offices where exemption applications are to be filed to the U.S. Air Carrier Licensing Division or Foreign Air Carrier Licensing Division, as appropriate, in the Office of International Aviation. New § 302.302(b)(4) would permit the filing of exemption requests by facsimile and electronic mail (when available), and new § 302.302(e) (current § 302.401(e)) would be revised to reflect our present practice of omitting applicants' addresses when publishing notices of exemption applications filed. Also, the word "undue" would be changed to "unreasonable" in paragraphs (3) and (4) of new § 302.303(d) to reflect a change in this language in section 40109(g)(1)(C) of the Statute.

Subpart D—Rules Applicable to Enforcement Proceedings would replace and revise current Subpart B, which contains the specific rules governing enforcement actions, or proceedings by which the Department enforces the aviation economic provisions of the Statute and the rules, regulations, orders, and other requirements the

Department issues under those provisions. These rules also inform the public how to lodge complaints and detail the procedures that the Department and the parties will follow in the event the Department takes enforcement action.

A definitions section would be added to new Subpart D (new § 302.402).

In addition, various sections would be combined, separated or retitled for purposes of clarity. Thus, a separate section on informal complaints would be established (new § 302.403), and the section on formal complaints would be expanded to include current §§ 302.203 and 302.13 and separated into paragraphs pertaining to, among others things, the filing, amendment, and service of such complaints (new § 302.404). A section on responsive documents (new § 302.405) would contain provisions from current § 302.204, and a section on procedure for responding to formal complaints (new § 302.406) would contain provisions from current §§ 302.205 and 302.206.

The requirement that action must be taken on a formal complaint within 60 days of its filing would be eliminated, leaving in place the provision that such action would be taken "within a reasonable time" (new § 302.406).

The section on commencement of enforcement proceedings (new § 302.407) would include provisions from current §§ 302.206 and 302.206a; the section on answers and replies (new § 302.408) would contain provisions from current §§ 302.207 and 302.209; and current § 302.212 on admissions as to facts and motions to dismiss would be divided into two sections (new §§ 302.411 and 302.412).

The term "third-party complaint" used throughout would be replaced with "formal complaint," and the "saving clause" from Subpart A (current § 302.40) would be moved to this subpart as new § 302.420 and modified to include provisions of the Statute and orders and other requirements of the Department.

Subpart E—Rules Applicable to Proceedings with Respect to Rates, Fares and Charges for Foreign Air Transportation would revise current Subpart E, which contains special rules for proceedings relating to prices and their related rules, classifications and practices applied in foreign air transportation. These proceedings are instituted at the Department's discretion in response to a third-party complaint, or upon the Department's own initiative. Historically, most such proceedings involved complaints against tariffs by competitors.

The title of the Subpart E would be amended to add "for Foreign Air Transportation" to clarify that these rules do not apply to rates, fares and charges in interstate transportation.

New § 302.506(d) would permit, in emergency situations, the filing of complaints requesting the suspension of a tariff by facsimile and electronic mail (when available), but would require that the filing be confirmed in writing within three business days.

Current § 302.506 would be eliminated. That section places the burden of going forward with the evidence (*i.e.*, making at least a *prima facie* case of lawfulness) upon the carrier proposing a tariff change. Under deregulation pricing policies and procedures, fare decreases or rule liberalizations do not need any justification. Similarly, complainants challenging tariffs on the ground of "unjust discrimination" now must make a *prima facie* case of unlawfulness. Thus, the subsection is misleading and should be eliminated entirely because specific evidentiary burdens are normally discussed at prehearing conferences, and nonhearing evidentiary matters can be resolved in an instituting order.

Subpart F—Rules Applicable to Proceedings Concerning Airport Fees contains the specific rules that apply to a complaint filed by one or more U.S. or foreign carriers for a determination of the reasonableness of a fee increase or a newly established fee imposed upon the carrier by the owner or operator of an airport. This subpart also applies to requests by the owner or operator of an airport for such a determination.

Since Subpart F was only recently adopted (in February 1995), it would not be revised at this time except to make the provisions internally consistent with the rest of revised part 302, such as by changing section reference numbers (*e.g.*, in § 302.617, the reference to § 302.28(a) would be changed to § 302.32(a), and in § 302.603 an additional reference to § 302.4 concerning the form of documents would be added). In addition, since at the time of the adoption of Subpart F, references to that subpart were not added to the index in Appendix A, those references would be added at this time.

Subpart G—Rules Applicable to Mail Rate Proceedings and Contracts would combine, replace and revise subparts C and O.

Current Subpart C (Rules Applicable to Mail Rate Proceedings) sets forth the special rules applicable to proceedings for the establishment of mail rates by the Department in accordance with

section 41901 of the Statute. These are the rates paid by the United States Postal Service to U.S. carriers for the transportation of U.S. mail within Alaska and between the U.S. and foreign countries.

Current Subpart O (Procedure for Processing Contracts for Transportation of Mail by Air in Foreign Air Transportation) sets forth procedures applicable to certain contractor arrangements for the carriage of mail by air between the U.S. Postal Service and certificated air carriers pursuant to 39 U.S.C. 5402(a).

In new Subpart G, current references to actions by "the Department" or "DOT" would be changed to "DOT decisionmaker" to differentiate from actions by an administrative law judge in an oral evidentiary hearing, and current §§ 302.304 and 302.309 would be combined into new § 302.703 to reflect that the DOT decisionmaker may either issue an order to show cause or set a matter for oral hearing before an administrative law judge.

Certain sections also would be revised to allow the DOT decisionmaker additional flexibility in dealing with specific cases. Thus, current § 302.305(a) would be revised to allow for answers to show cause orders within 10 days "or within such other period as the order may specify" (new § 302.704(a)); and current § 302.307 would be revised to allow the decisionmaker to authorize the filing of additional pleadings or establish further procedural steps in lieu of instituting an oral hearing (new § 302.705(b)) and to allow the issues at any hearing that is instituted to be formulated by the instituting order (new § 302.706(a)).

The provisions of current §§ 302.306 and 302.307 would be combined into new § 302.705 covering further procedures, and current §§ 302.301, 302.302, 302.307, and 302.308 would be combined into new § 302.706 entitled Hearing.

Current §§ 302.311 and 302.321 would be combined into new § 302.708. The provisions of paragraphs (a) and (b) of current § 302.1503 would be eliminated as unnecessary, and new § 302.719 would refine and condense the data required to reflect current practice.

The subject index contained in Appendix A—Index to Rules of Practice would be updated to include additional references (such as to Fitness Cases and Airport Fee cases), and to eliminate obsolete references. Also, to assist users in locating the newly renumbered sections, the revised Appendix would list for each subject both the current

section number(s) and the corresponding new section number(s).

#### *Executive Order 12866 (Regulatory Planning and Review)*

The Department has analyzed the economic and other effects of the proposed amendment and has determined that they are not "significant" within the meaning of Executive Order 12866. The amendment will not have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. It will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency, and it will not materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. Nor does it raise any novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

#### *DOT Regulatory Policies and Procedures*

The proposed amendment is not significant under the Department's Regulatory Policies and Procedures, dated February 26, 1979, because it does not involve important Departmental policies; rather, it is being made solely for the purposes of eliminating or correcting obsolete requirements and reorganizing the presentation of the regulations used by the Department to administer its aviation economic regulatory functions. The Department has also determined that the economic effects of the amendment are so minimal that a full regulatory evaluation is not required.

#### *Regulatory Flexibility Act*

In accordance with the Regulatory Flexibility Act, the Department has evaluated the effects of this proposed action on small entities, i.e., those air carriers operating small aircraft (60 seats or less or 18,000 pounds maximum payload or less) in strictly domestic service. The proposed changes to the Department's Rules of Practice in Proceedings would merely eliminate unnecessary and obsolete verbiage, reorganize the provisions and bring them up to date with our current practice, and would not place any new requirements on applicants. Moreover, these rules generally are not applicable to proceedings involving such small entities. Therefore, the Department certifies that the amendment would not

have a significant economic impact on a substantial number of small entities.

#### *Executive Order 12612 (Federalism)*

This proposed amendment has been analyzed in accordance with the principles and criteria contained in Executive Order 12612. The Department has determined that the amendment does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This amendment will not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

#### *National Environmental Policy Act*

The Department has also analyzed this proposed amendment for the purpose of the National Environmental Policy Act. The amendment will not have any significant impact on the quality of the human environment.

#### *Paperwork Reduction Act*

There are no reporting or recordkeeping requirements associated with the proposed amendment.

#### List of Subjects

##### *14 CFR Part 300*

Administrative practice and procedure, Conflict of interests.

##### *14 CFR Part 302*

Administrative practice and procedure, Air carriers, Foreign air carriers.

#### Proposed Rule

For the reasons set out in the preamble, Title 14, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

#### **PART 300—[AMENDED]**

1. The authority citation for part 300 continues to read as follows:

Authority: 49 U.S.C. subtitle I and chapters 401, 411, 413, 415, 417, 419, 421, 449, 461, 463, and 465.

2. Paragraph (a-1) of § 302.18 is redesignated as § 300.18 and revised to read as follows:

#### **§ 300.18 Motions to disqualify DOT employee in review of hearing matters.**

In cases to be determined on an evidentiary record, a party desiring that a concerned DOT employee disqualify himself or herself from participating in a DOT decision must file a motion supported by an affidavit setting forth the grounds for such disqualification in

the form and within the periods prescribed in § 302.11. Where review of the administrative law judge's decision can be obtained only upon the filing of a petition for discretionary review, such motions must be filed on or before the date answers are due pursuant to § 302.32. In cases where exceptions are filed to recommended, initial, or tentative decisions or where the DOT decisionmaker orders review of an initial or recommended decision on his or her own initiative, such motions must be filed on or before the date briefs are due pursuant to § 302.35 or § 302.218, as applicable. Failure to file a timely motion will be deemed a waiver of disqualification. Applications for leave to file an untimely motion seeking disqualification of a concerned DOT employee must be accompanied by an affidavit setting forth in detail why the facts relied upon as grounds for disqualification were not known and could not have been discovered with reasonable diligence within the prescribed time.

#### **PART 302—[REVISED]**

3. Part 302 is revised to read as follows:

#### **PART 302—RULES OF PRACTICE IN PROCEEDINGS**

Sec.

- 302.1 Applicability and description of part.
- 302.2 Definitions.

##### **Subpart A—Rules of General Applicability**

- 302.3 Filing of documents.
- 302.4 General requirements as to documents.
- 302.5 Amendment of documents.
- 302.6 Responsive documents.
- 302.7 Service of documents.
- 302.8 Computation of time.
- 302.9 Continuances and extensions of time.
- 302.10 Parties.
- 302.11 Motions.
- 302.12 Objections to public disclosure of information.
- 302.13 Consolidation of proceedings.
- 302.14 Petitions for reconsideration.

##### **Non-Hearing Proceedings**

- 302.15 Non-hearing procedures.

##### **Rulemaking Proceedings**

- 302.16 Petitions for rulemaking.

##### **Oral Evidentiary Hearing Proceedings**

- 302.17 Administrative law judges.
- 302.18 DOT decisionmaker.
- 302.19 Participation by persons not parties.
- 302.20 Formal intervention.
- 302.21 Appearances.
- 302.22 Prehearing conference.
- 302.23 Hearing.
- 302.24 Evidence.
- 302.25 Subpoenas.
- 302.26 Depositions.

- 302.27 Rights of witnesses; attendance fees and mileage.
- 302.28 Transcripts of hearings.
- 302.29 Argument before the administrative law judge.
- 302.30 Briefs to the administrative law judge.
- 302.31 Initial and recommended decisions; certification of the record.
- 302.32 Petitions for discretionary review of initial decisions or recommended decisions; review proceedings.
- 302.33 Tentative decision of the DOT decisionmaker.
- 302.34 Exceptions to tentative decisions of the DOT decisionmaker.
- 302.35 Briefs to the DOT decisionmaker.
- 302.36 Oral argument before the DOT decisionmaker.
- 302.37 Waiver of procedural steps after hearing.
- 302.38 Final decision of the DOT decisionmaker.

##### **Subpart B—Rules Applicable to U.S. Air Carrier Certificate and Foreign Air Carrier Permit Licensing Proceedings**

- 302.201 Applicability.
- 302.202 Contents of applications.
- 302.203 Service of documents.
- 302.204 Responsive documents.
- 302.205 Economic data and other facts.
- 302.206 Verification.

##### **Disposition of Applications**

- 302.207 Cases to be decided on written submissions.
- 302.208 Petitions for oral presentation or judge's decision.
- 302.209 Procedures for deferral of applications.
- 302.210 Disposition of applications; orders establishing further procedures.
- 302.211 Procedures in certificate cases involving initial or continuing fitness.
- 302.212 Procedures in certificate cases involving international routes.
- 302.213 Procedures in foreign air carrier permit cases.
- 302.214 Oral evidentiary hearing.
- 302.215 Briefs to the administrative law judge.
- 302.216 Administrative law judge's initial or recommended decision.
- 302.217 Exceptions to administrative law judge's initial or recommended decision.
- 302.218 Briefs to the DOT decisionmaker.
- 302.219 Oral argument before the DOT decisionmaker.
- 302.220 Final decision of the Department.

##### **Subpart C—Rules Applicable to Exemption Proceedings**

- 302.301 Applicability.
- 302.302 Filing of applications.
- 302.303 Contents of applications.
- 302.304 Service of documents.
- 302.305 Posting of applications.
- 302.306 Dismissal or rejection of incomplete applications.
- 302.307 Answers to applications.
- 302.308 Replies to answers.
- 302.309 Requests for hearing.
- 302.310 Exemptions on the Department's initiative.
- 302.311 Emergency exemptions.

##### **Subpart D—Rules Applicable to Enforcement Proceedings**

- 302.401 Applicability.
- 302.402 Definitions.
- 302.403 Informal complaints.
- 302.404 Formal complaints.
- 302.405 Responsive documents.
- 302.406 Procedure for responding to formal complaints.
- 302.407 Commencement of enforcement proceeding.
- 302.408 Answers and replies.
- 302.409 Default.
- 302.410 Consolidation of proceedings.
- 302.411 Motions to dismiss and for summary judgment.
- 302.412 Admissions as to facts and documents.
- 302.413 Evidence of previous violations.
- 302.414 Prehearing conference.
- 302.415 Hearing.
- 302.416 Appearances by persons not parties.
- 302.417 Settlement of proceedings.
- 302.418 Motions for immediate suspension of operating authority pendente lite.
- 302.419 Modification or dissolution of enforcement actions.
- 302.420 Saving clause.

##### **Subpart E—Rules Applicable to Proceedings With Respect to Rates, Fares and Charges for Foreign Air Transportation**

- 302.501 Applicability.
- 302.502 Institution of proceedings.
- 302.503 Contents and service of petition or complaint.
- 302.504 Dismissal of petition or complaint.
- 302.505 Order of investigation.
- 302.506 Complaints requesting suspension of tariffs; answers to such complaints.
- 302.507 Computing time for filing complaints.

##### **Subpart F—Rules Applicable to Proceedings Concerning Airport Fees**

- 302.601 Applicability.
- 302.603 Complaint by an air carrier or foreign air carrier; request for determination by an airport owner or operator.
- 302.605 Contents of complaint or request for determination.
- 302.607 Answers to a complaint or request for determination.
- 302.609 Replies.
- 302.611 Review of complaints.
- 302.613 Review of requests for determination.
- 302.615 Decision by administrative law judge.
- 302.617 Petitions for discretionary review.
- 302.619 Completion of proceedings.
- 302.621 Final order.

##### **Subpart G—Rules Applicable to Mail Rate Proceedings and Contracts**

- 302.701 Applicability.
- Final Mail Rate Proceedings
- 302.702 Institution of proceedings.
  - 302.703 Order to show cause or instituting a hearing.
  - 302.704 Objections and answers to order to show cause.
  - 302.705 Further procedures.

- 302.706 Hearing.
- Provision for Temporary Rate
- 302.707 Procedure for fixing temporary mail rates.
- Informal Mail Rate Conference Procedure
- 302.708 Invocation of procedure.
- 302.709 Scope of conferences.
- 302.710 Participants in conferences.
- 302.711 Conditions upon participation.
- 302.712 Information to be requested from an air carrier.
- 302.713 DOT analysis of data for submission of answers thereto.
- 302.714 Availability of data to the U.S. Postal Service.
- 302.715 Post-conference procedure.
- 302.716 Effect of conference agreements.
- 302.717 Waiver of participant conditions.
- Processing Contracts for the Carriage of Mail in Foreign Air Transportation
- 302.718 Filing.
- 302.719 Explanation and data supporting the contract.
- 302.720 Service.
- 302.721 Complaints.
- 302.722 Answers to complaints.
- 302.723 Further procedures.
- 302.724 Petitions for reconsideration.

Appendix A—Index to Rules of Practice  
 Authority: 5 U.S.C. 551 *et seq.*, 39 U.S.C. 5402; 42 U.S.C., 4321, 49 U.S.C. Subtitle I and Chapters 401, 411, 413, 415, 417, 419, 461, 463, 471.

**§ 302.1 Applicability and description of part.**

(a) *Applicability.* This part governs the conduct of all aviation economic proceedings before the Department whether instituted by order of the Department or by the filing with the Department of an application, complaint, petition, motion, or other authorized or required document. This part also contains delegations to administrative law judges and to the DOT decisionmaker of the Department's function to render the agency decision in certain cases and the procedures for review of those decisions. This part applies unless otherwise specified by order of the Department.

(b) *Description.* Subpart A of this part sets forth general rules applicable to all types of proceedings. Each of the other subparts of this part sets forth special rules applicable to the type of proceedings described in the title of the subpart. Therefore, for information as to applicable rules, reference should be made to subpart A and to the rules in the subpart relating to the particular type of proceeding, if any. In addition,

reference should be made to Subtitle VII of Title 49 of the United States Code (Transportation) ("the Statute"), and to the substantive rules, regulations and orders of the Department relating to the proceeding. Wherever there is any conflict between one of the general rules in subpart A and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern.

(c) *Reference to part and method of citing rules.* This part may be referred to as the "Rules of Practice". Each section, and any paragraph or subparagraph thereof, may be referred to as a "Rule". The number of each rule need include only the numbers and letters at the right of the decimal point. For example, "302.7 Service of documents", may be referred to as "Rule 7".

**§ 302.2 Definitions.**

*Administrative law judge* as used in this part means an administrative law judge appointed pursuant to 5 U.S.C. 3105.

*DOT Decisionmaker* as used in this part is the official authorized to issue final decisions of the Department as set forth in § 302.18. This includes the Assistant Secretary for Aviation and International Affairs, the senior career official in the Office of the Assistant Secretary for Aviation and International Affairs, the Deputy Secretary, and the Secretary.

*Hearing case or oral hearing case* means any proceeding that the Department has determined will be conducted on the record using oral evidentiary procedures.

*Non-hearing case* means any proceeding not involving oral evidentiary procedures.

*Party* as used in this part includes the person initiating a proceeding, such as an applicant, complainant, or petitioner; any person filing an answer to such filing; and any other persons as set forth in § 302.10.

*Statute* when used in this chapter means Subtitle VII of Title 49 of the United States Code (Transportation).

**Subpart A—Rules of General Applicability**

**§ 302.3 Filing of documents.**

(a) *Filing address, date of filing, hours.* (1) Documents required by any section of this part to be filed with the Department must be filed with

Department of Transportation Dockets at the Department's offices in Washington, DC.

(2) Such documents will be deemed to be filed on the date on which they are actually received by the Department. Documents must be filed between the hours of 10:00 a.m. and 5:00 p.m., Monday to Friday, inclusive, except on legal holidays.

(b) *Formal specifications of documents.* (1) Documents filed under this part must be on white paper not larger than 8½ by 11 inches, including any tables, charts and other documents that may be included. Ink must be black to provide substantial contrast for scanning and photographic reproduction. Text must be double-spaced (except for footnotes and long quotations which may be single-spaced) using type not smaller than 12 point. The left margin must be at least 1½ inches; all other margins must be at least 1 inch. The title page and first page must bear a clear date and all subsequent pages must bear a page number and abbreviated heading. In order to facilitate automated processing in document sheet feeders, documents of more than one page should be held together with removable metal clips or similar retainers. Original documents may not be bound in any form or include tabs, except in cases assigned by order to an Administrative Law Judge for hearing, in which case the filing requirements will be set by order. Section 302.35 contains additional requirements as to the contents and style of briefs.

(2) Papers may be reproduced by any duplicating process, provided all copies are clear and legible. Appropriate notes or other indications must be used, so that the existence of any matters shown in color on the original will be accurately indicated on all copies.

(c) *Number of copies.* (1) Unless otherwise specified, an executed original, along with the number of true copies set forth in this paragraph for each type of proceeding, must be filed with Department of Transportation Dockets. The copies filed need not be signed, but the name of the person signing the original document, as distinguished from the firm or organization he or she represents, must also be typed or printed on all copies below the space provided for signature.

	Copies
Airport Fees .....	9
Agreements:	
International Air Transport Association (IATA) .....	6

	Copies
Other (under 49 U.S.C. 41309) .....	9
Complaints:	
Enforcement .....	5
Mail Contracts .....	4
Rates, Fares and Charges in Foreign Air Transportation .....	6
Unfair Practices in Foreign Air Transportation .....	7
Employee Protection Program (14 CFR 314) .....	7
Exemptions:	
Computer Reservations Systems (14 CFR 255) .....	8
Slot Exemptions (under 49 U.S.C. 41714) .....	7
Tariffs (under 49 U.S.C. Chapter 415 or 14 CFR 221) .....	5
Other (under 49 U.S.C. 40109) .....	7
Foreign Air Carrier Permits/Exemptions .....	7
International Authority for U.S. Air Carriers (certificates, exemptions, allocation of limited frequencies or charters) .....	7
Mail Rate Proceedings .....	4
Name Change/Trade Name Registrations .....	4
Suspension of Service (14 CFR 323) .....	4
Tariff Justifications to exceed Standard International Fare Level .....	6
U.S. Air Carrier Certificates (involving Initial or Continuing Fitness) .....	6
Other matters .....	3

(2) Filers are encouraged to submit one of the required true copies (except for counterparts of Agreement CAB 18900) in electronic form on a 3½ inch floppy disk, labeled to show the filer's and representative's names, docket number (if known) or space for it, and document title. The electronic submission must be in one of the following formats: Microsoft Word (or RTF), WordPerfect, Excel, Lotus 123, or ASCII text. The disk must be accompanied by a signed certification that it is a true copy of the executed original document.

(d) *Prohibition and dismissal of certain documents.* (1) No document that is subject to the general requirements of this subpart concerning form, filing, subscription, service or similar matters will be accepted for filing by the Department, and will not be physically incorporated in the docket of the proceeding, unless:

(i) Such document and its filing by the person submitting it have been expressly authorized or required in the Statute, any other law, this part, other Department regulations, or any order, notice or other document issued by the DOT decisionmaker, the Chief Administrative Law Judge or an administrative law judge assigned to the proceeding, and

(ii) Such document complies with each of the requirements of this paragraph and § 302.7, and is submitted as a formal application, complaint, petition, motion, answer, pleading, or similar paper rather than as a letter, telegram, or other informal written communication; *Provided, however*, That for good cause shown, pleadings of any public body or civic organization or comments concerning tariff agreements

that have not been docketed, may be submitted in the form of a letter.

(2) If any document initiating, or filed in, a proceeding is not in substantial conformity with the applicable rules or regulations of the Department as to the contents thereof, or is otherwise insufficient, the Department, on its own initiative, or on motion of any party, may reject, strike or dismiss such document, or require its amendment.

(e) *Motions for leave to file otherwise unauthorized documents.* (1) The Department will accept otherwise unauthorized documents for filing only if leave has been obtained from the DOT decisionmaker or, if applicable, the administrative law judge, on written motion and for good cause shown.

(2) Such motions shall contain a concise statement of the matters relied upon as good cause and shall be attached to the pleading or other document for which leave to file is sought, or the written motion may be incorporated into the otherwise unauthorized document for which admission is sought. In such event, the document filed shall be titled to describe both the motion and the underlying documents.

(3) Such motions must be filed within seven (7) days after service of any document, order, or ruling to which the proposed filing is responsive and must be served on all parties to the proceeding.

(f) *Official docket copy.* With respect to all documents filed under this part that are scanned, the electronic scanned record produced by the Department shall thereafter be the official docket copy of the document and any subsequent copies generated by the Department's electronic records system will be usable for admission as record

copies in any proceeding before the Department.

(g) *Retention of documents by the Department.* All documents filed with or presented to the Department may be retained in the files of Department of Transportation Dockets. However, the Department may permit the withdrawal of original documents by motion upon the submission of properly authenticated copies to replace such documents.

#### § 302.4 General requirements as to documents.

(a) *Contents.* (1) In case there is no rule, regulation, or order of the Department that prescribes the contents of a formal application, petition, complaint, motion or other authorized or required document, such document shall contain a proper identification of the parties concerned, a concise but complete statement of the facts relied upon and the relief sought, and, where required, such document shall be accompanied by an Environmental Assessment, in conformity with the provisions of part 313 of this chapter.

(2)(i) Each document must include with or provide on its first page:

- (A) The docket title and subject;
- (B) The relevant operating administration before which the application or request is filed;
- (C) The identity of the filer and its filing agent, if applicable;
- (D) The name and mailing address of the designated agent for service of any documents filed in the proceeding, along with the telephone and facsimile numbers and, if available, electronic mail address of that person; and
- (E) The title of the specific action being requested.

Department of Transportation Dockets has an Expedited Processing Sheet that



filers can use to assist in preparing this index.

(3) All documents filed under this part consisting of twenty (20) or more pages must contain a subject index of the matter in such document, with page references.

(b) *Subscription.* Every application, petition, complaint, motion or other authorized or required document must be signed by the party filing the same, or by a duly authorized officer or the attorney-at-law of record of such party, or by any other person so authorized. The signature of the person signing the document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information, and belief every statement contained in the document is true and no such statements are misleading; and that the document is not interposed for delay.

#### § 302.5 Amendment of documents.

(a) An application may be amended prior to the filing of answers thereto, or, if no answer is filed, prior to the issuance of an order establishing further procedures, disposing of the application, or setting the case for hearing. Thereafter, applications may be amended only if leave is granted pursuant to the procedures set forth in § 302.11.

(b) Except as otherwise provided, if properly amended, a document and any statutory deadline shall be made effective as of the date of original filing but the time prescribed for the filing of an answer or any further responsive document directed towards the amended document shall be computed from the date of the filing of the amendment.

#### § 302.6 Responsive documents.

(a) *Answers.* Answers to applications, complaints, petitions, motions or other documents or orders instituting proceedings may be filed by any person. In hearing cases, answers may be filed by any party to such proceedings or any person who has a petition for intervention pending. Except as otherwise provided, answers are not required.

(b) *Further responsive documents.* Except as otherwise provided, no reply to an answer, reply to a reply, or any further responsive document shall be filed. Where such further responsive documents are not permitted, all new matter contained in an answer filed pursuant to paragraph (a) of this section shall be deemed controverted.

(c) *Time for filing.* Except as otherwise provided, an answer or any further responsive document shall be filed

within seven (7) days after service of the document to which such responsive filing is directed.

#### § 302.7 Service of documents.

(a) *Who makes service—(1) The Department.* Formal complaints, notices, orders, and similar documents issued by the Department will be served by the Department upon all parties to the proceeding.

(2) *The parties.* Answers, petitions, motions, briefs, exceptions, notices, protests, or memoranda, or any other documents filed by any party or other person with the Department shall be served by such party or other person upon all parties to the proceeding in which it is filed; including, where applicable, all persons who have petitioned for intervention in, or consolidation of applications with, such proceeding. Proof of service shall accompany all documents when they are filed. The Department may require additional service of any document(s).

(b) *How service may be made.* Service may be made by first class mail, express mail, priority mail, registered or certified mail, facsimile transmission, personal delivery, or by electronic mail. The Department may prescribe other means of service by order or notice. The means of service selected must be such as to permit compliance with section 46103 of the Statute, which provides for service of notices and processes in a proceeding by personal service or registered or certified mail.

(c) *Who may be served.* Service upon a party or person may be made upon an individual, or upon a member of a partnership or firm to be served, or upon the president or other officer of the corporation, company, firm, or association to be served, or upon the assignee or legal successor of any of the foregoing, or upon any attorney of record for the party, or upon the agent designated by an air carrier or foreign air carrier under section 46103 of the Statute, but it shall be served upon a person designated by a party to receive service of documents in a particular proceeding in accordance with § 302.4(a)(2)(iv) once a proceeding has been commenced.

(d) *Where service may be made.* Service shall be made at the principal place of business of the party to be served, or at his or her usual residence if he or she is an individual, or at the office of the party's attorney of record, or at the office or usual residence of the agent designated by an air carrier or foreign air carrier under section 46103 of the Statute, or at the post office or electronic address or facsimile number

stated for a person designated to receive service pursuant to § 302.4(a)(2)(iv).

(e) *Proof of service.* Proof of service of any document shall consist of one of the following:

(1) A certificate of mailing executed by the person mailing the document.

(2) A certificate of successful transmission executed by the person transmitting the document by facsimile or electronic mail, listing the facsimile numbers or electronic mail address to which the document was sent.

(3) An acknowledgment of service signed by a person receiving service personally, or a certificate of the person making personal service.

(f) *Date of service.* Whenever proof of service by post office or electronic mail is made, the date of mailing shall be the date of service. Whenever proof of service by personal delivery or facsimile transmission is made, the date of such delivery or facsimile transmission shall be the date of service.

(g) *Freely Associated State Proceedings.* In any proceeding directly involving air transportation to the Federated States of Micronesia, the Marshall Islands, or Palau, the Department and any party or participant in the proceeding shall serve all documents on the President and the designated authorities of the government(s) involved. This requirement shall apply to all proceedings where service is otherwise required, and shall be in addition to any other service required by this chapter.

(h) *Alaska Proceedings.* In any proceeding that affects a point in Alaska, the person filing shall send an additional copy to: U.S. Department of Transportation, Alaska Field Office, 801 B Street, Suite 506, Anchorage, Alaska 99501-3657.

#### § 302.8 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice, order or regulation or by any applicable statute, the day of the act, event, or default after 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 legal holiday for the Department, in which event the period runs until the end of the next day that is neither a Saturday, Sunday, nor holiday. When the period of time prescribed is seven (7) days or fewer, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation, unless otherwise specified by the DOT decisionmaker or the administrative law judge assigned to the proceeding, as the case may be.

**§ 302.9 Continuances and extensions of time.**

(a) Whenever a party has the right or obligation to take action within a period prescribed by this part, by a notice given thereunder, or by an order or regulation, the DOT decisionmaker or the administrative law judge assigned to the proceeding, as appropriate, may:

(1) Before the expiration of the prescribed period, with or without notice, extend such period, or

(2) upon motion, permit the act to be done after the expiration of the specified period, where good cause for the failure to act on time is clearly shown.

(b) Except where an administrative law judge has been assigned to a proceeding, requests for continuance or extensions of time, as described in paragraph (a) of this section, shall be directed to the DOT decisionmaker. Requests for continuances and extensions of time may be directed to the Chief Administrative Law Judge in the absence of the administrative law judge assigned to the proceeding.

**§ 302.10 Parties.**

(a) In addition to the persons set forth in § 302.2, in hearing cases, parties shall include appropriate Department staff designated to participate in the proceeding and any persons authorized to intervene or granted permission to participate in accordance with §§ 302.19 and 302.20. In any proceeding directly involving air transportation to the Federated States of Micronesia, the Marshall Islands or Palau, these governments or their designated authorities shall be a party.

(b) Upon motion and for good cause shown, the Department may order a substitution of parties, except that in case of the death of a party, substitution may be ordered without the filing of a motion.

(c) An association composed entirely or in part of direct air carriers may participate in any proceedings of the Department to which the Department's procedural regulations apply if the association represents members that are identified in any documents filed with the Department, and that have specifically authorized the positions taken by the association in that proceeding. The specific authorizations may be informal and evidence of them shall be provided only upon request of the Department. Upon motion of any interested person or upon its own initiative, the Department may issue an order requiring an association to withdraw from a case on the grounds of significant divergence of interest or position within the association.

**§ 302.11 Motions.**

(a) *Generally.* An application to the DOT decisionmaker or an administrative law judge for an order or ruling not otherwise specifically provided for in this part shall be by motion. If an administrative law judge is assigned to a proceeding and before the issuance of a recommended or initial decision or the certification of the record to the DOT decisionmaker, all motions shall be addressed to the administrative law judge. At all other times, motions shall be addressed to the DOT decisionmaker. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein. This paragraph should not be construed as authorizing motions in the nature of petitions for reconsideration.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4, shall state their grounds and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers to them, and rulings on them, may be made orally on the record unless the administrative law judge directs otherwise. Written motions shall be filed as separate documents, and shall not be incorporated in any other documents, except where incorporation of a motion in another document is specifically authorized by the Department, or where a document is filed that requests alternative forms of relief and one of these alternative requests is properly to be made by motion. In these instances the document filed shall be appropriately titled and identified to indicate that it incorporates a motion; otherwise, the motion will be disregarded.

(c) *Answers to motions.* Within seven (7) days after a motion is served, or such other period as the DOT decisionmaker or the administrative law judge may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon. Except as otherwise provided, no reply to an answer, reply to a reply, or any further responsive document shall be filed.

(d) *Oral arguments; briefs.* No oral argument will be heard on motions unless the DOT decisionmaker or the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(e) *Requests for expedition.* Any interested person may by motion request expedition of any proceeding or file an answer in support of or in opposition to such motions.

(f) *Effect of pendency of motions.* The filing or pendency of a motion shall not automatically alter or extend the time to take action fixed by this part or by any order of the Department or of an administrative law judge (or any extension granted thereunder).

(g) *Disposition of motions.* The DOT decisionmaker shall pass upon all motions properly submitted to him or her for decision. The administrative law judge shall pass upon all motions properly addressed to him or her, except that, if the administrative law judge finds that a prompt decision by the DOT decisionmaker on a motion is essential to the proper conduct of the proceeding, the administrative law judge may refer such motion to the DOT decisionmaker for decision.

(h) *Appeals to the DOT decisionmaker from rulings of administrative law judges.* Rulings of administrative law judges on motions may not be appealed to the DOT decisionmaker prior to his or her consideration of the entire proceeding except in extraordinary circumstances and with the consent of the administrative law judge. An appeal shall be disallowed unless the administrative law judge finds, either on the record or in writing, that the allowance of such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party. If an appeal is allowed, any party may file a brief with the DOT decisionmaker within such period as the administrative law judge directs. No oral argument will be heard unless the DOT decisionmaker directs otherwise. The rulings of the administrative law judge on a motion may be reviewed by the DOT decisionmaker in connection with his or her final action in the proceeding or at any other appropriate time irrespective of the filing of an appeal or any action taken on it.

**§ 302.12 Objections to public disclosure of information.**

(a) *Generally.* Part 7 of the Office of the Secretary regulations, Public Availability of Information, governs the availability of records and documents of the Department to the public. (49 CFR 7)

(b) *Information contained in written documents.* Any person who objects to the public disclosure of any information filed in any proceeding, or pursuant to the provisions of the Statute, or any

Department rule, regulation, or order, shall segregate, or request the segregation of, such information into a separate submission and shall file it separately in a sealed envelope, bearing the caption of the enclosed submission, and the notation "Classified or Confidential Treatment Requested Under § 302.12." At the time of filing such submission (or, when the objection is made by a person who is not the filer, within five (5) days after the filing of such submission), the objecting party shall file a motion to withhold the information from public disclosure, in accordance with the procedure outlined in paragraph (d) or (f) of this section, as appropriate. Notwithstanding any other provision of this section, copies of the filed submission and of the motion need not be served upon any other party unless so ordered by the Department.

(c) *Information contained in oral testimony.* Any person who objects to the public disclosure of any information sought to be elicited from a witness or deponent on oral examination shall, before such information is disclosed, make his or her objection known. Upon such objection duly made, the witness or deponent shall be compelled to disclose such information only in the presence of the administrative law judge or the person before whom the deposition is being taken, as the case may be, the official stenographer and such attorneys for and representative of each party as the administrative law judge or the person before whom the deposition is being taken shall designate, and after all present have been sworn to secrecy. The transcript of testimony containing such information shall be segregated and filed in a sealed envelope, bearing the title and docket number of the proceeding, and the notation "Classified or Confidential Treatment Requested Under § 302.12 Testimony Given by (name of witness or deponent)." Within five (5) days after such testimony is given, the objecting person shall file a motion in accordance with the procedure outlined in paragraph (d) of this section, to withhold the information from public disclosure. Notwithstanding any other provision of this section, copies of the segregated portion of the transcript and of the motion need not be served upon any other party unless so ordered by the Department.

(d) *Form of motion.* Motions to withhold from public disclosure information covered by paragraphs (b) and (c) of this section shall be filed with the Department in accordance with the following procedure:

(1) The motion shall include:

(i) A description of the information sought to be withheld, sufficient for identification of the same;

(ii) A statement explaining how and why the information falls within the exemptions from the Freedom of Information Act (5 U.S.C. 552(b) (1)–(9)); and

(iii) A statement explaining how and why public disclosure of the information would adversely affect the interests of the objecting persons and is not required in the interest of the public.

(2) Such motion shall be filed with the person conducting the proceeding, or with the person with whom said application, report, or submission is required to be filed. Such motion will be denied when the complete justification required by this paragraph is not provided.

(3) During the pendency of such motion, the ruling official may, by notice or order, allow limited disclosure to parties' representatives, for purposes of participating in the proceeding, upon submission by them of affidavits swearing to protect the confidentiality of the documents at issue.

(e) *Conditions of disclosure.* The order, notice or other action of the Department containing its ruling upon each such motion will specify the extent to which, and the conditions upon which, the information may be disclosed to the parties and to the public, which ruling shall become effective upon the date stated therein, unless, within five (5) days after the date of the entry of the Department's order with respect thereto, a petition is filed by the objecting person requesting reconsideration by the Department, or a written statement is filed indicating that the objecting person in good faith intends to seek judicial review of the Department's order.

(f) *Objection by Government departments or representative thereof.* In the case of objection to the public disclosure of any information filed by or elicited from any United States Government department or agency, or representative thereof, under paragraph (b) or (c) of this section, the department or agency making such objection shall be exempted from the provisions of paragraphs (b), (c), and (d) of this section insofar as said paragraphs require the filing of a written objection to such disclosure. However, any department, agency, or representative thereof may, if it so desires, file a memorandum setting forth the reasons why it is claimed that a public disclosure of the information should not be made. If such a memorandum is submitted, it shall be filed and handled

as is provided by this section in the case of a motion to withhold information from public disclosure.

### § 302.13 Consolidation of proceedings.

(a) *Initiation of consolidations.* The Department, upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings that involve substantially the same parties, or issues that are the same or closely related, if it finds that such consolidation or contemporaneous consideration will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although the Department may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or contemporaneous consideration of a particular application shall rest upon the applicant and the Department will not undertake to search its docket for all applications that might be consolidated or contemporaneously considered.

(b) *Time for filing.* Unless the Department has provided otherwise in a particular proceeding, a motion to consolidate or contemporaneously consider an application with any other application shall be filed within 21 days of the original application in the case of international route awards under section 41102 (see § 302.212), or, where a proceeding has been set for hearing before an administrative law judge, not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. If made at such conference, the motion may be oral. All motions for consolidation or consideration of issues that enlarge, expand, or otherwise change the nature of the proceeding shall be addressed to the DOT decisionmaker, unless made orally at the prehearing conference, in which event the presiding administrative law judge shall present such motion to the DOT decisionmaker for his or her decision. A motion that is not timely filed, or that does not relate to an application pending at such time, shall be dismissed unless the movant shall clearly show good cause for failure to file such motion or application on time.

(c) *Answer.* If a motion to consolidate two or more proceedings is filed with the Department, any party to any of such proceedings, or any person who has a petition for intervention pending, may file an answer to such motion within such period as the DOT decisionmaker may permit. The

administrative law judge may require that answers to such motions be stated orally at the prehearing conference in the proceeding with which the consolidation is proposed.

**§ 302.14 Petitions for reconsideration.**

(a) *Department orders subject to reconsideration; time for filing.* (1) Unless an order or a rule of the Department specifically provides otherwise:

(i) Any interested person may file a petition for reconsideration of any interlocutory order issued by the Department that institutes a proceeding; and

(ii) Any party to a proceeding may file a petition for reconsideration, rehearing, or reargument of final orders issued by the Department (*See* § 302.38), or an interlocutory order that defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Department.

(2) Unless otherwise provided, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, or a final decision described in § 302.220, within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the DOT decisionmaker. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing has expired, will not be granted except on a showing of unusual and exceptional circumstances, constituting good cause for the movant's inability to meet the established procedural dates.

(b) *Contents of petition.* A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, the ground relied upon, and the relief sought. If a decision by the Secretary or Deputy Secretary is requested, the petition should describe in detail the reasons for such request and specify any important national transportation policy issues that are presented. If the petition is based, in whole or in part, on allegations as to the consequences that would result from the final order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth,

accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision. Unless otherwise directed by the DOT decisionmaker upon a showing of unusual or exceptional circumstances, petitions for reconsideration, rehearing or reargument or answers thereto that exceed twenty-five (25) pages (including appendices) in length shall not be accepted for filing by Department of Transportation Dockets.

(c) *Successive petitions.* A successive petition for rehearing, reargument, reconsideration filed by the same party or person, and upon substantially the same ground as a former petition that has been considered or denied will not be entertained.

**Non-Hearing Proceedings**

**§ 302.15 Non-hearing procedures.**

In cases where oral evidentiary hearing procedures will not be used, §§ 302.17 through 302.37, relating to hearing procedures, shall not be applicable except to the extent that the DOT decisionmaker shall determine that the application of some or all of such rules in the particular case will be conducive to the proper dispatch of its business and to the ends of justice. References in these and other sections of this part to powers or actions by administrative law judges shall not apply.

**Rulemaking Proceedings**

**§ 302.16 Petitions for rulemaking.**

Any interested person may petition the Department for the issuance, amendment, modification, or repeal of any regulation, subject to the provisions of part 5, Rulemaking Procedures, of the Office of the Secretary regulations (49 CFR 5):

**Oral Evidentiary Hearing Proceedings**

**§ 302.17 Administrative law judges.**

(a) *Powers and delegation of authority.* (1) An administrative law judge shall have the following powers, in addition to any others specified in this part:

- (i) To give notice concerning and to hold hearings;
- (ii) To administer oaths and affirmations;
- (iii) To examine witnesses;
- (iv) To issue subpoenas and to take or cause depositions to be taken;
- (v) To rule upon offers of proof and to receive relevant evidence;
- (vi) To regulate the course and conduct of the hearing;

(vii) To hold conferences before or during the hearing for the settlement or simplification of issues;

(viii) To rule on motions and to dispose of procedural requests or similar matters;

(ix) To make initial or recommended decisions as provided in § 302.31;

(x) To take any other action authorized by this part or by the Statute.

(2) The administrative law judge shall have the power to take any other action authorized by part 385 of this chapter or by the Administrative Procedure Act.

(3) The administrative law judge assigned to a particular case is delegated the DOT decisionmaker's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing in such case, except that this delegation does not apply in cases where the record is certified to the DOT decisionmaker, with or without an initial or recommended decision by the administrative law judge, or in cases requiring Presidential approval under section 41307 of the Statute. This delegation does not apply to the review of rulings by the administrative law judge on interlocutory matters that have been appealed to the DOT decisionmaker in accordance with the requirements of § 302.11.

(4) The administrative law judge's authority in each case will terminate either upon the certification of the record in the proceeding to the DOT decisionmaker, or upon the issuance of an initial or recommended decision, or when he or she shall have withdrawn from the case upon considering himself or herself disqualified.

(b) *Disqualification.* An administrative law judge shall withdraw from the case if at any time he or she deems himself or herself disqualified. If, prior to the initial or recommended decision in the case, there is filed with the administrative law judge, in good faith, an affidavit of personal bias or disqualification with substantiating facts and the administrative law judge does not withdraw, the DOT decisionmaker shall determine the matter, if properly presented by exception or brief, as a part of the record and decision in the case. The DOT decisionmaker shall not otherwise consider any claim of bias or disqualification. The DOT decisionmaker, in his or her discretion, may order a hearing on a charge of bias or disqualification.

**§ 302.18 DOT decisionmaker.**

(a) *Assistant Secretary for Aviation and International Affairs.* Except as provided in paragraphs (b) and (c) of

this section, the Assistant Secretary for Aviation and International Affairs is the DOT decisionmaker. The Assistant Secretary shall have all of the powers set forth in § 302.17(a)(1) and those additional powers delegated by the Secretary. The Assistant Secretary may delegate this authority in appropriate non-hearing cases to subordinate officials.

(b) *Oral hearing cases assigned to the senior career official.* Carrier selection proceedings for international route authority that are set for oral hearing and such other oral hearing cases as the Secretary deems appropriate will be assigned to the senior career official in the Office of the Assistant Secretary for Aviation and International Affairs, who will serve as the DOT decisionmaker. In all such cases, the administrative law judge shall render a recommended decision to the senior career official, who shall have all of the powers set forth in § 302.17(a)(1) and those additional powers delegated by the Secretary.

(1) Decisions of the senior career official are subject to review by, and at the discretion of, the Assistant Secretary for Aviation and International Affairs. Petitions for discretionary review of decisions of the senior career official will not be entertained. A notice of review by the Assistant Secretary will establish the procedures for review and will be issued within 14 days after the decision of the senior career official is adopted. Unless a notice of review is issued, the decision of the senior career official will be issued as a final decision of the Department.

(2) Final decisions of the senior career official may be reviewed upon a petition for reconsideration filed pursuant to § 302.14. Such a petition shall state clearly the basis for requesting reconsideration and shall specify any questions of national transportation policy that may be involved. The Assistant Secretary will either grant or deny the petition.

(3) Upon review or reconsideration, the Assistant Secretary may either affirm the decision or remand the decision to the senior career official for further action consistent with such order of remand.

(4) Subject to the provisions of paragraphs (b) (2) and (3) of this section, final decisions of the senior career official will be transmitted to the President of the United States when required under 49 U.S.C. 41307.

(c) *Secretary and Deputy Secretary.* The Secretary or Deputy Secretary may exercise any authority of the Assistant Secretary whenever he or she believes a

decision involves important questions of national transportation policy.

**§ 302.19 Participation by persons not parties.**

Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence that is relevant to the issues. With the consent of the administrative law judge or the DOT decisionmaker, such person may also cross-examine witnesses directly. Such persons may also present to the administrative law judge a written statement on the issues involved in the proceeding. Such written statements shall be filed and served on all parties prior to the close of the hearing.

**§ 302.20 Formal intervention.**

(a) *Who may intervene.* Any person who has a statutory right to be made a party to an oral evidentiary hearing proceeding shall be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene.

(b) *Considerations relevant to determination of petition to intervene.* In passing upon a petition to intervene, the following factors, among other things, will be considered and will be liberally interpreted to facilitate the effective participation by members of the public in Department proceedings:

(1) The nature of the petitioner's right under the statute to be made a party to the proceeding;

(2) The nature and extent of the property, financial or other interest of the petitioner;

(3) The effect of the order that may be entered in the proceeding on petitioner's interest;

(4) The availability of other means whereby the petitioner's interest may be protected;

(5) The extent to which petitioner's interest will be represented by existing parties;

(6) The extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and

(7) The extent to which participation of the petitioner will broaden the issues or delay the proceeding.

(c) *Petition to intervene—(1) Contents.* Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he or she thinks he or she should be permitted to intervene. The petition should make

specific reference to the factors set forth in paragraph (b) of this section.

(2) *Time for filing.* Unless otherwise ordered by the Department:

(i) A petition to intervene shall be filed with the Department prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(ii) A petition to intervene filed by a city, other public body, or a chamber of commerce shall be filed with the Department not later than the last day prior to the beginning of the hearing.

(iii) A petition to intervene that is not timely filed shall be dismissed unless the petitioner shall clearly show good cause for his or her failure to file such petition on time.

(3) *Answer.* Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) *Disposition.* The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by the Department that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

**§ 302.21 Appearances.**

(a) Any party to a proceeding may appear and be heard in person or by a designated representative.

(b) No register of persons who may practice before the Department is maintained and no application for admission to practice is required.

(c) Any person practicing or desiring to practice before the Department may, upon hearing and good cause shown, be suspended or barred from practicing.

**§ 302.22 Prehearing conference.**

(a) *Purpose and scope of conference.* At the discretion of the administrative law judge, a prehearing conference may be called prior to any hearing. Written notice of the prehearing conference shall be sent by the administrative law judge to all parties to a proceeding and to other persons who appear to have an interest in such proceeding. The

purpose of such a conference is to define the issues and the scope of the proceeding, to secure statements of the positions of the parties and amendments to the pleadings, to schedule the exchange of exhibits before the date set for hearing, and to arrive at such agreements as will aid in the conduct and disposition of the proceeding. For example, consideration will be given to:

(1) Matters that the DOT decisionmaker can consider without the necessity of proof;

(2) Admissions of fact and of the genuineness of documents;

(3) Requests for documents;

(4) Admissibility of evidence;

(5) Limitation of the number of witnesses;

(6) Reducing of oral testimony to exhibit form;

(7) Procedure at the hearing; and

(8) Use of electronic media as a basis for exchange of briefs, hearing transcripts and exhibits, etc., in addition to the official record copy.

(b) *Actions during prehearing conference.* The administrative law judge may require a further conference, or responsive pleadings, or both. If a party refuses to produce documents requested by another party at the conference, the administrative law judge may compel the production of such documents prior to a hearing by subpoena issued in accordance with the provisions of § 302.25 as though at a hearing. Applications for the production prior to hearing of documents in the Department's possession shall be addressed to the administrative law judge, in accordance with the provisions of § 302.25(g), in the same manner as provided therein for production of documents at a hearing. The administrative law judge may also, on his or her own initiative or on motion of any party, direct any party to the proceeding (air carrier or non-air carrier) to prepare and submit exhibits setting forth studies, forecasts, or estimates on matters relevant to the issues in the proceeding.

(c) *Report of prehearing conference.* The administrative law judge shall issue a report of prehearing conference, defining the issues, giving an account of the results of the conference, specifying a schedule for the exchange of exhibits and rebuttal exhibits, the date of hearing, and specifying a time for the filing of objections to such report. The report shall be served upon all parties to the proceeding and any person who appeared at the conference. Objections to the report may be filed by any interested person within the time specified therein. The administrative law judge may revise his or her report

in the light of the objections presented. The revised report, if any, shall be served upon the same persons as was the original report. Exceptions may be taken on the basis of any timely written objection that has not been met by a revision of the report if the exceptions are filed within the time specified in the revised report. Such report shall constitute the official account of the conference and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to protect the public interest or to prevent injustice.

#### § 302.23 Hearing.

The administrative law judge to whom the case is assigned or the DOT decisionmaker shall give the parties reasonable notice of a hearing or of the change in the date and place of a hearing and the nature of such hearing.

#### § 302.24 Evidence.

(a) Evidence presented at the hearing shall be limited to material evidence relevant to the issues as drawn by the pleadings or as defined in the report of prehearing conference, subject to such later modifications of the issues as may be necessary to protect the public interest or to prevent injustice, and shall not be unduly repetitious. Evidence shall be presented in such form by all parties as the administrative law judge may direct.

(b) *Objections to evidence.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections relied upon, and the transcript shall not include argument or debate except as ordered by the administrative law judge. Rulings on such objections shall be a part of the transcript.

(c) *Exhibits.* When exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and two copies to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits, the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing or, at the latest, at the commencement of the hearing. Copies of exhibits may, at the discretion of the administrative law judge or the DOT decisionmaker, be furnished by use of electronic media in addition to an official record copy.

(d) *Substitution of copies for original exhibits.* In his or her discretion, the administrative law judge may permit a party to withdraw original documents

offered in evidence and substitute true copies in lieu thereof.

(e) *Designation of parts of documents.* When relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matter not material or relevant, the party offering the same shall plainly designate the matter so offered. The immaterial and irrelevant parts shall be excluded and shall be segregated insofar as practicable. If the volume of immaterial or irrelevant matter would unduly encumber the record, such submission will not be received in evidence, but may be marked for identification, and, if properly authenticated, the relevant or material matter may be read into the record, or, if the administrative law judge so directs, a true copy of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the submission, and to offer in evidence in like manner other portions of the exhibit.

(f) *Records in other proceedings.* In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(1) The portion is specified with particularity in such manner as to be readily identified;

(2) The party offering the same agrees unconditionally to supply such copies later, or when required by the DOT decisionmaker;

(3) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any portion offered by any other party may be incorporated by like reference upon compliance with paragraphs (f) (1) and (2) of this section; and

(4) The administrative law judge directs such incorporation or waives the requirement in paragraph (f)(3) of this section with the consent of the parties.

(g) *Official notice of facts contained in certain documents.* (1) Without limiting, in any manner or to any extent, the discretionary powers of the DOT decisionmaker and the administrative law judge to notice other matters or documents properly the subject of official notice, facts contained in any document within the categories enumerated in this subdivision are officially noticed in all formal economic proceedings except those subject to subpart D of this part. Each such

category shall include any document antedating the final Department decision in the proceeding where such notice is taken. The matters officially noticed under the provisions of this paragraph are:

1. Air carrier certificates or applications therefor, together with any requests for amendment, and pleadings responding to applications when properly filed.
2. All Form 41 reports required to be filed by air carriers with the Department.
3. Reports of Traffic and Financial Data of all U.S. Air Carriers issued by the Civil Aeronautics Board (CAB) or the Department.
4. Airline Traffic Surveys and Passenger Origin-Destination Surveys, Domestic and International, compiled by the CAB or the Department and published and/or made available either to the public or to parties in proceedings.
5. Compilations of data relating to competition in the airline industry and made available to the public by the CAB or the Department, such as the 1990 Airline Competition Study.
6. Passenger, mail, express, and freight data submitted to the CAB or the Department as part of ER-586 Service Segment Data by U.S. carriers, or similar data submitted to the Department by U.S. air carriers (T-100) or by foreign air carriers (T-100F) that is not confidential.
7. All tariffs, including the electronic versions, and amendments thereof, of all air carriers, on file with the Department.
8. Service Mail Pay and Subsidy for U.S. Certificated Air Carriers published by the CAB and any supplemental data and subsequent issues published by the CAB or the Department.
9. Airport Activity Statistics of Certificated Air Carriers compiled and published by the Federal Aviation Administration (FAA) or the Department.
10. Air Traffic Activity Data issued by the FAA.
11. National Plan of Integrated Airport Systems (NPIAS) issued by the FAA.
12. Airport Facilities Directory, Form 5010, issued by the FAA.
13. The Airman's Information Manual issued by the FAA.
14. ICAO Statistical Summary, Preliminary Issues and Nos. 1 through 14, and Digest of Statistics, Nos. 15 through 71, prepared by ICAO, Montreal, Canada, with all changes and additions.
15. Monthly, quarterly and annual reports of the Immigration and Naturalization Service, U.S. Department of Justice.
16. All forms and reports required by the U.S. Postal Service to be filed by air carriers authorized to transport mail.
17. All orders of the Postmaster General designating schedules for the transportation of mail.
18. Publications of the Bureau of the Census of the U.S. Department of Commerce (DOC) relating, but not necessarily limited, to population, manufacturing, business, statistics, and any yearbooks, abstracts, or similar publications published by DOC.
19. ABC World Airways Guide and all Official Airline Guides, including the North

American, Worldwide, All-Cargo and quick reference editions, including electronic versions.

20. Official Guide of the Railways and Russell's Official National Motor Coach Guide.

21. The Rand McNally Commercial Atlas and Marketing Guide, and the Rand McNally Road Atlas, United States, Canada, and Mexico.

22. Survey of Buying Power published by Sales Management Magazine.

(2) Any fact contained in a document belonging to a category enumerated in paragraph (g)(1) of this section shall be deemed to have been physically incorporated into and made part of the record in such proceedings. However, such taking of official notice shall be subject to the rights granted to any party or intervener to the proceeding under section 7(d) of the Administrative Procedure Act (5 U.S.C. 557(d)).

(3) The decisions of the Department and its administrative law judges may officially notice any appropriate matter without regard to whether or not such items are contained in a document belonging to the categories enumerated in paragraph (g)(1) of this section. However, where the decision rests on official notice of a material fact or facts, it will set forth such items with sufficient particularity to advise interested persons of the matters that have been noticed.

(h) *Receipt of documents after hearing.* No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the administrative law judge or the DOT decisionmaker.

(i) *Exceptions.* Formal exceptions to the rulings of the administrative law judge made during the course of the hearing are unnecessary. For all purposes for which an exception otherwise would be taken, it is sufficient that a party, at the time the ruling of the administrative law judge is made or sought, makes known the action he or she desires the administrative law judge to take or his or her objection to an action taken, and his or her grounds therefor.

(j) *Offers of proof.* Any offer of proof made in connection with an objection taken to any ruling of the administrative law judge rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence that counsel contends would be adduced by such testimony, and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall

be marked for identification and shall constitute the offer of proof.

### § 302.25 Subpoenas.

(a) An application for a subpoena requiring the attendance of a witness at a hearing or the production of documentary evidence may be made without notice by any party to the administrative law judge or, in the event that an administrative law judge has not been assigned to a proceeding or is not available, to the DOT decisionmaker or the Chief Administrative Law Judge, for action.

(b) An application for a subpoena shall be in duplicate except that if it is made during the course of a hearing, it may be made orally on the record with the consent of the administrative law judge.

(c) All such applications, whether written or oral, shall contain a statement or showing of general relevance and reasonable scope of the evidence sought, and shall be accompanied by two copies of a draft of the subpoena sought that, in the case of evidence, shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible, or, in the case of a witness, the name of the witness and a general description of the matters concerning which the witness will be asked to testify.

(d) The administrative law judge or DOT decisionmaker considering any application for a subpoena shall issue the subpoena requested if the application complies with this section. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena, and no detailed or burdensome showing shall be required as a condition to the issuance of a subpoena.

(e) Where it appears during the course of a proceeding that the testimony of a witness or documentary evidence is relevant to the issues in a proceeding, the administrative law judge, Chief Administrative Law Judge or DOT decisionmaker may issue on his or her own initiative a subpoena requiring such witness to attend and testify or requiring the production of such documentary evidence.

(f) Subpoenas issued under this section shall be served upon the person to whom directed in accordance with § 302.7(b). Any person upon whom a subpoena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the administrative law judge or, in the event an administrative law judge has not been assigned to a proceeding or is not

available, to the DOT decisionmaker or the Chief Administrative Law Judge for action. If the person to whom the motion to modify or quash the subpoena has been addressed or directed, has not acted upon such a motion by the return date, such date shall be stayed pending his or her final action thereon. The DOT decisionmaker may at any time review, upon his or her own initiative, the ruling of an administrative law judge or the Chief Administrative Law Judge denying a motion to quash a subpoena. In such cases, the DOT decisionmaker may order that the return date of a subpoena be stayed pending action thereon.

(g) The provisions of this section are not applicable to the attendance of DOT employees or the production of documentary evidence in the custody thereof at a hearing. The attendance of DOT employees and the production of documentary evidence in their custody are governed by 49 CFR parts 9 and 7, respectively.

#### **§ 302.26 Depositions.**

(a) For good cause shown, the DOT decisionmaker or administrative law judge assigned to a proceeding may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with such testimony. Ordinarily an order to take the deposition of a witness will be entered only if:

(1) The person whose deposition is to be taken would be unavailable at the hearing,

(2) The deposition is deemed necessary to perpetuate the testimony of the witness, or

(3) The taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in an undue burden to other parties or in undue delay.

(b) Any party desiring to take the deposition of a witness shall make application therefor in duplicate to the administrative law judge or, in the event that an administrative law judge has not been assigned to a proceeding or is not available, to the DOT decisionmaker or Chief Administrative Law Judge, setting forth the reasons why such deposition should be taken, the name and residence of the witness, the time and place proposed for the taking of the deposition, and a general description of the matters concerning which the witness will be asked to testify. If good cause be shown, the administrative law judge, the DOT decisionmaker, or the Chief Administrative Law Judge, as the case may be, may, in his or her discretion, issue an order authorizing

such deposition and specifying the witness whose deposition is to be taken, the general scope of the testimony to be taken, the time when, the place where, the designated officer (authorized to take oaths) before whom the witness is to testify, and the number of copies of the deposition to be supplied. Such order shall be served upon all parties by the person proposing to take the deposition a reasonable period in advance of the time fixed for taking testimony.

(c) Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question shall be recorded and the answers shall be taken down in the words of the witness.

(d) Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon, but no transcript filed by the designated officer shall include argument or debate. Objections to questions or evidence shall be noted by the designated officer upon the deposition, but he or she shall not have power to decide on the competency or materiality or relevance of evidence, and he or she shall record the evidence subject to objection. Objections to questions or evidence not made before the designated officer shall not be deemed waived unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) The testimony shall be reduced to writing by the designated officer, or under his or her direction, after which the deposition shall be signed by the witness unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign, and certified in usual form by the designated officer. If the deposition is not signed by the witness, the designated officer shall state on the record this fact and the reason therefor. The original deposition and exhibits shall be forwarded to Department of Transportation Dockets and shall be filed in the proceedings.

(f) Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination. Ordinarily such procedure will be authorized only if necessary to achieve the purposes of an oral deposition and to serve the balance of convenience of the parties. The interrogatories shall be filed in quadruplicate with two copies of the application and a copy of each shall be served on each party. Within seven (7) days after service any party may file with the person to whom application was made two copies of his or her objections, if any, to such interrogatories and may file such cross-

interrogatories as he or she desires to submit. Cross-interrogatories shall be filed in quadruplicate, and a copy thereof together with a copy of any objections to interrogatories, shall be served on each party, who shall have five (5) days thereafter to file and serve his or her objections, if any, to such cross-interrogatories. Objections to interrogatories or cross-interrogatories, shall be served on the DOT decisionmaker or the administrative law judge considering the application. Objections to interrogatories shall be made before the order for taking the deposition issues and if not so made shall be deemed waived. When a deposition is taken upon written interrogatories, and cross-interrogatories, no party shall be present or represented, and no person other than the witness, a reporter, and the designated officer shall be present at the examination of the witness, which fact shall be certified by the designated officer, who shall ask the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness's own words. The provisions of paragraph (e) of this section shall be applicable to depositions taken in accordance with this paragraph.

(g) All depositions shall conform to the specifications of § 302.3 except that the filing of three copies thereof shall be sufficient. Any fees of a witness, the reporter, or the officer designated to take the deposition shall be paid by the person at whose instance the deposition is taken.

(h) The fact that a deposition is taken and filed in a proceeding as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the proceeding. Only such part or the whole of a deposition as is received in evidence shall constitute a part of the record in such proceeding upon which a decision may be based.

#### **§ 302.27 Rights of witnesses; attendance fees and mileage.**

(a) Any person appearing as a witness in any proceeding governed by this part, whether in response to a subpoena or by request or permission of the Department, may be accompanied, represented, and advised by counsel and may be examined by that counsel after other questioning.

(b) Any person who submits data or evidence in a proceeding governed by this part, whether in response to a subpoena or by request or permission of the Department, may retain, or, on payment of lawfully prescribed costs, procure, a copy of any document so



submitted or a copy of any transcript made of such testimony.

(c)(1) No person whose attendance at a hearing or whose deposition is to be taken shall be obliged to respond to a subpoena unless upon a service of the subpoena he or she is tendered attendance fees and mileage by the party at whose instance he or she is called in accordance with the requirements of paragraph (c)(2) of this section; *Provided*, That a witness summoned at the instance of the Department or one of its employees, or a salaried employee of the United States summoned to testify as to matters related to his or her public employment, need not be tendered such fees or mileage at that time.

(2)(i) Witnesses who are not salaried employees of the United States, or such employees summoned to testify on matters not related to their public employment, shall be paid the same per diem, subsistence, and mileage fees paid to witnesses for like service in the courts of the United States that are in effect at the time of travel; *Provided*, That no employee, officer, or attorney of an air carrier who travels under the free or reduced rate provisions of section 41511 of the Statute shall be entitled to any fees or mileage; *And provided further*, That such fees and mileage shall not be applicable for witnesses summoned to testify in Alaska, and that, in Alaska, where permitted by section 41511 of the Statute, the witness may, at his or her option, accept a pass for travel by air. Such witnesses shall be furnished appropriate forms and instructions for the submission of claims for attendance fees, subsistence, and mileage from the Government before the close of the proceedings that they are required to attend. Only persons summoned by subpoena shall be entitled to claim attendance fees, subsistence, or mileage from the Government.

(ii) Witnesses who are salaried employees of the United States and who are summoned to testify on matters relating to their public employment, irrespective of at whose instance they are summoned, shall be paid in accordance with applicable Government regulations.

#### **§ 302.28 Transcripts of hearings.**

(a) Hearings shall be recorded and transcribed under supervision of the administrative law judge, by a reporting firm under contract with the Department. Copies of the transcript that may, at the discretion of the administrative law judge, be furnished by use of electronic media in addition to the official copy, shall be supplied to the parties to the proceeding by said

reporting firm, at the contract price for copies.

(b) The administrative law judge shall determine whether "ordinary transcript" or "daily transcript" (as those terms are defined in the contract) will be necessary and required for the proper conduct of the proceeding and the Department will pay the reporting firm the full cost of reporting its proceedings at the contract price for such type of transcript. If the administrative law judge has determined that ordinary transcript is adequate, and has notified the parties of such determination (in the notice of hearings, or otherwise), then any party may request reconsideration of such determination and that daily transcript be required. In determining what is necessary and required for the proper conduct of the proceeding, the administrative law judge shall consider, among other things:

(1) The nature of the proceeding itself;  
 (2) The DOT decisionmaker's needs as well as the reasonable needs of the parties;

(3) The cost to the Department; and  
 (4) The requirements of a fair hearing.

(c) If the administrative law judge has determined that ordinary transcript is adequate, or, upon reconsideration, has adhered to such determination, then any party may request the reporting firm to provide daily transcript. In that case, pursuant to its contract with the Department, the reporting firm will be obligated to furnish to the Department daily transcript upon the agreement by the requesting party to pay to the reporting firm an amount equal to the difference between the contract prices for ordinary transcript and daily transcript, provided that the requesting party makes such agreement with the reporting firm at least twenty-four (24) hours in advance of the date for which such transcript is requested.

(d) Any party may obtain from the Office of the Assistant Secretary for Administration, the name and address of the private reporting company with which the Department currently has a contract for transcripts and copies, as well as the contract prices then in effect for such services.

(e) Copies of transcripts ordered by parties other than the Department shall be prepared for delivery to the requesting person at the reporting firm's place of business, within the stated time for the type of transcript ordered. The requesting party and the reporting firm may agree upon some other form or means of delivery (mail, messenger, electronic media, etc.) and the reporting firm may charge for such special service, provided that such charge shall

not exceed the reasonable cost of such service.

(f) Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be filed with Department of Transportation Dockets, within ten (10) days after receipt of the completed transcript by the Department. If no objections to the motion are filed within ten (10) days thereafter, the transcript may, upon the approval of the administrative law judge, be changed to reflect such corrections. If objections are received, the motion and objections shall be submitted to the official reporter by the administrative law judge together with a request for a comparison of the transcript with the reporter's record of the hearing. After receipt of the report of the official reporter an order shall be entered by the administrative law judge settling the record and ruling on the motion.

#### **§ 302.29 Argument before the administrative law judge.**

(a) The administrative law judge shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the administrative law judge.

(b) When, in the opinion of the administrative law judge, the volume of the evidence or the importance or complexity of the issues involved warrants, he or she may, either on his or her own motion or at the request of a party, permit the presentation of oral argument, and may impose such time limits on the argument as he or she may determine appropriate. Such argument shall be transcribed and bound with the transcript of testimony and will be available to the Department decisionmaker for consideration in deciding the case.

#### **§ 302.30 Briefs to the administrative law judge.**

Within such limited time after the close of the reception of evidence fixed by the administrative law judge, any party may, upon request and under such conditions as the administrative law judge may prescribe, file for his or her consideration briefs which may include proposed findings of fact and conclusions of law that shall contain exact references to the record and authorities relied upon.

#### **§ 302.31 Initial and recommended decisions; certification of the record.**

(a) *Action by administrative law judge after hearing.* Except where the DOT decisionmaker directs otherwise, after

the taking of evidence and the receipt of briefs which may include proposed findings of fact and conclusions of law, if any, the administrative law judge shall take the following action:

(1) *Initial decision.* If the proceeding does not involve foreign air transportation, the administrative law judge shall render an "initial decision." Such decision shall encompass the administrative law judge's decision on the merits of the proceeding and on all ancillary procedural issues remaining for disposition at the close of the hearing.

(2) *Recommended decision.* In cases where the action of the Department involves foreign air transportation and is subject to review by the President of the United States pursuant to section 41307 of the Statute, the administrative law judge shall render a "recommended decision." Such decision shall encompass the administrative law judge's decision on the merits of the proceeding and on all ancillary procedural issues remaining for disposition at the close of the hearing.

(b) *Certification to the DOT decisionmaker for decision.* At any time prior to the close of the hearing, the DOT decisionmaker may direct the administrative law judge to certify any question or the entire record in the proceeding to the DOT decisionmaker for decision. In cases where the record is thus certified, the administrative law judge shall not render a decision but shall make a recommendation to the DOT decisionmaker as required by section 8(a) of the Administrative Procedure Act (5 U.S.C. 558(a)) unless advised by the DOT decisionmaker that he or she intends to issue a tentative decision.

(c) Every initial or recommended decision issued shall state the names of the persons who are to be served with copies of it, the time within which exceptions to, or petitions for review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed. In addition, every such decision shall recite that it is made under delegated authority, and contain notice of the provisions of paragraph (d) of this section. In the event the administrative law judge certifies the record to the DOT decisionmaker without an initial or recommended decision, he or she shall notify the parties of the time within which to file with the DOT decisionmaker briefs which may include proposed findings of fact and conclusions of law.

(d) Unless a petition for discretionary review is filed pursuant to § 302.32, exceptions are filed pursuant to

§ 302.217, or the DOT decisionmaker issues an order to review upon his or her own initiative, the initial decision shall become effective as the final order of the Department thirty (30) days after service thereof; in the case of a recommended decision, that decision shall be transmitted to the President of the United States under 49 U.S.C. 41307. If a petition for discretionary review or exceptions are timely filed or action to review is taken by the DOT decisionmaker upon his or her own initiative, the effectiveness of the initial decision or the transmission of the recommended decision is stayed until the further order of the DOT decisionmaker.

**§ 302.32 Petitions for discretionary review of initial or recommended decisions; review proceedings.**

(a) *Petitions for discretionary review.*

(1) Review by the DOT decisionmaker pursuant to this section is not a matter of right but is at the sole discretion of the DOT decisionmaker. Any party may file and serve a petition for discretionary review by the DOT decisionmaker of an initial decision or recommended decision within twenty-one (21) days after service thereof, unless the DOT decisionmaker sets a different period for filing.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, the Department's rules, or precedent;

(iii) A substantial and important question of law, policy or discretion is involved; or

(iv) A prejudicial procedural error has occurred.

(3) Each issue shall be separately numbered and plainly and concisely stated. Petitioners shall not restate the same point in repetitive discussions of an issue. Each issue shall be supported by detailed citations of the record when objections are based on the record, and by statutes, regulations or principal authorities relied upon. Any matters of fact or law not argued before the administrative law judge, but that the petitioner proposes to argue on brief to the DOT decisionmaker, shall be stated.

(4) Petitions for discretionary review shall be self-contained and shall not incorporate by reference any part of another document. Except by permission of the DOT decisionmaker, petitions shall not exceed twenty (20) pages including appendices and other

papers physically attached to the petition.

(5) Requests for oral argument on petitions for discretionary review will not be entertained by the DOT decisionmaker.

(b) *Answers.* Within fifteen (15) days after service of a petition for discretionary review, any party may file and serve an answer of not more than fifteen (15) pages in support of or in opposition to the petition. If any party desires to answer more than one petition for discretionary review in the same proceeding, he or she shall do so in a single document of not more than twenty (20) pages.

(c) *Orders declining review.* The DOT decisionmaker's orders declining to exercise the discretionary right of review will specify the date upon which the administrative law judge's decision shall become effective as the final decision of the Department. A petition for reconsideration of a Department order declining review will be entertained only when the order exercises, in part, the DOT decisionmaker's discretionary right of review, and such petition shall be limited to the single question of whether any issue designated for review and any issue not so designated are so inseparably interrelated that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of the Department in the review proceeding.

(d) *Review proceedings.* (1) The DOT decisionmaker may take review of an initial or recommended decision upon petition or on his or her own initiative or both. The DOT decisionmaker will issue a final order upon such review without further proceedings on any or all the issues where he or she finds that matters raised do not warrant further proceedings.

(2) Where the DOT decisionmaker desires further proceedings, he or she will issue an order for review that will:

(i) Specify the issues to which review will be limited. Only those issues specified in the order shall be argued on brief to the DOT decisionmaker, pursuant to § 302.35, and considered by the DOT decisionmaker;

(ii) Specify the portions of the administrative law judge's decision, if any, that are to be stayed as well as the effective date of the remaining portions thereof; and

(iii) Designate the parties to the review proceeding.

**§ 302.33 Tentative decision of the DOT decisionmaker.**

(a) Except as provided in paragraph (b) of this section, whenever the

administrative law judge certifies the record in a proceeding directly to the DOT decisionmaker without issuing an initial or recommended decision in the matter, the DOT decisionmaker shall, after consideration of any briefs submitted by the parties, prepare a tentative decision and serve it upon the parties. Every tentative decision of the DOT decisionmaker shall state the names of the persons who are to receive copies of it, the time within which exceptions to such decision and briefs, if any, in support of or in opposition to the exceptions may be filed, and the date when such decision will become final in the absence of exceptions thereto. If no exceptions are filed to the tentative decision of the DOT decisionmaker within the period fixed, it shall become final at the expiration of such period unless the DOT decisionmaker orders otherwise.

(b) The DOT decisionmaker may, in his or her discretion, omit a tentative decision in proceedings under subpart B. The DOT decisionmaker may also, in rulemaking proceedings, omit a tentative decision in any case in which he or she finds upon the record that due and timely execution of the Department's functions imperatively and unavoidably so requires. Final decisions of the DOT decisionmaker are subject to review as provided in § 302.18.

**§ 302.34 Exceptions to tentative decisions of the DOT decisionmaker.**

(a) *Time for filing.* Within ten (10) days after service of any tentative decision of the DOT decisionmaker, any party to a proceeding may file exceptions to such decision with the DOT decisionmaker.

(b) *Form and contents of exceptions.* Each exception shall be separately numbered and shall be stated as a separate point, and appellants shall not restate the same point in several exceptions. Each exception shall state, sufficiently identify, and be limited to, an ultimate conclusion in the decision to which exception is taken (such as, selection of one carrier rather than another to serve any point or points; points included in or excluded from a new route; imposition or failure to impose a given restriction; determination of a rate at a given amount rather than another). No specific exception shall be taken with respect to underlying findings or statements, but exceptions to an ultimate conclusion shall be deemed to include exceptions to all underlying findings and statements pertaining thereto; *Provided, however,* That exceptions shall specify any matters of law, fact, or policy that

were not argued before the administrative law judge but will be set forth for the first time on brief to the DOT decisionmaker.

(c) *Effect of failure to file timely and adequate exceptions.* No objection may be made on brief or at a later time to an ultimate conclusion that is not expressly made the subject of an exception in compliance with the provisions of this section; *Provided, however,* That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

**§ 302.35 Briefs to the DOT decisionmaker.**

(a) *Time for filing.* Within such period after the date of service of any tentative decision by the DOT decisionmaker as may be fixed therein, any party may file a brief addressed to the DOT decisionmaker in support of his or her exceptions to such decision or in opposition to the exceptions filed by any other party. Briefs to the DOT decisionmaker on initial or recommended decisions of administrative law judges shall be filed only in those cases where the DOT decisionmaker grants discretionary review and orders further proceedings, pursuant to § 302.32(d)(2), and only upon those issues specified in the order. Such briefs shall be filed within thirty (30) days after date of service of the order granting discretionary review unless otherwise specified in the order. In cases where, because of the limited number of parties and the nature of the issues, the filing of opening, answering, and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the DOT decisionmaker may direct that the parties file briefs at different times rather than at the same time.

(b) *Effect of failure to restate objections in briefs.* In determining the merits of an appeal, the DOT decisionmaker will not consider the exceptions or the petition for discretionary review but will consider only the brief. Each objection contained in the exceptions or each issue specified in the DOT decisionmaker's order exercising discretionary review must be restated and supported by a statement and adequate discussion of all matters relied upon, in a brief filed pursuant to and in compliance with the requirements of this section.

(c) *Formal specifications of briefs—(1) Contents.* Each brief shall discuss every point of law, fact, or precedent that the party submitting it is entitled to raise and that it wishes the DOT decisionmaker to consider. Each brief shall include a summary of the argument not to exceed five (5) pages.

Support and justification for every point raised shall include itemized references to the pages of the transcript of hearing, exhibit or other matter of record, and citations of the statutes, regulations, or principal authorities relied upon. If a brief or any point discussed in the brief is not in substantial conformity with the requirement for such support and justification, no motion to strike or dismiss such document shall be made but the DOT decisionmaker may disregard the points involved. Copies of briefs may be furnished by use of electronic media in a format acceptable to the Department and the parties.

(2) *Incorporation by reference.* Briefs to the DOT decisionmaker shall be completely self-contained and shall not incorporate by reference any portion of any other brief or pleading; *Provided, however,* That instead of submitting a brief to the DOT decisionmaker a party may adopt by reference specifically identified pages or the whole of his or her prior brief to the administrative law judge if the latter complies with all requirements of this section. In such cases, the party shall file with Department of Transportation Dockets a letter exercising this privilege and serve all parties in the same manner as a brief to the DOT decisionmaker.

(3) *Length.* Except by permission or direction of the DOT decisionmaker, briefs shall not exceed fifty (50) pages including pages contained in any appendix, table, chart, or other document physically attached to the brief, but excluding maps and the summary of the argument. In this case "map" means only those pictorial representations of routes, flight paths, mileage, and similar ancillary data that are superimposed on geographic drawings and contain only such text as is needed to explain the pictorial representation.

**§ 302.36 Oral argument before the DOT decisionmaker.**

(a) If any party desires to argue a case orally before the DOT decisionmaker, he or she shall request leave to make such argument in his or her exceptions or brief. Such request shall be filed no later than the date when briefs before the DOT decisionmaker are due in the proceeding. The DOT decisionmaker will rule on such request, and, if oral argument is to be allowed, all parties to the proceeding will be advised of the date and hour set for such argument and the amount of time allowed to each party. Requests for oral argument on petitions for discretionary review will not be entertained.

(b) Pamphlets, charts, and other written data may be offered to the DOT

decisionmaker at oral argument only in accordance with the following rules: All such material shall be limited to facts in the record of the case being argued and shall be served on all parties to the proceeding with four (4) copies transmitted to Department of Transportation Dockets at least five (5) calendar days in advance of the argument.

**§ 302.37 Waiver of procedural steps after hearing.**

The parties to any proceeding may agree to waive any one or more of the procedural steps provided in §§ 302.29 through 302.36.

**§ 302.38 Final decision of the DOT decisionmaker.**

When a case stands submitted to the DOT decisionmaker for final decision on the merits, he or she will dispose of the issues presented by entering an appropriate order that will include a statement of the reasons for his or her findings and conclusions. Such orders shall be deemed "final orders" within the purview of § 302.14(a), in the manner provided by § 302.18.

**Subpart B—Rules Applicable to U.S. Air Carrier Certificate and Foreign Air Carrier Permit Licensing Proceedings**

**§ 302.201 Applicability.**

(a) This subpart sets forth the specific rules applicable to proceedings on:

(1) U.S. air carrier certificates of public convenience and necessity and U.S. all-cargo air service certificates under Chapter 411 of the Statute, including renewals, amendments, modifications, suspensions and transfers of such certificates.

(2) Foreign air carrier permits under Chapter 413 of the Statute, including renewals, amendments, modifications, suspensions, and transfers of such permits.

(b) Except as modified by this subpart, the provisions of subpart A of this part apply.

**§ 302.202 Contents of applications.**

(a) Certificate applications filed under this subpart shall contain the information required by part 201 of this chapter and, where applicable, part 204 of this chapter, and foreign air carrier permit applications shall contain the information required by part 211 of this chapter, along with any other information that the applicant desires the Department to notice officially.

(b) Applications shall include a notice on the cover page stating that any person may support or oppose the application by filing an answer and serving a copy of the answer on all

persons served with the application. The notice shall also state the due date for answers. Amendments to applications will be considered new applications for the purpose of calculating the time limitations of this subpart.

(c) Applications shall include a list of the names and addresses of all persons who have been served in accordance with § 302.203.

(d) Where required, each application shall be accompanied by an Environmental Evaluation in conformity with part 313 of this chapter.

**§ 302.203 Service of documents.**

(a) *General requirements.* (1) Applicants shall serve on the persons listed in paragraph (b) of this section a notice that an application has been filed, and upon request shall promptly provide those persons with copies of the application and supporting documents. The notice must clearly state the authority sought and the due date for other pleadings.

(2) Applicants shall serve a complete copy of the application on the Manager of the FAA Flight Standards District Office responsible for processing the application for any FAA authority needed to conduct the proposed operations.

(3) After an order under § 302.210 has been issued, parties need only serve documents on those persons listed in the service list accompanying the order.

(4) In the case of an application sought to be consolidated, the applicant shall serve the notice required in paragraph (a)(1) of this section on all persons served by the original applicant.

(b) *Persons to be served*—(1) *U.S. air carriers.* (i) In certificate proceedings, except for those proceedings that involve charter-only authority under section 41102(a)(3) of the Statute:

(A) Applicants for certificates to engage in interstate air transportation and other persons who file a pleading in the docket shall serve:

(1) The airport authority of each airport that the applicant initially proposes to serve, and

(2) Any other person who has filed a pleading in the docket.

(B) Applicants for certificates to engage in foreign air transportation and other persons who file a pleading in the docket shall serve:

(1) All U.S. air carriers (including commuter air carriers) that publish schedules in the *Official Airline Guide* or in the *Air Cargo Guide* for the country-pair market(s) specified in the application,

(2) The airport authority of each U.S. airport that the applicant initially proposes to serve, and

(3) Any other person who has filed a pleading in the docket.

(ii) In certificate proceedings involving charter-only authority under 41102(a)(3) of the Statute, applicants and other persons who file a pleading in the docket shall serve any other person who has filed a pleading in the docket.

(2) *Foreign air carriers.* (i) In permit proceedings, except for those proceedings involving charter-only authority, applicants and other persons who have filed a pleading in the docket shall serve:

(A) All U.S. air carriers (including commuter air carriers) that publish schedules in the *Official Airline Guide* or the *Air Cargo Guide* for the country-pair market(s) specified in the application,

(B) The U.S. Department of State,

(C) The airport authority of each U.S. airport that the applicant initially proposes to serve, and

(D) Any other person who has filed a pleading in the docket.

(ii) In foreign air carrier permit proceedings for charter-only authority, applicants and other persons who file a pleading in the docket shall serve the U.S. Department of State and any other person who has filed a pleading in the docket.

(c) *Additional service.* The Department may, at its discretion, order additional service upon such persons as the facts of the situation warrant. Where only notices are required, parties are encouraged to serve copies of their actual pleadings where feasible. In any proceeding directly involving air transportation to the Federated States of Micronesia, the Marshall Islands or Palau, the Department and any party or participant in the proceeding shall serve all documents on the President and the designated authorities of the government(s) involved. In any proceeding that affects a point in Alaska, the person filing shall send an additional copy to: U.S. Department of Transportation, Alaska Field Office, 801 B Street, Suite 506, Anchorage, Alaska 99501-3657.

**§ 302.204 Responsive documents.**

(a) Any person may file an answer in support of or in opposition to any application. Answers shall set forth the basis for the position taken, including any economic data or other facts relied on. Except as otherwise provided in § 302.212(d), answers shall be filed within twenty-one (21) days of the original or amended application and shall be served in accordance with § 302.203.

(b) Replies to answers shall be filed within fourteen (14) days after the filing of the answer.

(c) Persons having common interests shall, to the extent practicable, arrange for the joint preparation of pleadings.

**§ 302.205 Economic data and other facts.**

Whenever economic data and other facts are provided in any pleading, such information shall include enough detail so that final results can be obtained without further clarification. Sources, bases, and methodology used in constructing exhibits, including any estimates or judgments, shall be provided.

**§ 302.206 Verification.**

The following certification shall be included with any pleading filed under this subpart: "Pursuant to Title 18 United States Code Section 1001, I [*the individual signing the pleading, who shall be someone who will appear as a witness to substantiate the facts asserted if an oral hearing becomes necessary*] in my individual capacity and as the authorized representative of the submitter, have not in any manner knowingly or willfully falsified, concealed, or covered up any material fact or made any false, fictitious, or fraudulent statement or knowingly used any documents that contain such statements in connection with the preparation, filing, or prosecution of this pleading. I understand that a submitter who violates the provisions of 18 U.S.C. 1001 shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

**Disposition of Applications**

**§ 302.207 Cases to be decided on written submissions.**

(a) Applications under this subpart will be decided on the basis of written submissions unless the DOT decisionmaker, on petition as provided in § 302.208 or on his or her own initiative, determines that an oral presentation or an administrative law judge's decision is required because:

- (1) Use of written procedures will prejudice a party;
- (2) Material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures; or
- (3) Assignment of an application for oral evidentiary hearing procedures or an initial or recommended decision by an administrative law judge is otherwise required by the public interest.

(b) The standards employed in deciding cases under § 302.210(a) (1) or (5) shall be the same as the standards applied in cases decided under § 302.210(a)(4). These are the standards

set forth in the Statute as interpreted and expanded upon under that Statute.

**§ 302.208 Petitions for oral presentation or judge's decision.**

(a) Any person may file a petition for oral evidentiary hearing, oral argument, an initial or recommended decision, or any combination of these. Petitions shall demonstrate that one or more of the criteria set forth in § 302.207 are applicable to the issues for which an oral presentation or judge's decision is requested. Such petitions shall be supported by a detailed explanation of the following:

(1) Why the evidence or argument to be presented cannot be submitted in the form of written evidence or briefs;

(2) Which issues should be examined by an administrative law judge and why such issues should not be presented directly to the DOT decisionmaker for decision;

(3) An estimate of the time required for the oral presentation and the number of witnesses whom the petitioner would present; and

(4) If cross-examination of any witness is desired, the name of the witness, if known, the subject matter of the desired cross-examination or the title or number of the exhibit to be cross-examined, what the petitioner expects to establish by the cross-examination, and an estimate of the time needed for it.

(b) Petitions for an oral hearing, oral argument, or an administrative law judge's decision shall be filed no later than the due date for answers in proceedings governed by §§ 302.211, 302.212 and 302.213.

(c) Where a stipulation of disputed facts would eliminate the need for an oral presentation or an administrative law judge's decision, parties shall include in their petitions an offer to withdraw the request should the stipulation be made.

**§ 302.209 Procedures for deferral of applications.**

Within twenty-eight (28) days after the filing of an application under this subpart, the DOT decisionmaker may defer further processing of the application until all of the information necessary to process that application is submitted. The time periods contained in this subpart with respect to the disposition of the application shall not begin to run until the application is complete. In addition, the DOT decisionmaker may defer action on a foreign air carrier permit application for foreign policy reasons.

**§ 302.210 Disposition of applications; orders establishing further procedures.**

(a) *General requirements.* The DOT decisionmaker will take one of the following actions with respect to all or any portion of each application:

(1) Issue an Order to Show Cause why the application should not be granted, denied or dismissed, in whole or in part.

(2) Issue a Final Order granting the application if the Department determines that there are no material issues of fact that warrant further procedures for their resolution.

(3) Issue a Final Order dismissing or rejecting the application for lack of prosecution or if the application does not comply with this subpart or is otherwise materially deficient.

(4) Issue an order setting the application for oral evidentiary hearing. The order will establish the scope of the issues to be considered and the procedures to be employed, and will indicate whether one or more attorneys from the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings will participate as a party. All of the procedures set forth in §§ 302.214 through 302.218 will apply unless the DOT decisionmaker decides otherwise.

(5) Begin to make a determination with respect to the application under simplified procedures without oral evidentiary hearing. In this event, the DOT decisionmaker may indicate which, if any, of the procedural steps set forth in § 302.215 through § 302.219 will be employed. The DOT decisionmaker may also indicate that other non-oral evidentiary hearing procedures will be employed.

(b) *Additional evidence.* An order establishing further procedures under paragraph (a) (1), (4) or (5) of this section may provide for the filing of additional evidence.

(c) *Petitions for reconsideration.* Petitions for reconsideration of an order issued under this section will not be entertained except to the extent that the order dismissed or rejected all or part of an application. If a petition for reconsideration results in the reinstatement of all or part of an application, the deadline for final Department decision established in § 302.220 will be calculated from the date of the order reinstating the application.

**§ 302.211 Procedures in certificate cases involving initial or continuing fitness.**

(a) *Applicability.* This section applies to cases involving certificate authority under sections 41102 and 41103 of the Statute, including applications for new

authority, renewals, amendments, modifications, suspensions, and transfers of such certificates, where the issues involve a determination of the applicant's fitness to operate. Where such applications propose the operation of scheduled service in limited entry international markets, the provisions of § 302.212 also apply.

(b) *Order establishing further procedures.* Within 90 days after a complete application is filed, the DOT decisionmaker will take action as provided in § 302.210.

**§ 302.212 Procedures in certificate cases involving international routes.**

(a) *Applicability.* This section applies to cases involving certificates under section 41102 of the Statute that involve international routes, including applications to obtain, renew, amend, transfer, or remove restrictions in such certificates.

(b) *Answers to applications.* Answers shall be filed within twenty-one (21) days after the filing of the original application.

(c) *Conforming applications or motions to modify scope.* Any person may file an application for the same authority as sought in an application to obtain, renew, amend, or transfer a certificate filed under paragraph (a) of this section. Requests to modify the issues to be decided and to consolidate applications filed in other dockets shall be filed as a "motion to modify scope." Motions and applications under this section shall include economic data, other facts, and any argument in support of the person's position and must be filed within twenty-one (21) days after the original application is filed. Later-filed competing applications shall conform to the base and forecast years used by the original applicant and need not contain traffic and financial data for markets for which data have already been submitted by another person.

(d) *Answers to conforming applications or motions to modify scope.* Answers to conforming applications and motions to modify scope filed in accordance with paragraph (b) of this section shall be filed within fourteen (14) days after the filing of the conforming application or motion. Answers may argue that an application should be dismissed. Answers may also seek to consolidate an application filed in another docket if that application conforms to the scope of the proceeding proposed in the motion to modify scope and includes the information prescribed in § 302.202. Answers and applications shall not, however, propose the consideration of additional markets.

(e) *Order establishing further procedures.* Within 90 days after a complete application is filed, the DOT decisionmaker will issue an order as provided in § 302.210.

**§ 302.213 Procedures in foreign air carrier permit cases.**

(a) *Applicability.* This section applies to cases involving foreign air carrier permits under section 41302, including applications for new authority, renewals, amendments, modifications, suspensions, and transfers of such permits.

(b) *Executive departments.* In addition to the standards set forth in § 302.207(b), the views of the Department of State and the Federal Aviation Administration's evaluation of the applicant's operational fitness shall be relied upon in determining the appropriate action on applications filed under this section.

(c) *Order establishing further procedures.* As soon as possible after the date that answers are due and all information needed to reach a decision is filed, the DOT decisionmaker will issue an order as provided in § 302.210.

**§ 302.214 Oral evidentiary hearing.**

If the Department determines under § 302.210(a)(4) that an oral evidentiary hearing should be held, the application or applications will be set for oral hearing before an administrative law judge. The issues will be those set forth in the order establishing further procedures. The procedures in §§ 302.17 through 302.38 governing the conduct of oral evidentiary hearings will apply.

**§ 302.215 Briefs to the administrative law judge.**

Briefs to the administrative law judge shall be filed within the following periods, as applicable:

(a) Fourteen (14) days after the close of the oral evidentiary hearing, unless the administrative law judge determines that, under the circumstances of the case, briefs are not necessary or that the parties will require more time to prepare briefs; or

(b) Fourteen (14) days after the filing of additional evidence called for in the order establishing further procedures if no oral evidentiary hearing is called for, unless the Department determines that some other period should be allowed.

**§ 302.216 Administrative law judge's initial or recommended decision.**

(a) In a case that has been set for oral evidentiary hearing under § 302.210(a)(4), the administrative law judge shall adopt and serve an initial or recommended decision within one hundred thirty-six (136) days after the

issuance of the order establishing further procedures unless:

(1) The DOT decisionmaker, having found extraordinary circumstances, has by order delayed the initial or recommended decision by a period of not more than thirty (30) days; or

(2) An applicant has failed to meet the procedural schedule adopted by the judge or the DOT decisionmaker. In this case, the administrative law judge may, by notice, extend the due date for the issuance of an initial or recommended decision for a period not to exceed the period of delay caused by the applicant.

(b) In a case in which some of the issues have not been set for oral hearing under § 302.210(a)(4), the administrative law judge shall adopt and serve an initial or recommended decision within the time established by the DOT decisionmaker in the order establishing further procedures, except that that due date may be extended in accordance with paragraph (a)(2) of this section.

(c) The initial or recommended decision shall be issued by the administrative law judge fourteen (14) days after it is adopted and served. Unless exceptions are filed under § 302.217 or the DOT decisionmaker issues an order to review on his or her own initiative, an initial decision shall become effective as the final order of the Department the day it is issued. Where exceptions are timely filed or the DOT decisionmaker takes action to review on his or her own initiative, the effectiveness of the initial decision is stayed until further order of the DOT decisionmaker.

(d) In all other respects, the provisions of § 302.31 shall apply.

**§ 302.217 Exceptions to administrative law judge's initial or recommended decision.**

(a) Within seven (7) days after service of any initial or recommended decision of an administrative law judge, any party may file exceptions to the decision with the Department.

(b) If timely and adequate exceptions are filed, review of the initial or recommended decision is automatic.

(c) In all other respects, the provisions of § 302.34 shall apply.

**§ 302.218 Briefs to the DOT decisionmaker.**

(a) In a case in which an initial or recommended decision has been adopted and served and exceptions have been filed, any party may file a brief in support of or in opposition to any exceptions. Such briefs shall be filed within fourteen (14) days after service of the initial or recommended decision.

(b) In a case in which no exceptions have been filed, briefs shall not be filed

unless the DOT decisionmaker has taken review of the initial or recommended decision on his or her own initiative and has specifically provided for the filing of such briefs.

(c) In all other respect, the provisions of § 302.35 shall apply.

**§ 302.219 Oral argument before the DOT decisionmaker.**

If the order establishing further procedures provides for an oral argument, or if the DOT decisionmaker otherwise decides to hear oral argument, all parties will be advised of the date and hour set for that argument and the amount of time allowed each party. The provisions of § 302.36(b) shall also apply.

**§ 302.220 Final decision of the Department.**

In addition to the provisions of § 302.38, the following provisions shall apply:

(a) In the case of a certificate application that has been set for oral evidentiary hearing under § 302.210(a)(4), the Department will issue its final order within ninety (90) days after the initial or recommended decision is issued. If an application has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the date for a final decision for a period equal to the period of delay caused by the applicant.

(b) If the DOT decisionmaker does not act in the time period established in paragraph (a) of this section:

(1) In the case of an application for a certificate to engage in foreign air transportation, the recommended decision shall be transmitted to the President of the United States under 49 U.S.C. 41307; or

(2) In the case of an application not subject to review by the President of the United States, the initial decision shall become effective as the final order of the Department.

(c) In the case of a certificate application that has been processed under § 302.210(a) (1) or (5), the Department will issue its final order within one hundred eighty (180) days after the order establishing further procedures. If an applicant has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the due date for a final decision for a period equal to the period of delay caused by the applicant.

**Subpart C—Rules Applicable to Exemption Proceedings**

**§ 302.301 Applicability.**

(a) This subpart sets forth the specific rules applicable to proceedings for exemptions under sections 40109 and 41714 of the Statute, including the granting of emergency exemptions. Except as modified by this subpart, the provisions of subpart A of this part apply.

(b) Proceedings for the issuance of exemptions by regulation are subject to the provisions governing rulemaking.

**§ 302.302 Filing of applications.**

(a) Except as provided in paragraphs (b) and (c) of this section, applications for exemption shall conform to the requirements of §§ 302.3 and 302.4.

(b) Applications for exemption from section 41101 or 41301 of the Statute (including those that incorporate an exemption from section 41504) that involve ten (10) or fewer flights may be submitted to the U.S. Air Carrier Licensing Division or the Foreign Air Carrier Licensing Division (as appropriate), Office of International Aviation, on OST Form 4536. However, that form may not be used for:

(1) Applications filed under section 40109(g) of the Statute;

(2) Applications by persons who do not have either:

(i) An effective air carrier certificate or foreign air carrier permit from the Department, or

(ii) A properly completed application for such a certificate or permit, and an effective exemption from the Department for operations similar to those proposed;

(3) Successive applications for the same or similar authority that would total more than ten (10) flights; or

(4) Any other application for which the Department decides the requirements of §§ 302.3 and 302.4 are more appropriate. Upon a showing of good cause, an application may be filed by cablegram, telegram, facsimile, electronic mail (when available), or telephone; all such requests must be confirmed by written application within three (3) business days of the original request.

(c) Applications for exemption from Chapter 415 of the Statute, from tariffs (except for waivers filed under subpart Q of part 221 of this chapter), or from Department regulations concerning tariffs (part 221 of this chapter) may be submitted by letter. Three copies of such applications shall be sent to Department of Transportation Dockets. Upon a showing of good cause, the application may also be filed by

cablegram, telegram, facsimile, electronic mail (when available), or telephone; all such requests must be confirmed by written application within three (3) business days of the original request.

(d) Applications filed under paragraph (a) of this section shall be docketed and any additional documents filed shall be identified by the assigned docket number.

(e) Applications filed under paragraph (b) or (c) of this section will normally not be docketed. The Department may require such applications to be docketed if appropriate. The Department will publish a notice of such applications in its Weekly List of Applications Filed.

**§ 302.303 Contents of applications.**

(a) *Title.* An application filed under § 302.302(a) shall be entitled "Application for Exemption," and shall state if the application involves renewal and/or amendment of existing exemption authority.

(b) *Factual statement.* Each application shall state:

(1) The section(s) of the Statute or the rule, regulation, term, condition, or limitation from which the exemption is requested;

(2) The proposed effective date and duration of the exemption;

(3) A description of how the applicant proposes to exercise the authority (for example, applications for exemption from section 41101 or 41301 of the Statute should include at least: places to be served; equipment types, capacity and source; type and frequency or service; and other operations that the proposed service will connect with or support); and

(4) Any other facts the applicant relies upon to establish that the proposed service will be consistent with the public interest.

(c) *Supporting evidence.* (1) Each application shall be accompanied by:

(i) A statement of economic data, or other matters or information that the applicant desires the Department to officially notice;

(ii) Affidavits, or statements under penalty of perjury, establishing any other facts the applicant wants the Department to rely upon; and

(iii) Information showing the applicant is qualified to perform the proposed services.

(2) In addition to the information required by paragraph (c)(1) of this section, an application for exemption from section 41101 or 41301 of the Statute (except exemptions under section 40109(g)) shall state whether the authority sought is governed by a bilateral agreement or by principles of

comity and reciprocity. Applications by foreign carriers shall state whether the applicant's homeland government grants U.S. carriers authority similar to that requested. If so, the application shall state whether the fact of reciprocity has been established by the Department and cite the pertinent finding. If the fact of reciprocity has not been established by the Department, the application shall include documentation to establish such reciprocity.

(d) *Emergency cabotage.* Applications under section 40109(g) of the Statute shall, in addition to the information required in paragraphs (b) and (c) of this section, contain evidence showing that:

(1) Because of an emergency created by unusual circumstances not arising in the normal course of business, traffic in the markets requested cannot be accommodated by air carriers holding certificates under section 41102 of the Statute;

(2) All possible efforts have been made to accommodate the traffic by using the resources of such air carriers (including, for example, the use of foreign aircraft, or sections of foreign aircraft, under lease or charter to such air carriers, and the use of such air carriers' reservation systems to the extent practicable);

(3) The authority requested is necessary to avoid unreasonable hardship for the traffic in the market that cannot be accommodated by air carriers; and

(4) In any case where an inability to accommodate traffic in a market results from a labor dispute, the grant of the requested exemption will not result in an unreasonable advantage to any party in the dispute.

(e) *Renewal applications.* An application requesting renewal of an exemption that is intended to invoke the automatic extension provisions of 5 U.S.C. 558(c) shall comply with, and contain the statements and information required by part 377 of this chapter.

(f) *Record of service.* An application shall list the parties served as required by § 302.304.

#### § 302.304 Service of documents.

(a) *General requirements.* (1) An application for exemption and responsive pleadings shall be served as provided by § 302.7.

(2) Except for an application for exemption from chapter 415 of the Statute, an applicant shall serve on the persons listed in paragraph (b) of this section a notice that the application has been filed, and, upon request, shall promptly provide those persons with copies of the application and any

supporting documents. (Applicants filing OST Form 4536 may serve a copy of the form instead of a notice.) The notice must clearly state the authority sought, the due date for responsive pleadings, and that copies of the application will be supplied upon request. Responsive pleadings shall be filed in the same manner and served on the same persons as applications.

(b) *Persons to be served.* (1)

Applicants for scheduled interstate air transportation authority shall serve

(i) All U.S. air carriers (including commuter air carriers) that publish schedules in the *Official Airline Guide* or the *Air Cargo Guide* for the city-pair market(s) specified in the application,

(ii) The airport authority of each U.S. airport that the applicant proposes to serve, and

(iii) Any other person who has filed a pleading in a related proceeding under section 41102, 41305 or 40109 of the Statute.

(2) Applicants for scheduled foreign air transportation authority shall serve

(i) All U.S. air carriers (including commuter air carriers) that publish schedules in the *Official Airline Guide* or in the *Air Cargo Guide* for the country-pair market(s) specified in the application,

(ii) The airport authority of each U.S. airport that the applicant proposes to serve, and

(iii) Any other person who has filed a pleading in a related proceeding under section 41102, 41302, or 40109 of the Statute.

(3) Applicants for charter-only or nonscheduled-only authority shall serve any person who has filed a pleading in a related proceeding under section 41102, 41302, or 40109 of the Statute. However, applicants that file fewer than sixteen (16) days prior to the proposed start of service must also serve

(i) Those U.S. carriers (including commuter carriers) that are known to be operating in the general market(s) at issue and

(ii) Those persons who may be presumed to have an interest in the subject matter of the application.

(4) Applicants for slot exemptions under section 41714 of the Statute shall serve the manager of the affected airport, the mayor of the city that it serves, and the Governor of the State in which it is located.

(5) *Additional service.* The Department may, in its discretion, order additional service upon any other person.

#### § 302.305 Posting of applications.

A copy of every docketed application for exemption shall be posted in

Department of Transportation Dockets and listed in the Department's Weekly List of Applications Filed. A copy of every undocketed application shall be posted in the Licensing Division's lobby of the Office of International Aviation.

#### § 302.306 Dismissal or rejection of incomplete applications.

(a) *Dismissal or rejection.* The Department may dismiss or reject any application for exemption that does not comply with the requirements of this part.

(b) *Additional data.* The Department may require the filing of additional data with respect to any application for exemption, answer, or reply.

#### § 302.307 Answers to applications.

Within fifteen (15) days after the filing of an application for exemption, any person may file an answer in support of or in opposition to the grant of a requested exemption. Such answer shall set forth in detail the reasons why the exemption should be granted or denied. An answer shall include a statement of economic data or other matters the Department is requested to officially notice, and shall be accompanied by affidavits establishing any other facts relied upon.

#### § 302.308 Replies to answers.

Within seven (7) days after the last day for filing an answer, an applicant may file a reply to one or more answers.

#### § 302.309 Requests for hearing.

The Department will not normally conduct oral evidentiary hearings concerning applications for exemption. However, the Department may, in its discretion, order such a hearing on an application. Any applicant, or any person opposing an application, may request an oral evidentiary hearing. Such a request shall set forth in detail the reasons why the filing of affidavits or other written evidence will not permit the fair and expeditious disposition of the application. A request relying on factual assertions shall be accompanied by affidavits establishing such facts. If the Department orders an oral evidentiary hearing, the procedures in subpart A of this part shall apply.

#### § 302.310 Exemptions on the Department's initiative.

The Department may grant exemptions on its own initiative when it finds that such exemptions are required by the circumstances and consistent with the public interest.

#### § 302.311 Emergency exemptions.

(a) *Shortened procedures.* When required by the circumstances and



consistent with the public interest, the Department may take action, without notice, on exemption applications prior to the expiration of the normal period for filing answers and replies. When required in a particular proceeding, the Department may specify a lesser time for the filing of answers and replies, and notify interested persons of this time period.

(b) *Applications.* (1) Applications for emergency exemption need not conform to the requirements of this subpart or of subpart A of this part (except as provided in this section and in § 302.303(d) concerning emergency cabotage requests). However, an application for emergency exemption must normally be in writing and must state in detail the facts and evidence that support the application, the grounds for the exemption, and the public interest basis for the authority sought. In addition, the application shall state specific reasons that justify departure from the normal exemption application procedures. The application shall also identify those persons notified as required by paragraph (c) of this section. The Department may require additional information from any applicant before acting on an application.

(2) *Oral requests.* The Department will consider oral requests, including telephone requests, for emergency exemption authority under this section in circumstances that do not permit the immediate filing of a written application. All oral requests must, however, provide the information required in paragraph (b)(1) of this section, except that actual evidence in support of the application need not be tendered when the request is made. All oral requests must be confirmed by written application, together with all supporting evidence, within three (3) business days of the original request.

(c) *Notice.* Except when the Department decides that no notice need be given, applicants for emergency exemption shall notify, as appropriate, those persons specified in § 302.304(b) of this subpart. Such notification shall be made in the same manner, contain the same information, and be dispatched at the same time, as the application made to the Department.

#### **Subpart D—Rules Applicable to Enforcement Proceedings**

##### **§ 302.401 Applicability.**

This subpart contains the specific rules that apply to Department proceedings to enforce the provisions of Subtitle VII of the Statute, and the rules, regulations, orders and other

requirements issued by the Department, as well as the filing of informal and formal complaints. Except as modified by this subpart, the provisions of subpart A of this part apply.

##### **§ 302.402 Definitions.**

*Assistant General Counsel*, when used in this subpart, refers to the Assistant General Counsel for Aviation Enforcement and Proceedings.

*Complainant* refers to the person filing a complaint.

*Parties*, when used in this subpart, include the Office of the Assistant General Counsel, the respondent, the complainant, and any other person permitted to intervene under § 302.20.

*Respondent* refers to the person against whom a complaint is filed.

##### **§ 302.403 Informal complaints.**

Any person may submit in writing to the Assistant General Counsel an informal complaint with respect to anything done or omitted to be done by any person in contravention of any provision of the Statute or any requirement established thereunder. Such informal complaints need not otherwise comply with the provisions of this part. Matters so presented may, if their nature warrants, be handled by correspondence or conference with the appropriate persons. Any matter not disposed of informally may be made the subject of an enforcement proceeding pursuant to this subpart. The filing of an informal complaint shall not bar the subsequent filing of a formal complaint.

##### **§ 302.404 Formal complaints.**

(a) *Filing.* Any person may make a formal complaint to the Assistant General Counsel about any violation of the economic regulatory provisions of the Statute or of the Department's rules, regulations, orders, or other requirements. Every formal complaint shall conform to the requirements of §§ 302.3 and 302.4, concerning the form and filing of documents. The filing of a complaint shall result in the institution of an enforcement proceeding only if the Assistant General Counsel issues a notice instituting such a proceeding as to all or part of the complaint under § 302.406(a) or the Deputy General Counsel does so under § 302.406(c).

(b) *Amendment.* A formal complaint may be amended at any time before service of an answer to the complaint. After service of an answer but before institution of an enforcement proceeding, the complaint may be amended with the permission of the Assistant General Counsel. After institution of an enforcement proceeding, the complaint may be

amended only on grant of a motion filed under § 302.12.

(c) *Insufficiency of formal complaint.* In any case where the Assistant General Counsel is of the opinion that a complaint does not sufficiently set forth matters required by any applicable rule, regulation or order of the Department, or is otherwise insufficient, he or she may advise the complainant of the deficiency and require that any additional information be supplied by amendment.

(d) *Joinder of complaints or complainants.* Two or more grounds of complaints involving substantially the same purposes, subject or state of facts may be included in one complaint even though they involve more than one respondent. Two or more complainants may join in one complaint if their respective causes of complaint are against the same party or parties and involve substantially the same purposes, subject or state of facts. The Assistant General Counsel may separate or split complaints if he or she finds that the joinder of complaints, complainants, or respondents will not be conducive to the proper dispatch of the Department's business or the ends of justice.

(e) *Service.* A formal complaint, and any amendments thereto, shall be served by the person filing such documents upon each party complained of, upon the Deputy General Counsel, and upon the Assistant General Counsel.

##### **§ 302.405 Responsive documents.**

(a) *Answers.* Within fifteen (15) days after the date of service of a formal complaint, each respondent shall file an answer in conformance with and subject to the requirements of § 302.408(b). Extensions of time for filing an answer may be granted by the Assistant General Counsel for good cause shown.

(b) *Offers to satisfy.* A respondent in a formal complaint may offer to satisfy the complaint through submission of facts, offer of settlement or proposal of adjustment. Such offer shall be in writing and shall be served, within fifteen (15) days after service of the complaint, upon the same persons and in the same manner as an answer. The submittal of an offer to satisfy the complaint shall not excuse the filing of an answer.

(c) Motions to dismiss a formal complaint shall not be fileable prior to the filing of a notice instituting an enforcement proceeding with respect to such complaint or a portion thereof.

##### **§ 302.406 Procedure for responding to formal complaints.**

(a) Within a reasonable time after an answer to a formal complaint is filed,

the Assistant General Counsel shall either issue a notice instituting a formal enforcement proceeding in accordance with § 302.407, or issue an order dismissing the complaint in whole or in part, stating the reasons for such dismissal.

(b) An order dismissing a complaint issued pursuant to paragraph (a)(2) of this section shall become effective as a final order of the Department thirty (30) days after service thereof.

(c) Whenever the Assistant General Counsel has failed to act on a formal complaint within a reasonable time after an answer is due, the following motions may be addressed to the Deputy General Counsel:

(1) By the complainant to institute an enforcement proceeding by docketing the complaint upon a showing that it is in the public interest to do so; and

(2) By the respondent to dismiss the complaint upon a showing that it is in the public interest to do so.

(d) The Deputy General Counsel may grant, deny, or defer any of the motions, in whole or in part, and take appropriate action to carry out his or her decision.

#### **§ 302.407 Commencement of enforcement proceeding.**

(a) Whenever in the opinion of the Assistant General Counsel there are reasonable grounds to believe that any economic regulatory provision of the Statute, or any rule, regulation, order, limitation, condition, or other requirement established pursuant thereto, has been or is being violated, that efforts to satisfy a complaint as provided by § 302.405 have failed, and that the investigation of any or all of the alleged violations is in the public interest, the Assistant General Counsel may issue a notice instituting an enforcement proceeding before an administrative law judge.

(b) The notice shall incorporate by reference the formal complaint submitted pursuant to § 302.404 or shall be accompanied by a complaint by an attorney from the Office of the Assistant General Counsel. The notice and accompanying complaint, if any, shall be formally served upon each respondent and each complainant.

(c) The proceedings thus instituted shall be processed in regular course in accordance with this part. However, nothing in this part shall be construed to limit the authority of the Department to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedures that it may deem necessary or proper.

(d) Whenever the Assistant General Counsel seeks an assessment of civil

penalties in an enforcement proceeding, he or she shall serve on all parties to the proceeding a notice of the violations alleged and the amount of penalties for which the respondent may be liable. The notice may be included in the notice instituting a formal enforcement proceeding or in a separate document.

(e) In any proceeding in which civil penalties are sought, any decisions issued by the Department shall state the amount of any civil penalties assessed upon a finding of violation, and the time and manner in which payment shall be made to the United States.

#### **§ 302.408 Answers and replies.**

(a) Within fifteen (15) days after the date of service of a notice issued pursuant to § 302.407, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.405. Any requests for extension of time for filing of an answer to such complaint shall be filed in accordance with § 302.11.

(b) All answers shall be served in accordance with § 302.7 and shall fully and completely advise the parties and the Department as to the nature of the defense and shall admit or deny specifically and in detail each allegation of the complaint unless the respondent is without knowledge, in which case, his or her answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted. Any answer to a complaint, or response to a notice, proposing the assessment of civil penalties shall specifically present any matters that the respondent intends to rely upon in opposition to, or in mitigation of, such civil penalties.

(c) The DOT decisionmaker or the administrative law judge may, in his or her discretion, require or permit the filing of a reply in appropriate cases; otherwise, no reply may be filed.

#### **§ 302.409 Default.**

Failure of a respondent to file and serve an answer within the time and in the manner prescribed by § 302.408 shall be deemed to authorize the DOT decisionmaker or administrative law judge, as a matter of discretion, to find the facts alleged in the complaint incorporated in or accompanying the notice instituting a formal enforcement proceeding to be true and to enter such orders as may be appropriate without notice or hearing, or, as a matter of discretion, to proceed to take proof,

without notice, of the allegations or charges set forth in the complaint or order; *Provided*, that the DOT decisionmaker or administrative law judge may permit late filing of an answer for good cause shown.

#### **§ 302.410 Consolidation of proceedings.**

The DOT decisionmaker or Chief Administrative Law Judge may, upon his or her own initiative, or upon motion of any party, consolidate for hearing or for other purposes, or may contemporaneously consider, two or more enforcement proceedings that involve substantially the same parties or issues that are the same or closely related, if he or she finds that such consolidation or contemporaneous hearing will be conducive to the dispatch of business and to the ends of justice and will not unduly delay the proceedings.

#### **§ 302.411 Motions to dismiss and for summary judgment.**

(a) At any time after an answer has been filed, any party may file with the DOT decisionmaker or the administrative law judge a motion to dismiss or a motion for summary judgment, including supporting affidavits. The procedure on such motions shall be in accordance with the Federal Rules of Civil Procedure (28 U.S.C.), particularly Rules 6(d), 7(b), 12, and 56, except that answers and supporting papers to a motion to dismiss or for summary judgment shall be filed within seven (7) days after service of the motion.

(b) Parties may petition the DOT decisionmaker to review any action by the administrative law judge granting summary judgment or dismissing an enforcement proceeding under the procedure established for review of an initial decision in § 302.32.

#### **§ 302.412 Admissions as to facts and documents.**

(a) At any time after an answer has been filed, any party may file with the DOT decisionmaker or administrative law judge and serve upon the opposing side a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request or for the admission of the truth of any relevant matters of fact stated in the request with respect to such documents.

(b) Each of the matters of which an admission is requested shall be deemed admitted unless within a period designated in the request, not less than ten (10) days after service thereof, or within such further time as the DOT decisionmaker or the administrative law

judge may allow upon motion and notice, the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he or she cannot truthfully either admit or deny such matters.

(c) Service of such request and answering statement shall be made as provided in § 302.7. Any admission made by a party pursuant to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement of any order entered therein, and shall not constitute an admission by him or her for any other purpose or be used against him or her in any other proceeding or action.

**§ 302.413 Evidence of previous violations.**

Evidence of previous violations by any person or of any provision of the Statute or any requirement thereunder found by the Department or a court in any other proceeding or criminal or civil action may, if relevant and material, be admitted in any enforcement proceeding involving such person.

**§ 302.414 Prehearing conference.**

A prehearing conference may be held in an enforcement proceeding whenever the administrative law judge believes that the fair and expeditious disposition of the proceeding requires one. If a prehearing conference is held, it shall be conducted in accordance with § 302.22.

**§ 302.415 Hearing.**

After the issues have been formulated, whether by the pleadings or otherwise, the administrative law judge shall give the parties reasonable written notice of the time and place of the hearings. Except as may be modified by the provisions of this subpart, the procedures in §§ 302.17 through 302.38 governing the conduct of oral evidentiary hearings will apply.

**§ 302.416 Appearances by persons not parties.**

With consent of the administrative law judge, appearances may be entered without request for or grant of permission to intervene by interested persons who are not parties to the proceeding. Such persons may, with the consent of the administrative law judge, cross-examine a particular witness or suggest to any party or counsel therefor questions or interrogations to be asked witnesses called by any party, but may not otherwise examine witnesses and may not introduce evidence or otherwise participate in the proceeding. However, such persons may present to

both the administrative law judge and the DOT decisionmaker an oral or written statement of their position on the issues involved in the proceeding.

**§ 302.417 Settlement of proceedings.**

(a) The Deputy General Counsel and the respondent may agree to settle all or some of the issues in an enforcement proceeding at any time before a final decision is issued by the DOT decisionmaker. The Deputy General Counsel shall serve a copy of any proposed settlement on each party and shall submit the proposed settlement to the administrative law judge for approval. The submission of a proposed settlement shall not automatically delay the proceeding.

(b) Any party to the proceeding may submit written comments supporting or opposing the proposed settlement within ten (10) days from the date of service.

(c) The administrative law judge shall approve the proposed settlement, as submitted, if it appears to be in the public interest, or otherwise shall disapprove it.

(d) Information relating to settlement offers and negotiations will be withheld from public disclosure if the Deputy General Counsel determines that disclosure would interfere with the likelihood of settlement of an enforcement proceeding.

**§ 302.418 Motions for immediate suspension of operating authority pendente lite.**

All motions for the suspension of the economic operating authority of an air carrier during the pendency of proceedings to revoke such authority shall be filed with, and decided by, the DOT decisionmaker. Proceedings on the motion shall be in accordance with § 302.11. In addition, the DOT decisionmaker shall afford the parties an opportunity for oral argument on such motion.

**§ 302.419 Modification or dissolution of enforcement actions.**

Whenever any party to a proceeding, in which an order of the Department has been issued pursuant to section 46101 of the Statute or an injunction or other form of enforcement action has been issued by a court of competent jurisdiction pursuant to section 46106 of the Statute, believes that changed conditions of fact or law or the public interest require that said order or judicial action be modified or set aside, in whole or in part, such party may file with the Department a motion requesting that the Department take such administrative action or join in applying to the appropriate court for

such judicial action, as the case may be. The motion shall state the changes desired and the changed circumstances warranting such action, and shall include the materials and argument in support thereof. The motion shall be served on each party to the proceeding in which the enforcement action was taken. Within thirty (30) days after the service of such motion, any party so served may file an answer thereto. The Department shall dispose of the motion by such procedure as it deems appropriate.

**§ 302.420 Saving clause.**

Repeal, revision or amendment of any of the economic regulatory provisions of the Statute or of the Department's rules, regulations, orders, or other requirements shall not affect any pending enforcement proceeding or any enforcement proceeding initiated thereafter with respect to causes arising or acts committed prior to said repeal, revision or amendment, unless the act of repeal, revision or amendment specifically so provides.

**Subpart E—Rules Applicable to Proceedings With Respect to Rates, Fares and Charges for Foreign Air Transportation**

**§ 302.501 Applicability.**

This subpart sets forth the special rules applicable to proceedings with respect to rates, fares and charges in foreign air transportation under Chapter 415 of the Statute. Except as modified by this subpart, the provisions of subpart A apply.

**§ 302.502 Institution of proceedings.**

A proceeding to determine the lawfulness of rates, fares, or charges for the foreign air transportation of persons or property by aircraft, or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares or charges, may be instituted by the filing of a petition or complaint by any person, or by the issuance of an order by the Department.

**§ 302.503 Contents and service of petition or complaint.**

(a) If a petition or complaint is filed it shall state the reasons why the rates, fares, or charges, or the classification, rule, regulation, or practice complained of are unlawful and shall support such reasons with a full factual analysis.

(b) A petition or complaint shall be served by the petitioner or complainant upon the air carrier against whose tariff provision the petition or complaint is filed.

(c) Answers to complaints, other than those filed under § 302.506, shall be

filed within seven (7) working days after the complaint is filed.

**§ 302.504 Dismissal of petition or complaint.**

If the Department is of the opinion that a petition or complaint does not state facts that warrant an investigation or action on its part, it may dismiss such petition or complaint without hearing.

**§ 302.505 Order of investigation.**

The Department, on its own initiative, or if it is of the opinion that the facts stated in a petition or complaint warrant it, may issue an order instituting an investigation of the lawfulness of any present or proposed rates, fares, or charges for the foreign air transportation of persons or property by aircraft or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares, or charges, and may assign the proceeding for hearing before an administrative law judge. If a hearing is held, except as modified by this subpart, the provisions of §§ 302.17 through 302.38 of this part shall apply.

**§ 302.506 Complaints requesting suspension of tariffs; answers to such complaints.**

(a) Formal complaints seeking suspension of tariffs pursuant to section 41509 of the Statute shall fully identify the tariff and include reference to the issued or posting date, to the effective date, to the name of the publishing carrier or agent, to the Department number, and to specific items or particular provisions protested or complained against. The complaint should indicate in what respect the tariff is considered to be unlawful, and state what complainant suggests by way of substitution.

(b) A complaint requesting suspension of a tariff ordinarily will not be considered unless made in conformity with this section and filed no more than ten (10) days after the issued date contained within such tariff.

(c) A complaint requesting suspension, pursuant to section 41509 of the Statute, of an existing tariff for foreign air transportation may be filed at any time. However, such a complaint must be accompanied by a statement setting forth compelling reasons for not having requested suspension within the time limitations provided in paragraph (b) of this section.

(d) In an emergency satisfactorily shown by the complainant, and within the time limits provided in this section, a complaint may be sent by facsimile, telegram, or electronic mail (when available) to the Department and to the carrier against whose tariff provision the complaint is made. Such complaint

shall state the grounds relied upon, and must be confirmed in writing within three (3) business days and filed and served in accordance with this part.

(e) Answers to complaints shall be filed within six (6) working days after the complaint is filed.

**§ 302.507 Computing time for filing complaints.**

In computing the time for filing formal complaints pursuant to § 302.506, with respect to tariffs that do not contain a posting date, the first day preceding the effective date of the tariff shall be the first day counted, and the last day so counted shall be the last day for filing unless such day is a Saturday, Sunday, or legal holiday for the Department, in which event the period for filing shall be extended to the next successive day that is not a Saturday, Sunday, or holiday. The computation of the time for filing complaints as to tariffs containing a posting date shall be governed by § 302.8.

**Subpart F—Rules Applicable to Proceedings Concerning Airport Fees**

**§ 302.601 Applicability.**

(a) This subpart contains the specific rules that apply to a complaint filed by one or more air carriers or foreign air carriers, pursuant to 49 U.S.C. 47129(a), for a determination of the reasonableness of a fee increase or a newly established fee for aeronautical uses that is imposed upon the air carrier or foreign air carrier by the owner or operator of an airport. This subpart also applies to requests by the owner or operator of an airport for such a determination. An airport owner or operator has imposed a fee on an air carrier or foreign air carrier when it has taken all steps necessary under its procedures to establish the fee, whether or not the fee is being collected or carriers are currently required to pay it.

(b) This subpart does not apply to:

(1) A fee imposed pursuant to a written agreement with air carriers or foreign air carriers using the facilities of an airport;

(2) A fee imposed pursuant to a financing agreement or covenant entered into prior to August 23, 1994 or

(3) Any other existing fee not in dispute as of August 23, 1994.

**§ 302.603 Complaint by an air carrier or foreign air carrier; request for determination by an airport owner or operator.**

(a) Any air carrier or foreign air carrier may file a complaint with the Secretary for a determination as to the reasonableness of any fee imposed on the carrier by the owner or operator of an airport. Any airport owner or

operator may also request such a determination with respect to a fee it has imposed on one or more air carriers. The complaint or request for determination shall conform to the requirements of this subpart and §§ 302.3 and § 302.4 concerning the form and filing of documents.

(b) If an air carrier or foreign air carrier has previously filed a complaint with respect to the same airport fee or fees, any complaint by another carrier and any airport request for determination shall be filed no later than seven (7) calendar days following the initial complaint. In addition, all complaints or requests for determination must be filed on or before the sixtieth (60th) day after the carrier receives written notice of the imposition of the new fee or the imposition of the increase in the fee.

(c) To ensure an orderly disposition of the matter, all complaints and any request for determination filed with respect to the same airport fee or fees will be considered in a consolidated proceeding, as provided in §§ 302.611 and 302.613.

**§ 302.605 Contents of complaint or request for determination.**

(a) The complaint or request for determination shall set forth the entire grounds for requesting a determination of the reasonableness of the airport fee. The complaint or request shall include a copy of the airport owner or operator's written notice to the carrier of the imposition of the fee, a statement of position with a brief, and all supporting testimony and exhibits available to the carrier on which the filing party intends to rely. In lieu of submitting duplicative exhibits or testimony, the filing party may incorporate by reference testimony and exhibits already filed in the same proceeding.

(b) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the Federal Register: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M-50), and one copy to the Chief, Economic and Financial Analysis Division (X-55),

of the Office of Aviation Analysis. Filers should ensure that files on the diskettes are unalterably locked.

(c) When a carrier files a complaint, it must also submit the following certifications:

(1) The carrier has served the complaint, brief, and all supporting testimony and exhibits on the airport owner or operator and all other air carriers and foreign air carriers serving the airport by hand, by electronic transmission, or by overnight express delivery. (Unless an air carrier or foreign air carrier has informed the complaining carrier that a different person should be served, service may be made on the person responsible for communicating with the airport on behalf of the carrier about airport fees.);

(2) The parties served have received the complaint, brief, and all supporting testimony and exhibits or will receive them no later than the date the complaint is filed;

(3) The carrier has previously attempted to resolve the dispute directly with the airport owner or operator;

(4) When there is information on which the carrier intends to rely that is not included with the brief, exhibits, or testimony, the information has been omitted because the airport owner or operator has not made that information available to the carrier. The certification shall specify the date and form of the carrier's request for information from the airport owner or operator; and

(5) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

(d) When an airport owner or operator files a request for determination, it must also submit the following certifications:

(1) The airport owner or operator has served the request, brief, and all supporting testimony and exhibits on all air carriers and foreign air carriers serving the airport by hand, by electronic transmission, or by overnight express delivery. (Unless the air carrier or foreign air carrier has informed the airport owner or operator that a different person should be served, service may be made on the person responsible for communicating with the airport on behalf of the carrier about airport fees.);

(2) The carriers served have received the request, brief, and all supporting testimony and exhibits or will receive them no later than the date the request is filed;

(3) The airport owner or operator has previously attempted to resolve the dispute directly with the carriers; and

(4) Any submission on computer diskette is a true copy of the data file

used to prepare the printed versions of the exhibits or briefs.

**§ 302.607 Answers to a complaint or request for determination.**

(a)(1) When an air carrier or foreign air carrier files a complaint under this subpart, the owner or operator of an airport and any other air carrier or foreign air carrier serving the airport may file an answer to the complaint as provided in paragraphs (b) and (c) of this section.

(2) When the owner or operator of an airport files a request for determination of the reasonableness of a fee it has imposed, any air carrier or foreign air carrier serving the airport may file an answer to the request.

(b) The answer to a complaint or request for determination shall set forth the answering party's entire response. When one or more additional complaints or a request for determination has been filed pursuant to § 302.603(b) with respect to the same airport's fee or fees, the answer shall set forth the answering party's entire response to all complaints and any such request for determination. The answer shall include a statement of position with a brief and any supporting testimony and exhibits on which the answering party intends to rely. In lieu of submitting duplicative exhibits or testimony, the answering party may incorporate by reference testimony and exhibits already filed in the same proceeding.

(c) Answers to a complaint shall be filed no later than fourteen (14) calendar days after the filing date of the first complaint with respect to the fee or fees in dispute at a particular airport. Answers to a request for determination shall be filed no later than fourteen (14) calendar days after the filing date of the request.

(d) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the Federal Register: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M-50), and one copy to the Chief, Economic and Financial Analysis Division (X-55), of the Office of Aviation Analysis. Filers

should ensure that files on the diskettes are unalterably locked.

(e) The answering party must also submit the following certifications:

(1) The answering party has served the answer, brief, and all supporting testimony and exhibits by hand, by electronic transmission, or by overnight express delivery on the carrier filing the complaint or the airport owner or operator requesting the determination;

(2) The parties served have received the answer and exhibits or will receive them no later than the filing date of the answer; and

(3) Any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

**§ 302.609 Replies.**

(a) The carrier submitting a complaint may file a reply to any or all of the answers to the complaint. The airport owner or operator submitting a request for determination may file a reply to any or all of the answers to the request for determination.

(b) The reply shall be limited to new matters raised in the answers. It shall constitute the replying party's entire response to the answers. It shall be in the form of a reply brief and may include supporting testimony and exhibits responsive to new matters raised in the answers. In lieu of submitting duplicative exhibits or testimony, the replying party may incorporate by reference testimony and exhibits already filed in the same proceeding.

(c) The reply shall be filed no later than two (2) calendar days after answers are filed.

(d) All exhibits and briefs prepared on electronic spreadsheet or word processing programs should be accompanied by standard-format computer diskettes containing those submissions. Word processing and spreadsheets files must be readable by current versions of one or more of the following programs, or in such other format as may be specified by notice in the Federal Register: Microsoft Word, Word Perfect, Ami Pro, Microsoft Excel, Lotus, Quattro Pro, or ASCII tab-delineated files. Parties should submit one copy of each diskette to the docket section, one copy to the office of the Chief Administrative Law Judge (M-50), and one copy to the Chief, Economic and Financial Analysis Division, (X-55) of the Office of Aviation Analysis. Filers should ensure that files on the diskettes are unalterably locked.

(e) The carrier or airport owner or operator submitting the reply must certify that it has served the reply and

all supporting testimony and exhibits on the party or parties submitting the answer to which the reply is directed and that any submission on computer diskette is a true copy of the data file used to prepare the printed versions of the exhibits or briefs.

**§ 302.611 Review of complaints.**

(a) Within 30 days after a complaint is filed under this subpart, the Secretary will determine whether the complaint meets the procedural requirements of this subpart and whether a significant dispute exists, and take appropriate action pursuant to paragraph (b), (c), or (d) of this section.

(b) If the Secretary determines that a significant dispute exists, he or she will issue an instituting order assigning the complaint for hearing before an administrative law judge. The instituting order will—

(1) Establish the scope of the issues to be considered and the procedures to be employed;

(2) Indicate the parties to participate in the hearing;

(3) Consolidate into a single proceeding all complaints and any request for determination with respect to the fee or fees in dispute; and

(4) Include any special provisions for exchange or disclosure of information by the parties.

(c) The Secretary will dismiss any complaint if he or she finds that no significant dispute exists. The order dismissing the complaint will contain a concise explanation of the reasons for the determination that the dispute is not significant.

(d) If the Secretary determines that the complaint does not meet the procedural requirements of this subpart, the complaint will be dismissed without prejudice to filing a new complaint. The order of the Secretary will set forth the terms and conditions under which a revised complaint may be filed.

**§ 302.613 Review of requests for determination.**

(a) Except as provided in paragraph (e) of this section, within 30 days after an airport owner or operator files a request for determination of the reasonableness of a fee under this subpart, the Secretary will determine whether the request meets the procedural requirements of this subpart and whether a significant dispute exists.

(b) If the Secretary determines that a significant dispute exists, he or she will issue an instituting order assigning the request for hearing before an administrative law judge. The instituting order will establish the scope of the issues to be considered and the

procedures to be employed and will indicate the parties to participate in the hearing. The instituting order will consolidate into a single proceeding all complaints and any request for determination with respect to the fee or fees in dispute.

(c) If the Secretary finds that the request for determination presents no significant dispute, the Secretary will either issue a final order as provided in § 302.621 or set forth the schedule for any additional procedures required to complete the proceeding.

(d) If the Secretary determines that the request does not meet the procedural requirements of this subpart, the request for determination will be dismissed without prejudice to filing a new request. The order of the Secretary will set forth the terms and conditions under which a revised request may be filed.

(e) When both a complaint and a request for determination have been filed with respect to the same airport fee or fees, the Secretary will issue a determination as to whether the complaint, the request, or both meet the procedural requirements of this subpart and whether a significant dispute exists within 30 days after the complaint is filed.

**§ 302.615 Decision by administrative law judge.**

The administrative law judge shall issue a decision recommending a disposition of a complaint or request for determination within 60 days after the date of the instituting order, unless a shorter period is specified by the Secretary.

**§ 302.617 Petitions for discretionary review.**

(a) Within five (5) calendar days after service of a decision by an administrative law judge, any party may file with the Secretary a petition for discretionary review of the administrative law judge's decision.

(b) Petitions for discretionary review shall comply with § 302.32(a). The petitioner must also submit the following certifications:

(1) The petitioner has served the petition by hand, by electronic transmission, or by overnight express delivery on all parties to the proceeding; and

(2) The parties served have received the petition or will receive it no later than the date the petition is filed.

(c) Any party may file an answer in support of or in opposition to any petition for discretionary review. The answer shall be filed within four (4) calendar days after service of the petition for discretionary review. The

answer shall comply with the page limits specified in § 302.32(b).

**§ 302.619 Completion of proceedings.**

(a) When a complaint with respect to an airport fee or fees has been filed under this subpart and has not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the complaint is filed.

(b) When a request for determination has been filed under this subpart and has not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the date the request for determination is filed.

(c) When both a complaint and a request for determination have been filed with respect to the same airport fee or fees and have not been dismissed, the Secretary will issue a determination as to whether the fee is reasonable within 120 days after the complaint is filed.

**§ 302.621 Final order.**

(a) When a complaint or request for determination stands submitted to the Secretary for final decision on the merits, he or she may dispose of the issues presented by entering an appropriate order, which will include a statement of the reasons for his or her findings and conclusions. Such an order shall be deemed a final order of the Secretary.

(b) The final order of the Secretary shall include, where necessary, directions regarding an appropriate refund or credit of the fee increase or newly established fee which is the subject of the complaint or request for determination.

(c) If the Secretary has not issued a final order within 120 days after the filing of a complaint by an air carrier or foreign air carrier, the decision of the administrative law judge shall be deemed to be the final order of the Secretary.

**Subpart G—Rules Applicable to Mail Rate Proceedings and Contracts**

**§ 302.701 Applicability.**

This subpart sets forth the special rules applicable to proceedings for the establishment of mail rates by the Department for foreign air transportation and air transportation between points in Alaska, and certain contractual arrangements between the U.S. Postal Service and certificated air carriers for the carriage of mail in foreign air transportation entered into pursuant to 39 U.S.C. 5402(a), 84 Stat. 772. Such contracts must be for the transportation of at least 750 pounds of

mail per flight, and no more than five (5) percent, based on weight, of the international mail transported under any such contract may consist of letter mail.

#### Final Mail Rate Proceedings

##### § 302.702 Institution of proceedings.

(a) Proceedings for the determination of rates of compensation for the transportation of mail may be commenced by the filing of a petition by an air carrier whose rate is to be fixed, or the U.S. Postal Service, or upon the issuance of an order by the DOT decisionmaker.

(b) The petition shall set forth the rate or rates sought to be established, a statement that they are believed to be fair and reasonable, the reasons supporting the request for a change in rates, and a detailed economic justification sufficient to establish the reasonableness of the rate or rates proposed.

(c) In any case where an air carrier is operating under a final mail rate uniformly applicable to an entire rate-making unit as established by the DOT decisionmaker, a petition must clearly and unequivocally challenge the rate for such entire rate-making unit and not only a part of such unit.

(d) All petitions, amended petitions, and documents relating thereto shall be served upon the U.S. Postal Service by sending a copy to the Assistant General Counsel, Transportation Division, Washington, DC 20260-1124, by registered or certified mail, postpaid, prior to the filing thereof with the Department. Proof of service on the U.S. Postal Service shall consist of a statement in the document that the person filing it has served a copy as required by this section.

(e) Answers to petitions shall be filed within twenty (20) days after service of the petition.

##### § 302.703 Order to show cause or instituting a hearing.

Whether the proceeding is commenced by the filing of a petition or upon the Department's own initiative, the DOT decisionmaker may issue an order directing the respondent to show cause why it should not adopt such findings and conclusions and such final rates as may be specified in the order to show cause, or may issue an order setting the matter for hearing before an administrative law judge.

##### § 302.704 Objections and answers to order to show cause.

(a) Where an order to show cause is issued, any person having objections to the rates specified in such order shall

file with the DOT decisionmaker a notice of objection within ten (10) days after the date of service of such order or within such other period as the order may specify.

(b) If such notice is properly filed, written answers and any supporting documents shall be filed within thirty (30) days after the service of the order to show cause, or within such other period as the order may specify. An answer to an order to show cause shall contain specific objections, and shall set forth the findings and conclusions, the rates, and the supporting exhibits that would be substituted for the corresponding items in the findings and conclusions of the show cause order, if such objections were found valid.

(c) A notice or answer filed by a person who is neither a party nor a person ultimately permitted to intervene in an oral evidentiary hearing if such proceeding is established shall be treated as a memorandum filed under § 302.706.

##### § 302.705 Further procedures.

(a) If no notice, or, if after notice, no answer is filed within the designated time, or if a timely filed answer raises no material issue of fact, the DOT decisionmaker may, upon the basis of all of the documents filed in the proceeding, enter a final order fixing the rate or rates.

(b) If an answer raising a material issue of fact is filed within the time designated in the Department's order, the DOT decisionmaker may then issue an order authorizing additional pleadings and/or establishing further procedural steps, including setting the matter for oral evidentiary hearing before an administrative law judge.

##### § 302.706 Hearing.

(a) *Issues.* If a hearing is ordered under § 302.705, the issues at such hearing shall be formulated in accordance with the instituting order, except that at a prehearing conference, the administrative law judge may permit the parties to raise such additional issues as he or she deems necessary to make a full determination of a fair and reasonable rate.

(b) *Parties and persons other than parties.* (1) The parties to the proceeding shall be the air carrier or carriers for whom rates are to be fixed, the U.S. Postal Service, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings and any other person whom the DOT decisionmaker or administrative law judge permits to intervene in accordance with § 302.20.

(2) In addition to participation in hearings in accordance with § 302.19, persons other than parties may, within the time fixed for filing notice of objection to an order to show cause as provided in § 302.704, submit a memorandum of opposition to, or in support of, the position taken in the petition or order. Such memorandum shall not be received as evidence in the proceeding.

(c) *Evidence.* All direct evidence shall be in writing and shall be filed in exhibit form within the times specified by the DOT decisionmaker or by the administrative law judge.

(d) Except as modified by this subpart, the provisions of §§ 302.17 through 302.38 of this part shall apply.

#### Provision for Temporary Rate

##### § 302.707 Procedure for fixing temporary mail rates.

At any time during the pendency of a proceeding for the determination of final mail rates, the DOT decisionmaker, upon his or her own initiative, or on petition by the air carrier whose rates are in issue or by the U.S. Postal Service, may fix temporary rates of compensation for the transportation of mail subject to downward or upward adjustment upon the determination of final mail rates.

#### Informal Mail Rate Conference Procedure

##### § 302.708 Invocation of procedure.

(a) Conferences between DOT employees, representatives of air carriers, the U.S. Postal Service and other interested persons may be called by DOT employees for the purpose of considering and clarifying issues and factual material in pending proceedings for the establishment of rates for the transportation of mail.

(b) At the commencement of an informal mail rate conference pursuant to this section, the authorized DOT employees conducting such conference shall issue to each person present at such conference a written statement to the effect that such conference is being conducted pursuant to this section and stating the time of commencement of such conference; and at the termination of such conference the DOT employees conducting such conference shall note in writing on such statement the time of termination of such conference.

##### § 302.709 Scope of conferences.

The mail rate conferences shall be limited to the discussion of, and possible agreement on, particular issues and related factual material in accordance with sound rate-making

principles. The duties and powers of DOT employees in rate conferences essentially will not be different, therefore, from the duties and powers they have in the processing of rate cases not involving a rate conference. The employees' function in both instances is to present clearly to the DOT decisionmaker the issues and the related material facts, together with recommendations. The DOT decisionmaker will make an independent determination of the soundness of the employees' analyses and recommendations.

**§ 302.710 Participants in conferences.**

The persons entitled to be present in mail rate conferences will be the representatives of the carrier whose rates are in issue, the staff of the U.S. Postal Service, and the authorized DOT employees. No other person will attend unless the DOT employees deem his or her presence necessary in the interest of one or more purposes to be accomplished, and in such case his or her participation will be limited to such specific purposes. No person, however, shall have the duty to attend merely by reason of invitation by the authorized DOT employees.

**§ 302.711 Conditions upon participation.**

(a) *Nondisclosure of information.* As a condition to participation, every participant, during the period of the conference and for ninety (90) days after its termination, or until the Department takes public action with respect to the facts and issues covered in the conference, whichever is earlier:

(1) Shall, except for necessary disclosures in the course of employment in connection with conference business, hold the information obtained in conference regarding the future course of action or position of the Department or its employees with respect to the facts or issues discussed at the conference in absolute confidence and trust;

(2) Shall not deal, directly or indirectly, for the account of himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the air carrier involved in the rate conference except that under exceptional circumstances special permission may be obtained in advance from the DOT decisionmaker; and

(3) Shall adopt effective controls for the confidential handling of such information and shall instruct personnel under his or her supervision, who by reason of their employment come into possession of information obtained at the conference, that such information is

confidential and must not be disclosed to anyone except to the extent absolutely necessary in the course of employment, and must not be misused.

(b) *Signed statement required.* Every representative of an air carrier actually present at any conference shall sign a statement that he or she has read this entire section and promises to abide by it and advise any other participant to whom he or she discloses any confidential information of the restrictions imposed in paragraph (a) of this section. Every representative of the U.S. Postal Service actually present at any conference shall, on his or her own behalf, sign a statement to the same effect.

(c) *Presumption of having conference information.* A director of any air carrier that has had a representative at the conference, who deals either directly or indirectly for himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the air carrier involved in the conference, during the restricted period set forth in paragraph (a) of this section, shall be presumed to have come into possession of information obtained at the conference knowing that such information was subject to the restrictions imposed in paragraph (a) of this section; but such presumption can be rebutted.

(d) *Compliance report required.* Within ten (10) days after the expiration of the time specified for keeping conference matters confidential, every participant, as defined in paragraph (e) of this section, shall file a verified compliance report with Department of Transportation Dockets stating that he or she has complied in every respect with the conditions of this section, or if he or she has not so complied, stating in detail in what respects he or she has failed to comply.

(e)(1) *Persons subject to the provisions of this section.* For the purposes of this section, participants shall include

(i) Any representative of any air carrier and any representative of the U.S. Postal Service actually present at the conference;

(ii) The directors and the officers of any air carrier that had a representative at the conference;

(iii) The members of any firm of attorneys or consultants that had a representative at the conference; and

(iv) The members of the U.S. Postal Service staff who come into possession of information obtained at the conference, knowing that such information is subject to the restrictions imposed in this section.

(2) Restrictions on disclosure of confidential information and dealing in

air carrier securities are imposed upon the DOT employees pursuant to applicable law.

**§ 302.712 Information to be requested from an air carrier.**

When an air carrier is requested to submit detailed estimates as to traffic, revenues and expenses by appropriate periods and the investment that will be required to perform the operations for a future period, full and adequate support shall be presented for all estimates, particularly where such estimates deviate materially from the air carrier's experience. With respect to the rate for a past period, essentially the same procedure shall be followed. Other information or data likewise may be requested by the DOT employees. All data submitted by the air carrier shall be certified by a responsible officer.

**§ 302.713 DOT analysis of data for submission of answers thereto.**

After a careful analysis of these data, the DOT employees will, in most cases, send the air carrier a statement of exceptions showing areas of differences. Where practicable, the air carrier may submit an answer to these exceptions. Conferences will then be scheduled to resolve the issues and facts in accordance with sound ratemaking principles.

**§ 302.714 Availability of data to the U.S. Postal Service.**

The representatives of the U.S. Postal Service shall have access to all conference data and, insofar as practicable, shall be furnished copies of all pertinent data prepared by the DOT employees and the air carrier, and a reasonable time shall be allowed to review the facts and issues and to make any presentation deemed necessary; *Provided*, That in cases other than those involving an issue as to the service mail rates payable by the U.S. Postal Service pursuant to section 41901 of the Statute, representatives of the U.S. Postal Service shall be furnished with copies of data under this provision only upon their written request.

**§ 302.715 Post-conference procedure.**

No briefs, argument, or any formal steps will be entertained by the DOT decisionmaker after the rate conferences. The form, content and time of the staff's presentation to the DOT decisionmaker are entirely matters of internal procedure. Any party to the mail rate proceeding may, through an authorized DOT employee, request the opportunity to submit a written or oral statement to the DOT decisionmaker on any unresolved issue. The DOT decisionmaker will grant such requests



whenever he or she deems such action desirable in the interest of further clarification and understanding of the issues. The granting of an opportunity for such further presentation shall not, however, impair the rights that any party might otherwise have under the Statute and this part.

**§ 302.716 Effect of conference agreements.**

No agreements or understandings reached in rate conferences as to facts or issues shall in any respect be binding on the Department or any participant. Any party to mail rate proceedings will have the same rights to file an answer and take other procedural steps as though no rate conference had been held. The fact, however, that a rate conference was held and certain agreements or understandings may have been reached on certain facts and issues renders it proper to provide that, upon the filing of an answer by any party to the rate proceeding, all issues going to the establishment of a rate shall be open, except insofar as limited in prehearing conference in accordance with § 302.22.

**§ 302.717 Waiver of participant conditions.**

After the termination of a mail rate conference conducted under the provisions of this subpart, the air carrier whose rates were in issue may petition the DOT decisionmaker for a release from the obligations imposed upon it and all other persons by § 302.711. The DOT decisionmaker will grant such petition only after a detailed and convincing showing is made in the petition and supporting exhibits and documents that there is no reasonable possibility that any of the abuses sought to be prevented will occur or that the Department's processes will in any way be prejudiced. There will be no hearing or oral argument on the petition and the DOT decisionmaker will grant or deny the request without being required to assign reasons therefor.

Processing Contracts for the Carriage of Mail in Foreign Air Transportation

**§ 302.718 Filing.**

Any air carrier that is a party to a contract to which this subpart is applicable shall file three (3) copies of the contract in the Office of Aviation Analysis, X-50, Department of Transportation, Washington, DC 20590, not later than ninety (90) days before the effective date of the contract. A copy of such contract shall be served upon the persons specified in § 302.720 and the certificate of service shall specify the persons upon whom service has been made. One copy of each contract filed shall bear the certification of the secretary or other duly authorized officer of the filing air carrier to the effect that such copy is a true and complete copy of the original written instrument executed by the parties.

**§ 302.719 Explanation and data supporting the contract.**

Each contract filed pursuant to this subpart shall be accompanied by economic data and such other information in support of the contract upon which the filing air carrier intends that the Department rely, including, in cases where pertinent, estimates of the annual volume of contract mail (weight and ton-miles) under the proposed contract, the nature of such mail (letter mail, parcel post, third class, etc.), together with a statement as to the extent to which this traffic is new or diverted from existing classes of air and surface mail services and the priority assigned to this class of mail.

**§ 302.720 Service.**

A copy of each contract filed pursuant to § 302.718, and a copy of all material and data filed pursuant to § 302.719, shall be served upon each of the following persons:

(a) Each certificated and commuter (as defined in § 298.2 of this chapter) air carrier, other than the contracting carrier, that is actually providing scheduled mail services between any pair of points between which mail is to

be transported pursuant to the contract; and

(b) The Assistant General Counsel, Transportation Division, U.S. Postal Service, Washington, DC 20260-1124.

**§ 302.721 Complaints.**

Within fifteen (15) days of the filing of a contract, any interested person may file with the Office of Aviation Analysis, X-50, Department of Transportation, Washington, DC 20590, a complaint with respect to the contract setting forth the basis for such complaint and all pertinent information in support of same. A copy of the complaint shall be served upon the air carrier filing the contract and upon each of the persons served with such contract pursuant to § 302.720.

**§ 302.722 Answers to complaints.**

Answers to the complaint may be filed within ten (10) days of the filing of the complaint, with service being made as provided in § 302.720.

**§ 302.723 Further procedures.**

(a) In any case where a complaint is filed, the DOT decisionmaker shall issue an order dismissing the complaint, disapproving the contract, or taking such other action as may be appropriate. Any such order shall be issued not later than ten (10) days prior to the effective date of the contract.

(b) In cases where no complaint is filed, the DOT decisionmaker may issue a letter of notification to all persons upon whom the contract was served indicating that the Department does not intend to disapprove the contract.

(c) Unless the DOT decisionmaker disapproves the contract not later than ten (10) days prior to its effective date, the contract automatically becomes effective.

**§ 302.724 Petitions for reconsideration.**

Except in the case of a Department determination to disapprove a contract, no petitions for reconsideration of any Department determination pursuant to this subpart shall be entertained.

APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE

Subject	Current rule	Proposed rule
ADMINISTRATIVE LAW JUDGES:		
Actions after hearings .....	§ 302.27(b)	§ 302.31(a)
Actions during prehearing conference .....	§ 302.23(a)	§ 302.22(b)
Arguments before .....	§ 302.25	§ 302.29
Briefs .....	§ 302.26	§ 302.30
Licensing cases .....	§ 302.1752	§ 302.215
Certification for decision .....	§ 302.22(d)	§ 302.31(b)
Definition .....	§ 302.22(a)	§ 302.2
Delegation of authority .....	§ 302.27(a)	§ 307.17(a)(3)
Exceptions .....	§ 302.27(a)	§ 307.17(a)(3)
Interlocutory matters .....	§ 302.27(a)	§ 307.17(a)(3)

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Disqualification .....	§ 302.22(b)	§ 302.17(b)
Exceptions .....	§ 302.24(e)	§ 302.24(i)
Licensing cases .....	§ 302.1754	§ 302.217
Hearings before .....	§ 302.24	§ 302.23
Initial decision (see Initial Decision)		
Powers .....	§ 302.22(c)	§ 302.17(a)
Prehearing conference report .....	§ 302.23(b)	§ 302.22(c)
Recommended decision (see Recommended Decision)		
Termination of authority .....	§ 302.22(c)	§ 307.17(a)(4)
ADMISSIONS:		
Enforcement proceeding .....	§ 302.212	§ 302.412
Limitation on use .....	§ 302.212	§ 302.412(c)
AIRPORT FEES:		
Administrative law judge decision .....	§ 302.615	§ 302.615
Complaints by U.S. or foreign air carriers .....	§ 302.603(a)	§ 302.603(a)
Answers .....	§ 302.607	§ 302.607
Additional complaints .....	§ 302.603(b)	§ 302.603(b)
Contents .....	§ 302.605	§ 302.605
Format of exhibits and briefs .....	§ 302.605(b)	§ 302.605(b)
Service .....	§ 302.605(c)(1)	§ 302.605(c)(1)
Replies .....	§ 302.609	§ 302.609
Consolidation of proceedings .....	§ 302.603(c)	§ 302.603(c)
Dismissal .....	§ 302.611 (c), (d)	§ 302.611 (c), (d)
Final order .....	§ 302.621	§ 302.621
Timing .....	§ 302.619	§ 302.619
Instituting order .....	§ 302.611(b)	§ 302.611(b)
Petitions for discretionary review .....	§ 302.617	§ 302.617
Answers .....	§ 302.617(c)	§ 302.617(c)
Request for determination by airport owner/operator .....	§ 302.603(a)	§ 302.603(a)
Answers .....	§ 302.607	§ 302.607
Contents .....	§ 302.605	§ 302.605
Format of exhibits and briefs .....	§ 302.605(b)	§ 302.605(b)
Service .....	§ 302.605(d)(1)	§ 302.605(d)(1)
Replies .....	§ 302.609	§ 302.609
Review procedures .....	§ 302.611	§ 302.611
Significant dispute determination .....	§ 302.611(b)	§ 302.611(b)
AMENDMENTS OF DOCUMENTS (see Documents)		
ANSWERS (see also Replies):		
Airport fees .....	§ 302.607	§ 302.607
Certificate applications:		
Initial fitness .....	§ 302.1730(c)	§ 302.204
International route awards:		
Conforming applications .....	§ 302.1720(d)	§ 302.212(d)
Motions to modify scope .....	§ 302.1720(e)	§ 302.212(d)
New authority .....	§ 302.1720(d)	§ 302.212(b)
Complaints:		
Air mail contracts .....	§ 302.1506	§ 302.722
Airport fees .....	§ 302.607	§ 302.607
Enforcement matters .....	§ 302.204(b)	§ 302.405
Suspension of tariffs .....	§ 302.505	§ 302.506
Consolidation of proceedings .....	§ 302.12(c)	§ 302.13(c)
Enforcement proceeding, notice instituting .....	§ 302.207	§ 302.408
Exemption applications .....	§ 302.406	§ 302.307
Foreign air carrier permit applications .....	§ 302.1740(c)	§ 302.204
Generally .....	§ 302.6	§ 302.6
Mail rate proceedings show cause orders .....	§ 302.305	§ 302.704
Motions, generally .....	§ 302.18(c)	§ 302.11(c)
Motions to consolidate .....	§ 302.12(c)	§ 302.13(c)
Motions to dismiss and for summary judgment .....	§ 302.212	§ 302.411
Motions for modification/dissolution of enforcement proceedings .....	§ 302.218	§ 302.419
Petitions for discretionary review .....	§ 302.28(b)	§ 302.32(b)
Petitions for final mail rates .....	§ 302.303	§ 302.702(e)
Petitions for intervention .....	§ 302.15(c)(3)	§ 302.20(c)(3)
Petitions for reconsideration .....	§ 302.37a	§ 302.14
Requests for determination of airport fees .....	§ 302.607	§ 302.607
APPEALS:		
Administrative Law Judge's ruling .....	§ 302.18(f)	§ 302.11(h)
Enforcement complaints .....	§ 302.206(b)	§ 302.406(c)
APPEARANCES:		
Generally .....	§ 302.11	§ 302.21
Application for admission to practice unnecessary .....	§ 302.11(a)	§ 302.21(b)
Copy of transcript .....	§ 302.11(c)	§ 302.27(b)

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Retention of counsel .....	§ 302.11(b)	§ 302.27(a)
Enforcement proceedings .....	§ 302.214	§ 302.416
APPLICATIONS:		
Admission to practice unnecessary .....	§ 302.11(a)	§ 302.21(b)
Suspension from practicing before DOT .....	§ 302.11(a)	§ 302.21(c)
Amendment .....	§ 302.5	§ 302.5
Certificates for international route awards .....	§§ 302.1701–1713, 1720	§§ 302.201–206
Conforming applications .....	§ 302.1720(c)	§ 302.212(c)
Certificates involving initial fitness .....	§§ 302.1701–1713, 1730	§§ 302.201–206
Consolidation .....	§ 302.12	§ 302.13
Exemptions .....	§§ 302.401–405	§§ 302.302–304
Exemptions, emergency .....	§ 302.410 (b), (c)	§ 302.311
Foreign Air Carrier Permits .....	§§ 302.1701–1713, 1740	§§ 302.201–206
Licensing cases .....	§§ 302.1701–1790	§§ 302.201–206
ARGUMENT:		
Before Administrative Law Judge .....	§ 302.25	§ 302.29
Oral (see Oral Arguments)		
ATTENDANCE FEES AND MILEAGE BRIEFS		
Accompanying motions or answers .....	§ 302.21	§ 302.27(c)
Failure to restate objections .....	§ 302.18(d)	§ 302.11(d)
Filing time .....	§ 302.31(b)	§ 302.35(b)
Formal specifications .....	§ 302.31(a)	§ 302.35(a)
Incorporation by reference .....	§ 302.31(c)	§ 302.35(c)
Licensing cases .....	§ 302.31(b)	§ 302.35(c)(2)
To Administrative Law Judge .....	§§ 302.1752, 1755	§§ 302.215, 218
Licensing cases .....	§ 302.26	§ 302.30
To DOT decisionmaker .....	§ 302.1752	§ 302.215
Licensing cases .....	§ 302.31	§ 302.35
Licensing cases .....	§ 302.1755	§ 302.218
CERTIFICATE CASES FOR U.S. AIR CARRIERS:		
Application:		
Answers to .....	§§ 302.1720(d), 1730(d)	§ 302.204(a)
Contents of .....	§ 302.1704	§ 302.202
Incomplete .....	§ 302.1713	§ 302.209
Replies to answers .....	§ 302.204(b)	
Service of .....	§ 302.1705	§ 302.203
Supporting evidence .....	§ 302.1710	§§ 302.202(a), 205
Verification .....	§ 302.1707	§ 302.206
Continuing Fitness .....	§ 302.1730	§ 302.211
Non-hearing procedures .....	§ 302.1712(a)	§ 302.207
Generally .....	§§ 302.1701–1790	§§ 302.201–220
Initial Fitness .....	§ 302.1730	§ 302.211
International Route Awards .....	§ 302.1720	§ 302.212
Oral evidentiary hearing proceedings .....	§ 302.1751–1757	§§ 302.214–220
Petition for .....	§ 302.1712(b)	§ 302.208
CERTIFICATION:		
Documents .....	§ 302.4(b)	§ 302.3(d)
Record .....	§§ 302.22(d), 27, 29	§ 302.31(b)
CHARGES (see Rates, Fares, and Charges; Airport Fees)		
CITATION OF RULES .....		
CIVIL PENALTIES .....	§ 302.2	§ 302.1(c)
COMPLAINANTS, JOINDER .....	§ 302.206(a)	§ 302.407 (d), (e)
COMPLAINTS:	§ 302.13	§ 302.404(d)
Airport fees .....	§§ 302.603–605	§§ 302.603–605
Contracts for transportation of mail .....	§§ 302.1505–1507	§ 302.721
Enforcement proceedings .....	§§ 302.200–204	§§ 302.403–404
Joinder .....	§ 302.13	§ 302.404(d)
Rates, fares, and charges .....	§§ 302.501–508	§§ 302.501–507
Suspension of tariffs .....	§§ 302.505–508	§ 302.506
COMPUTATION OF TIME (see also Time) .....	§ 302.16	§ 302.8
CONSOLIDATION OF PROCEEDINGS		
Airport fees .....	§ 302.12	§ 302.13
Answer to motion for .....	§ 302.603(c)	§ 302.603(c)
Enforcement proceedings .....	§ 302.12(c)	§ 302.13(c)
Filing time .....	§ 302.210(a)	§ 302.410
Initiation of .....	§ 302.12(b)	§ 302.13(b)
Initiation of .....	§ 302.12(a)	§ 302.13(a)
CONTINUING FITNESS CERTIFICATE CASES .....	§§ 302.1701–1713	§ 302.212
CONTRACTS (see Mail Contracts)		
DECISIONS:		
Final .....	§ 302.36	§§ 302.38, 220
Initial (see Administrative Law Judges)		
Recommended (see Administrative Law Judges)		
Tentative .....	§ 302.29	§ 302.33

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Exceptions to .....	§ 302.30	§ 302.34
DEFINITIONS .....	NA	§§ 302.2, 402
DELEGATION OF AUTHORITY .....	§ 302.27	§§ 302.17(a), 18(a)
DEPOSITIONS:		
Application by party for .....	§ 302.20(b)	§ 302.26(b)
Criteria for order to issue .....	§ 302.20(a)	§ 302.26(a)
Evidential status .....	§ 302.20(h)	§ 302.26(h)
Objections to questions or evidence .....	§ 302.2(d)	§ 302.26(d)
Specifications .....	§ 302.20(g)	§ 302.26(g)
Subscription by witness .....	§ 302.20(e)	§ 302.26(e)
Written interrogatories .....	§ 302.20(f)	§ 302.26(f)
DISCRETIONARY REVIEW:		
Initial and recommended decisions .....	§ 302.28	§ 302.32
Answers in opposition or support .....	§ 302.28(b)	§ 302.32(b)
Formal requirements .....	§ 302.28(a)(3)	§ 302.32(a) (3), (4)
Grounds for .....	§ 302.28(a)(2)	§ 302.32(a)(2)
Orders declining review .....	§ 302.28(c)	§ 302.32(c)
Oral arguments .....	§ 302.28(a)(5)	§ 302.32(a)(5)
Petitions for .....	§ 302.28(a)(1)	§ 302.32(a)(1)
Review proceedings .....	§ 302.28(d)	§ 302.32(d)
DISSOLUTION OF ENFORCEMENT ACTION .....	§ 302.218	§ 302.419
DOCUMENTS:		
Amendments .....	§ 302.5	§ 302.5
Leave of Department .....	§ 302.5	§ 302.5(a)
Timing of .....	§ 302.5	§ 302.5(b)
Answers (see Answers)		
Briefs (see Briefs)		
Dismissal .....	§ 302.5	§ 302.3(d)
Electronic filing .....	NA	§ 302.3(c)
Exhibits .....	§ 302.24(g)	§ 302.24(g)
Filing .....	§ 302.3	§ 302.24(c)
Address .....	§ 302.3	§ 302.3
Date .....	§ 302.3(a)	§ 302.3(a)
Improper filing .....	§ 302.3(a)	§ 302.3(a)
Improper filing .....	§ 302.4e	§ 302.3(d)
Formal specifications .....	§ 302.3(b)	§ 302.3(b)
General requirements .....	§ 302.4	§ 302.3(b)
Contents .....	§ 302.4(a)	§ 302.4
Designation of person to receive service .....	§ 302.4(a)	§ 302.4(a)(2)
Subscription .....	§ 302.4(c)	§ 302.4(a)
Subscription .....	§ 302.4(b)	§ 302.4(b)
Memoranda of opposition or support .....	§ 302.6(c)	§ 302.4(b)
Number of copies .....	§ 302.3(c)	§ 302.706(b)(2)
Objections to public disclosure .....	§ 302.3(c)	§ 302.3(c)
Official Notice of facts .....	§ 302.39(b)	§ 302.12
Partial relevance of .....	§ 302.24(n)	§ 302.24(g)
Presented at oral argument .....	§ 302.24(l)	§ 302.24(e)
Receipt after hearing .....	§ 302.32(b)	§ 302.24(e)
Responsive .....	§ 302.24(k)	§ 302.36(b)
Retention .....	§ 302.6	§ 302.24(h)
Service (see Service)	§ 302.7	§ 302.6
Table of contents/Index .....	§ 302.3(d)	§ 302.3(g)
Unauthorized .....	§ 302.4(f)	§ 302.3(e)
DOT DECISIONMAKER:		
Briefs to .....	§ 302.31	§ 302.35
Licensing cases .....	§ 302.1755	§ 302.218
Certification of record to .....	§ 302.22(d)	§ 302.31(b)
Definition .....	§ 302.22a	§ 302.2, 18
Final decision .....	§ 302.36	§ 302.38
Licensing cases .....	§ 302.1757	§ 302.220
Oral argument .....	§ 302.32	§ 302.36
Licensing cases .....	§ 302.1756	§ 302.219
Petitions for reconsideration .....	§ 302.37	§ 302.14
Review of Administrative Law Judge decision .....	§ 302.28	§ 302.32
Tentative decision .....	§ 302.29	§ 302.33
Exceptions .....	§ 302.30	§ 302.34
ENFORCEMENT PROCEEDINGS:		
Admissions as to facts and documents .....	§ 302.212	§ 302.34
Complaints:		
Formal .....	§ 302.201	§ 302.404
Informal .....	§ 302.200	§ 302.403
Insufficiency of .....	§ 302.203	§ 302.404(c)
Consolidation of proceedings .....	§ 302.210a	§ 302.410

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Evidence of previous violations .....	§ 302.216	§ 302.413
Generally .....	§§ 302.200–217	§§ 302.401–420
Hearings .....	§ 302.213	§ 302.415
Modification or dissolution of enforcement action .....	§ 302.218	§ 302.419
Motions to dismiss .....	§ 302.212	§ 302.411
Motions for summary judgment .....	§ 302.212	§ 302.402
Settlement proceedings .....	§ 302.215	§ 302.417
<b>EVIDENCE:</b>		
Exhibits .....	§ 302.24 (g),(h)	§ 302.24 (c),(d)
Generally .....	§ 302.24(c+)	§ 302.24(a)
Objections to .....	§ 302.24(d)	§ 302.24(b)
Offers of proof .....	§ 302.24(f)	§ 302.24(j)
Official notice of facts in certain documents .....	§ 302.24(n)	§ 302.24(g)
Partial relevance of .....	§ 302.24(l)	§ 302.24(e)
Previous violations .....	§ 302.216	§ 302.413
Records in other proceedings .....	§ 302.24(j)	§ 302.24(f)
<b>EXAMINERS (see Administrative Law Judges)</b>		
<b>EXCEPTIONS:</b>		
Administrative Law Judge's rulings .....	§ 302.24(e)	§ 302.24(i)
Initial decisions .....	§ 302.30	§ 302.31(c)
Licensing cases .....	§ 302.1754	§ 302.217
Recommended decisions .....	§ 302.30	§ 302.31(c)
Request for oral argument .....	§ 302.32	§ 302.36
Tentative decisions .....	§ 302.30	§ 302.34
Waiver .....	§ 302.33	§ 302.37
<b>EXEMPTION PROCEEDINGS:</b>		
Application:		
Answers to .....	§ 302.406	§ 302.307
Contents of .....	§ 302.402	§ 302.303
Filing of .....	§ 302.401	§ 302.302
Incomplete .....	§ 302.405	§ 302.306
Posting of .....	§ 302.404	§ 302.305
Service of .....	§ 302.403	§ 302.304
Reply to answer .....	§ 302.407	§ 302.308
Supporting evidence .....	§ 302.402(c)	§ 302.302(c)
DOT's initiative .....	§ 302.409	§ 302.310
Emergencies .....	§ 302.410	§ 302.311
Cabotage .....	§ 302.402(d)	§ 302.303(d)
Hearing request .....	§ 302.408	§ 302.309
<b>EXHIBITS (see also Evidence):</b>		
Generally .....	§ 302.24(g)	§ 302.24 (c),(d)
<b>FARES (see Rates, Fares, and Charges)</b>		
<b>FEES (see Airport Fees)</b>		
<b>FINAL MAIL RATE PROCEEDINGS (see Mail Rate Proceedings)</b>		
<b>FINAL ORDERS (see Orders)</b>		
<b>FITNESS CASES (see Certificate Cases)</b>		
<b>FOREIGN AIR CARRIER PERMIT CASES:</b>		
Application:		
Answers to .....	§ 302.1740(c)	§ 302.204(a)
Contents of .....	§ 302.1704	§ 302.202
Incomplete .....	§ 302.1713	§ 302.209
Replies to answers .....		§ 302.204(b)
Service of .....	§ 302.1705	§ 302.203
Supporting evidence .....	§ 302.1710	§ 302.202(a) 205,
Verification .....	§ 302.1707	§ 302.206
Non-hearing procedures .....	§ 302.1712(a)	§ 302.207
Generally .....	§§ 302.1701–1713, 1740–1790	§§ 302.201–220
Oral evidentiary hearing proceedings .....	§§ 302.1751–1757	§§ 302.214–220
Petition for .....	§ 302.1712(b)	§ 302.208
<b>HEARINGS:</b>		
Airport fee dispute proceedings .....	§ 302.611(b)	§ 302.611(b)
Argument before Administrative Law Judge .....	§ 302.25	§ 302.29
Change in rates, fares, or charges .....	§ 302.506	§ 302.706
Consolidated (see Consolidation of Proceedings)		
Documents of partial relevance .....	§ 302.24(i)	§ 302.24(e)
Enforcement proceedings .....	§ 302.213	§ 302.415
Evidence (see Evidence)		
Expedition of .....	§ 302.14(a)	§ 302.11(e)
Generally .....	§ 302.24	§ 302.23
Intervention .....	§ 302.15	§ 302.20
Licensing cases .....	§ 302.1751	§ 302.214

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Notice .....	§ 302.24(b)	§ 302.23
Offers of proof .....	§ 302.24(f)	§ 302.24(j)
Official notice of facts in certain documents .....	§ 302.24(n)	§ 302.24(g)
Participation by non parties .....	§ 302.14(b)	§ 302.19
Receipt of documents after hearing .....	§ 302.24(k)	§ 302.24(h)
Records in other proceedings .....	§ 302.24(j)	§ 302.24(f)
Request for, on application for exemption .....	§ 302.408	§ 302.309
Shortened procedure .....	§ 302.35	§ 302.15
Transcripts .....	§ 302.24 (l), (m)	§ 302.28
INITIAL DECISION:		
Answer in support or opposition .....	§ 302.28(b)	§ 302.32(b)
Contents .....	§ 302.27(b)	§ 302.31(c)
Effect of .....	§ 302.27(c)	§ 302.31(d)
Licensing cases .....	§ 302.1753	§ 302.216
Exceptions to .....	§ 302.1754	§ 302.217
Oral arguments .....	§ 302.28(a)(5)	§ 302.32(a)(5)
Orders declining review .....	§ 302.28(c)	§ 302.32(c)
Petitions for discretionary review .....	§ 302.28	§ 302.32
Service .....	§ 302.27(b)	§ 302.31(c)
Scope .....	§ 302.27(a)	§ 302.31(a)(1)
INITIAL FITNESS CERTIFICATE CASES (see Certificate Cases)		
INSTITUTING ORDERS (see Orders)		
INTERROGATORIES (see Depositions)		
INTERVENTION:		
Generally .....	§ 302.15	§ 302.20
JOINDER OF COMPLAINTS OR COMPLAINANTS .....	§ 302.13	§ 302.404(d)
JOINT PLEADINGS:		
Enforcement cases .....	§ 302.13	§ 302.404(d)
Licensing cases .....	§ 302.1708	§ 302.204(c)
LAW JUDGE (see Administrative Law Judges)		
LICENSING CASES (see Certificate Cases; Foreign Air Carrier Permit Cases)		
MAIL CONTRACTS:		
Complaint against contract .....	§ 302.1505–1507	§ 302.721–723
Data supporting contract .....	§ 302.1503	§ 302.719
Explanation of contract .....	§ 302.1503	§ 302.719
Filing of contract .....	§ 302.1502	§ 302.718
Petition for reconsideration .....	§ 302.1508	§ 302.724
Service of contract .....	§ 302.1504	§ 302.720
MAIL RATE CONFERENCES:		
Availability of data to Postal Service .....	§ 302.317	§ 302.714
Conditions upon participation .....	§ 302.314	§ 302.711
Compliance report .....	§ 302.314(d)	§ 302.711(d)
Non-disclosure of information .....	§ 302.314(a)	§ 302.711(a)
Signed statement required .....	§ 302.314(b)	§ 302.711(b)
DOT analysis of data for submission of answers .....	§ 302.316	§ 302.713
Effect of conference agreements .....	§ 302.319	§ 302.716
Information to be requested from carrier .....	§ 302.315	§ 302.712
Participants in conferences .....	§ 302.313	§ 302.710
Post conference procedure .....	§ 302.318	§ 302.715
Scope of conferences .....	§ 302.312	§ 302.709
Time of commencing and terminating conference .....	§ 302.321	§ 302.708(b)
Waiver of participant conditions .....	§ 302.320	§ 302.717
MAIL RATE PROCEEDINGS:		
Evidence .....	§ 302.308	§ 302.706(c)
Further procedures .....	§ 302.306, 307	§ 302.705
Hearing .....	§ 302.309	§ 302.706
Institution of proceedings .....	§ 302.302	§ 302.702
Objections and answers to show cause order .....	§ 302.305	§ 302.704
Order to show cause .....	§ 302.303	§ 302.703
Parties and persons other than parties .....	§ 302.301, 302	§ 302.706(b)
MILEAGE FEES .....	§ 302.21	§ 302.27(c)
MODIFICATION OF ENFORCEMENT ACTION .....	§ 302.218	§ 302.419
MOTIONS (see also Petitions):		
Answers to .....	§ 302.18(c)	§ 302.11(c)
Appeals from rulings of Administrative Law Judges .....	§ 302.18(f)	§ 302.11(h)
Briefs .....	§ 302.18(d)	§ 302.11(d)
Consolidation of proceedings .....	§ 302.12	§ 302.13
Enforcement cases .....	§ 302.210a	§ 302.410
Continuances and extension of time .....	§ 302.17	§ 302.9
Disposition of .....	§ 302.18(e)	§ 302.11(g)
Effect of pendency .....	§ 302.18(g)	§ 302.11(f)
Expedition of case .....	§ 302.14(a)	§ 302.11(e)

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
For suspension of operating authority pendente lite .....	§ 302.217	§ 302.418
For modification or dissolution of orders .....	§ 302.218	§ 302.419
Form and contents .....	§ 302.18(b)	§ 302.11(b)
Generally .....	§ 302.18	§ 302.11(a)
Oral arguments .....	§ 302.18(d)	§ 302.11(d)
Substitution of parties .....	§ 302.10	§ 302.10(b)
To correct transcripts .....	§ 302.24(m)	§ 302.28(f)
To dismiss and for summary judgment .....	§ 302.212	§ 302.411
To dismiss formal complaint .....	§ 302.204	§ 302.405(c)
To file unauthorized documents .....	§ 302.4(f)	§ 302.3(e)
To modify scope in Licensing cases .....	§ 302.1720(c)	§ 302.212(b)
To quash or modify subpoena .....	§ 302.19(f)	§ 302.25(f)
To whom motions addressed .....	§ 302.18(a)	§ 302.11(a)
To withhold information from public disclosure .....	§ 302.39(b), (e), (f)	§ 302.12(d), (e)
NON-HEARING PROCEDURES .....	§ 302.35	§ 302.15
Licensing cases .....	§ 302.1712(a)	§ 302.207
OBJECTIONS (see also Answers):		
To Public Disclosure of Information .....	§ 302.39	§ 302.12
OFFERS OF PROOF .....	§ 302.24(f)	§ 302.24(j)
OFFICIAL NOTICE .....	§ 302.24(n)	§ 302.24(g)
ORAL ARGUMENTS:		
Before DOT decisionmakers .....	§ 302.32	§ 302.36
Request for leave .....	§ 302.32(a)	§ 302.36(a)
Rules on documentary evidence .....	§ 302.32(b)	§ 302.36(b)
Before Administrative Law Judges .....	§ 302.25	§ 302.29
Discretionary review .....	§ 302.28(a)(5)	§ 302.32(a)(5)
Licensing cases .....	§ 302.1756	§ 302.219
Waivers .....	§ 302.33	§ 302.37
ORAL EVIDENTIARY HEARINGS (see Hearings)		
ORDERS:		
Declining review of initial decisions .....	§ 302.28(c)	§ 302.32(c)
Dismissal		
Airport fee dispute proceedings .....	§ 302.611 (c), (d)	§ 302.611 (c), (d)
Enforcement complaints .....	§ 302.205	§ 302.406
Licensing cases .....	§ 302.1750(a)(2)	§ 302.210(a)(3)
Establishing further procedures (Licensing cases) .....	§ 302.1750	§ 302.210
Final .....	§ 302.36	§ 302.38
Airport fee dispute proceedings .....	§ 302.621	§ 302.621
Licensing cases .....	§ 302.1750	§ 302.210
Mail contracts .....	§ 302.1507(a)	§ 302.723(a)
Mail rate proceedings .....	§ 302.306	§ 302.705
Instituting oral evidentiary hearing:		
Airport fee dispute proceedings .....	§ 302.611(b)	§ 302.611(b)
Licensing cases .....	§ 302.1750(a)(1)	§ 302.210(a)(4)
Mail rate proceedings .....	§§ 302.307, 309	§§ 302.703, 705(b)
Instituting investigation of rates, fares, and charges .....	§ 302.504	§ 302.505
Show cause:		
Licensing cases .....	§ 302.1730(d)	§ 302.210(a)(1)
Mail rate proceedings .....	§ 302.304	§ 302.703
PARTIES:		
Appearances of .....	§ 302.11	§ 302.21(a)
Defined .....	§ 302.9	§ 302.2, 10(a)
Enforcement proceedings .....	§ 302.210	§ 302.402
Licensing cases .....	§ 302.1709	§ 302.210(a)(4)
Mail rate proceedings .....	§ 302.301	§ 302.706(b)
Participation by Air Carrier Associations .....	§ 302.10(a)	§ 302.10(c)
Persons other than parties .....	§ 302.14	§ 302.19
Substitution of .....	§ 302.10	§ 302.10(b)
PETITIONS:		
Determination of rates, fares, or charges .....	§ 302.502(a)	§§ 302.502–503
Discretionary review (see Discretionary Review)		
Filing Time .....	§ 302.37(a)	§ 302.14(a)
Institution of mail rate proceedings .....	§ 302.303	§ 302.302
Intervention .....	§ 302.15(c)	§ 302.20
Orders subject to reconsideration .....	§ 302.37(a)	§ 302.14(a)
Repetitive .....	§ 302.37(c)	§ 302.14(c)
Reconsideration .....	§ 302.37	§ 302.14
Rulemaking .....	§ 302.38	§ 302.16
PREHEARING CONFERENCE .....	§ 302.23	§ 302.22
Actions during .....	§ 302.23(a)	§ 302.22(b)
Enforcement proceeding .....	§ 302.211	§ 302.414
Purpose .....	§ 302.23(a)	§ 302.22(a)

## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
Report of .....	§ 302.23(b)	§ 302.22(c)
Scope .....	§ 302.23(a)	§ 302.22(a)
<b>PROCEEDINGS:</b>		
Airport fee dispute proceedings .....	§§ 302.601–621	§§ 302.601–621
Consolidation of (see Consolidation)		
Contemporaneous consideration (see Consolidation)		
Enforcement .....	§§ 302.200–217	§§ 302.401–420
Exemption .....	§§ 302.400–410	§§ 302.301–311
Licensing cases .....	§§ 302.1701–1790	§§ 302.201–220
Mail rate .....	§§ 302.300–321	§§ 302.701–717
Rates, fares, and charges .....	§§ 302.500–508	§§ 302.501–507
<b>PUBLIC DISCLOSURE OF INFORMATION:</b>		
Documents .....	§ 302.39(b)	§ 302.12(b)
Generally .....	§ 302.39(a)	§ 302.12(a)
Objection to by government .....	§ 302.39(d)	§ 302.12(f)
Oral testimony .....	§ 302.39(c)	§ 302.12(c)
<b>RATES, FARES, AND CHARGES—PROCEEDINGS (see also Mail Rate Proceedings; Airport Fees):</b>		
Institution of .....	§ 302.501	§ 302.502
Order of investigation .....	§ 302.504	§ 302.505
Petition .....	§ 302.501	§ 302.503
Contents .....	§ 302.502(a)	§ 302.503(a)
Dismissed .....	§ 302.503	§ 302.504
Service .....	§ 302.502(b)	§ 302.503(b)
Suspension of tariffs .....	§ 302.505	§ 302.506
Answers .....	§ 302.505	§ 302.506(e)
Complaints .....	§ 302.505	§ 302.506
Time for filing complaint .....	§ 302.508	§ 302.507
<b>RECOMMENDED DECISIONS (see Decisions):</b>		
Answer in support or opposition .....	§ 302.28(b)	§ 302.32(b)
Contents .....	§ 302.27(b)	§ 302.31(c)
Effect of .....	§ 302.27(c)	§ 302.31(d)
Licensing cases .....	§ 302.1753	§ 302.216
Exceptions to .....	§ 302.1754	§ 302.217
Oral arguments .....	§ 302.28(a)(5)	§ 302.32(a)(5)
Orders declining review .....	§ 302.28(c)	§ 302.32(c)
Petitions for discretionary review .....	§ 302.28	§ 302.32
Service .....	§ 302.27(b)	§ 302.31(c)
Scope .....	§ 302.27(a)	§ 302.31(a)(2)
<b>RECONSIDERATION, REHEARING, REARGUMENT (see Petitions for Reconsideration):</b>		
<b>RECORD, CERTIFICATION</b>	§§ 302.22(d), 27(a), 29(a)	§ 302.31(b)
<b>REPLIES:</b>		
Airport fee dispute proceedings .....	§ 302.609	§ 302.609
Exemption cases .....	§ 302.407	§ 302.308
Generally .....	§ 302.6(b)	§ 302.6(b)
Licensing cases .....		§ 302.204(b)
Motions .....	§ 302.18(c)	§ 302.11(c)
Enforcement proceedings .....	§ 302.209	§ 302.408
<b>RESPONSIVE DOCUMENTS (see Answers; Replies)</b>		
<b>REVIEW (see Discretionary Review)</b>		
<b>ROUTE PROCEEDINGS (see also Certificate Cases):</b>		
International route awards .....	§§ 302.1701–1790	§§ 302.201–220
<b>RULEMAKING PETITIONS</b> .....	§ 302.38	§ 302.16
<b>SERVICE:</b>		
Airport fee dispute proceedings .....	§ 302.605 (c)(1), (d)(1)	§ 302.605 (c)(1), (d)(1)
By the Department .....	§ 302.8(a)(1)	§ 302.7(a)(1)
Date of .....	§ 302.8(f)	§ 302.7(f)
Enforcement complaints .....	§ 302.204(a)	§ 302.404(e)
Exemption cases .....	§ 302.403	§ 302.304
Generally .....	§ 302.8	§ 302.7
Licensing cases .....	§ 302.1705	§ 302.203
Mail rate petitions .....	§ 302.303(c)	§ 302.702(d)
Persons eligible for service .....	§ 302.8(c)	§ 302.7 (c), (g), (h)
Procedures .....	§ 302.8(b)	§ 302.7(b)
Proof of .....	§ 302.8(e)	§ 302.7(e)
Rates, fares, and charges complaints .....	§ 302.502(b)	§ 302.503(b)
Where to be made .....	§ 302.8(d)	§ 302.7(d)
<b>SETTLEMENT OFFERS:</b>		
Enforcement proceedings .....	§ 302.215	§ 302.417
Public disclosure .....	§ 302.215(d)	§ 302.417(d)
<b>SHORTENED PROCEDURE</b> .....	§ 302.35	§ 302.15



## APPENDIX A TO PART 302.—INDEX TO RULES OF PRACTICE—Continued

Subject	Current rule	Proposed rule
SHOW CAUSE ORDERS (see Orders):		
SUBPOENAS .....	§ 302.19	§ 302.25
SUSPENSION OF PRACTICE BEFORE DOT .....	§ 302.11(a)	§ 302.25(f)
TARIFFS:		
Complaints requesting suspension .....	§ 302.505	§ 302.506
TEMPORARY RATE PROCEEDINGS .....	§ 302.310	§ 302.707
TENTATIVE DECISIONS (see Decisions)		
TESTIMONY (see Witnesses)		
TIME:		
Computation of .....	§ 302.16	§ 302.8
Continuances of .....	§ 302.17	§ 302.9
Extensions of .....	§ 302.17	§ 302.9
Licensing cases .....	§§ 302.1706, 1711	§ 302.209
TRANSCRIPTS OF HEARINGS .....	§ 302.24(l)	§ 302.28
U.S. AIR CARRIER CERTIFICATION (see Certificate Cases)		
VERIFICATION:		
Licensing cases .....	§ 302.1707	§ 302.206
WAIVERS OF PROCEDURAL STEPS .....	§ 302.33	§ 302.37
WITNESSES:		
Attendance fees and mileage .....	§ 302.21	§ 302.27(c)
Cross-examination by nonparties .....	§ 302.14(b)	§ 302.19
Depositions .....	§ 302.20	§ 302.26
Objections to public disclosure of testimony .....	§ 302.39(c)	§ 302.12(c)
Represented by counsel .....	§ 302.11(a)	§ 302.27(a)
Subpoenas .....	§ 302.19	§ 302.25
VIOLATIONS—EVIDENTIAL STATUS IN ENFORCEMENT PROCEEDINGS .....	§ 302.216	§ 302.413

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