to conform with the statutory change and to avoid confusion as to what the actual maximum civil monetary penalty is, and therefore notice and public comment concerning this rule are unnecessary.

Because notice of proposed rulemaking and opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

List of Subjects in 15 CFR Part 764

Administrative practice and procedure, Exports, Law enforcement, Penalties.

■ Accordingly, part 764 of the Export Administration Regulations (15 CFR parts 730–774) is amended as follows:

PART 764—[AMENDED]

■ 1. The authority citation for part 764 is revised to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 2, 2005, 70 FR 45273 (August 5, 2005).

■ 2. In § 764.3, revise paragraph (a)(1)(i), remove footnote number 1, and redesignate footnote 2 as footnote 1, to read as follows:

§ 764.3 Sanctions.

(a) *Administrative.*

(1) *Civil monetary penalty.*

(i) A civil monetary penalty not to exceed the amount set forth in the EAA may be imposed for each violation, and in the event that any provision of the EAR is continued by IEEPA or any other authority, the maximum monetary civil penalty for each violation shall be that provided by such other authority.

* * * * *

Dated: August 1, 2006.

Matthew S. Borman,

Deputy Assistant Secretary for Export Administration.

[FR Doc. E6–12653 Filed 8–3–06; 8:45 am]

BILLING CODE 3510–33–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Parts 2700, 2704, and 2705

Procedural Rules

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Federal Mine Safety and Health Review Commission (the ''Commission'') is an independent adjudicatory agency that provides trials and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977 (2000) (the ''Mine Act''). Trials are held before the Commission's Administrative Law Judges, and appellate review is provided by a five-member Review Commission appointed by the President and confirmed by the Senate. This rule makes final revisions to many of the Commission's procedural rules, regulations implementing the Equal Access to Justice Act, and regulations implementing the Privacy Act. The Commission makes these changes in a continued effort to ensure the just, speedy, and inexpensive determination of all proceedings before the Commission.

DATES: This rule will take effect on October 3, 2006.

ADDRESSES: Questions may be mailed to Thomas A. Stock, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001, or sent via facsimile to 202–434–9944.

FOR FURTHER INFORMATION CONTACT: Thomas A. Stock, General Counsel, Office of the General Counsel, 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; telephone 202–434–9935; fax 202–434–9944.

SUPPLEMENTARY INFORMATION: The final rules will apply to cases initiated after the rules take effect. The final rules also will apply to further proceedings in cases pending on the effective date, except to the extent that such application would be infeasible or unfair, in which event the former procedural rules would continue to apply.

I. Background

In October 2004, the Commission published an Advance Notice of Proposed Rulemaking (''ANPRM'') in which it sought suggestions for improving its procedural rules (29 CFR part 2700), Government in the Sunshine Act regulations (29 CFR part 2701), regulations implementing the Freedom of Information Act (''FOIA'') (29 CFR part 2702), and regulations implementing the Equal Access to Justice Act (''EAJA'') (29 CFR part 2704). *See* 69 FR 62632, October 27, 2004. In the ANPRM, the Commission identified several procedural rules set forth in part 2700 that required further revision, clarification, or expansion. *See id.* at 62632 through 62635. The Commission also stated that it would examine its procedures for processing requests for relief from final judgments. *Id.* at 62632. The Commission did not include in the ANPRM any specific proposed revisions to the Commission's regulations implementing the Government in the Sunshine Act (part 2701), the FOIA (part 2702), the EAJA (part 2704), or the Privacy Act (part 2705).

The comment period on the ANPRM closed on January 25, 2005. The Commission received comments from the Secretary of Labor through the U.S. Department of Labor's Office of the Solicitor; the Pennsylvania Coal Association; the United Mine Workers of America (the ''UMWA''); the National Mining Association; the National Stone, Sand & Gravel Association; and other individual members of the mining community or bar who practice before the Commission. Most commenters expressed some degree of agreement with various areas that the Commission had targeted to review for possible revision. The commenters also requested further changes not described by the Commission in the ANPRM.

In January 2006, the Commission published a Notice of Proposed Rulemaking (''NPRM''). 71 FR 553, January 5, 2006. In the notice, the Commission explained that it determined that changes to the Commission's Procedural Rules and its regulations implementing the Privacy Act and EAJA were necessary, but that no revisions were necessary to its regulations implementing the Government in the Sunshine Act or FOIA. *Id.* at 554. Some of the changes in the NPRM were proposed in response to the comments received, while other changes were proposed in response to further reflection by the Commission or in response to developments in Commission proceedings. For example, after examining its procedures for processing requests for relief from final judgment, the Commission determined that such procedures could be made more efficient through informal means rather than through the rulemaking process. Such informal means include making available a summary of the Commission's procedural rules described in simple terms and placing on the Commission's Web site a page of frequently asked questions and answers regarding Commission procedure.

Although the proposed rules in this notice were procedural in nature and did not require notice and comment publication under the Administrative Procedure Act (''APA''), 5 U.S.C. 551, 553(b)(3)(A), the Commission invited comment from the interested public until March 6, 2006. Besides generally requesting comments on any revisions

to its rules, the Commission also requested comments on three particular subjects to aid its further consideration of possible rule revisions. Specifically, the Commission invited comments on whether a time limit and presumption should be imposed upon the issuance of a proposed penalty assessment (29 CFR 2700.25), whether an exception should be created for a proposed pleading requirement applicable to petitions for assessment of penalty (29 CFR 2700.28(b)), and whether the Commission should repeal its EAJA rule providing for aggregation in the determination of eligibility for an EAJA award (29 CFR 2704.104(b)(2)). 71 FR 557, 558, 559, 564, January 5, 2006.

In addition, the Commission invited members of the interested public to request a public meeting on the proposed rules during the comment period. The Commission stated that if public meetings were scheduled, the Commission would issue a subsequent notice to be published in the **Federal Register**. The Commission received no requests for public meetings.

The Commission received written comments on the NPRM from the Department of Labor's Office of the Solicitor and the UMWA. Those comments supported many of the revisions proposed by the Commission, although there were a few objections and suggestions for further improvements of the proposed rules. Those comments also addressed, in part, the three subjects upon which the Commission had requested further comment. The Commission has carefully considered all comments received and deliberated on the rules.

The final rules retain much of the same text set forth in the proposed rules. As discussed in the section-by-section analysis, some changes have been made in response to the comments received. In addition, the Commission has resolved the three areas in which it requested specific comments. First, as discussed more fully below, the Commission has determined not to set time limits on the filing of proposed penalty assessments (29 CFR 2700.25). Further, the Commission has determined that it is appropriate to set forth a pleading requirement for petitions for assessment of penalty, although an exception to the requirement has been made for single penalty assessments (29 CFR 2700.28(b)). The Commission has also determined that it is appropriate to repeal a provision allowing for the aggregation of assets or employees of affiliates of a prevailing party in determining eligibility for an EAJA award (29 CFR 2704.104(b)(2)). In addition, although not included in the proposed rules, the Commission made a revision clarifying when a motion for participation as amicus curiae and an amicus curiae brief must be filed when a movant does not support the position of a party in a Commission proceeding (29 CFR 2700.74). The Commission also made revisions that require a statement of material facts to be submitted with a motion for summary decision and that clarify the procedure for opposing a motion for summary decision (29 CFR 2700.67). The Commission did not invite comments on these revisions to sections 2700.67 and 2700.74 because the proceedings that brought to light the need for such clarification arose after the proposed rules had been published in the **Federal Register**. Finally, certain rules have been changed to accord with related changes in other rules.

II. Section-by-Section Analysis

Set forth below is an analysis of the comments received on the Commission's proposed rules and the final actions taken. Minor editorial modifications to present or proposed rules are not discussed.

A. Part 2700—Procedural Rules

Subpart A—General Provisions

29 CFR 2700.1

Proceedings before the Commission have sometimes revealed confusion regarding the relationship between the Commission and the Department of Labor and its Mine Safety and Health Administration (''MSHA''). In order to minimize such confusion, the Commission proposed amending paragraph (a) of Commission Procedural Rule 1 to add an explanation regarding the Commission's role and relationship to the Department of Labor. 71 FR 554, January 5, 2006. In addition, the Commission proposed adding to paragraph (a), pertinent information necessary for contacting the Commission or gaining access to Commission records. *Id.* The Commission received no objections to the change and adopts the proposed rule.

The Commission has also revised Procedural Rule 1 to add a provision stating the effective date of amendments to the Commission's procedural rules. The provision states that, unless the Commission provides otherwise, amendments to the rules are effective 60 days following publication in the **Federal Register**, and apply in cases then pending to the extent that application of the amended rules would not be feasible or would work injustice, in which event the former rules of procedure would apply. The Commission has repealed Commission Procedural Rule 84, which sets forth the effective date of the Commission's procedural rules which were revised and republished in 1993.

29 CFR 2700.5

Privacy-Related Issues Raised by Pleadings and Other Documents in Mine Act Cases

With the advent of electronic filings and internet access to judicial files, there has been increased sensitivity regarding personal information in files that are easily accessed by the public. Identity theft and other misuses of personal information are problems that have been exacerbated by the widespread availability of information over the internet. The Commission proposed redesignating current Commission Procedural Rule 5(d) as 5(e) and adding a new provision to paragraph (d) that would prevent incorporation into the Commission's case files of certain kinds of information (social security numbers, bank account numbers, and drivers' license numbers) and information related to certain individuals (e.g., minor children). 71 FR 554, January 5, 2006. The Commission explained that the role of the Commission's Judges in enforcing the rule would be limited because implementation of this rule would fall heavily on the parties in Mine Act proceedings in light of their interests in redacting personal information. *Id.* The Commission received no objections to the proposal, which is without change and will take effect as the new Procedural Rule 5(d).

Filing Requirements

Present Rule 5(d) provides that a notice of contest of a citation or order; a petition for assessment of penalty; a complaint for compensation; a complaint of discharge, discrimination, or interference; an application for temporary reinstatement; and an application for temporary relief shall be filed by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.5(d). Commission Procedural Rule 7(c) also requires that such documents, in addition to a proposed penalty assessment, must be served by personal delivery or by registered or certified mail, return receipt requested. 29 CFR 2700.7(c); *see also* 29 CFR 2700.45(a) (providing, in part, for service by certified mail of pleadings in a temporary reinstatement proceeding). Although not explicitly required by the Commission's procedural rules in all

circumstances, the Commission, as a matter of practice, generally mails Judges' decisions after hearing, default orders, and orders that require timely action by a party by certified mail, return receipt requested. *Cf. 29 CFR 2700.66(a) (requiring show cause orders to be mailed by registered or certified mail, return receipt requested).*

In addition, present paragraph (d) of Procedural Rule 5 provides that certain documents can be filed by facsimile transmission (''fax''), while Procedural Rule 7(c) contains corresponding provisions governing service when filing is by fax. The documents which can be filed by fax are motions for extension of time (29 CFR 2700.9), petitions for Commission review of a Judge's temporary reinstatement decision (29 CFR 2700.45(f)), motions for expedition of proceedings (29 CFR 2700.52(a)), petitions for discretionary review (''PDRs'') (29 CFR 2700.70(a)), motions to file a PDR in excess of the applicable page limit (29 CFR 2700.70(f)), and motions to file a brief in excess of the applicable page limit (29 CFR 2700.75(f)). Under that paragraph, a Judge or the Review Commission can also permit the filing of other documents via fax.

In the ANPRM, the Commission stated that it was reviewing whether present sections 2700.5(d) and 2700.7(c) should permit parties to use other methods, such as commercial mail services, to file and serve the documents for which personal delivery or registered or certified mail are presently required. 69 FR 62632, October 27, 2004. In addition, the Commission stated that it was considering whether notices designating a PDR as an opening brief should be added to the list of pleadings that may be filed by fax. *Id.*

The Secretary opposed changing the rules in the manner described in the ANPRM on the use of registered or certified mail because she does not consider the rules to be burdensome and considers the availability of the return receipt desirable for proving that a document has been filed or served. Another commenter also stated that the requirements for certified mail should not be changed, except that the Commission should codify its current practice of mailing documents by certified mail. Most commenters supported changing the rule to allow the use of commercial mail services but further suggested that the Commission allow filing by fax to a greater degree than allowed under current rules. Those commenters stated that the use of commercial mail services could provide reliable information about the date of filing or service and that most fax machines will also print a verification of transmission. One commenter explained that because some mines are located in remote locations, it may be difficult to satisfy the requirements for certified or registered mail in a timely manner.

The pleadings and other documents which require personal delivery or certified or registered mail as the method for filing and service are generally those that initiate Commission proceedings. The purpose for requiring such methods of filing and service is to provide the party initiating the proceeding with proof that filing and service had taken place in the event a question later arises. The documents that can be filed by fax are generally those requesting Commission action of a time-sensitive nature.

Whenever a party initiates a Commission proceeding, the party is assuming a certain degree of risk that it may not be successful in initiating the proceeding due to unexpected circumstances involving the document it is filing or serving once the document has left the party's control. It is in the filing party's best interest to ensure against that risk by using a method of delivery that provides adequate proof of proper filing and service. While a signed receipt is reliable proof that filing and service were actually accomplished, the Commission believes that a receipt provided by a private carrier that contains tracking information or a fax machine transmission report may also provide sufficiently reliable information that proper filing and service have been accomplished.

Accordingly, the Commission proposed revising the filing and service requirements in redesignated Procedural Rule 5(e) in an effort to require a method of filing and service that would be convenient to most parties yet would provide reliable verification of the time of filing and service. 71 FR 554 through 555, January 5, 2006. Proposed section 2700.5(e) provided that the filing party could choose the manner for filing a document, unless a certain method were otherwise required by the Mine Act or the Commission's procedural rules. Under the proposed rule, it would be incumbent upon parties to use a method of delivery that provides adequate proof of timely filing and service, particularly if a filing party is initiating a proceeding. It would be the responsibility of that filing or serving party to confirm receipt of the document filed or served.

The Commission did not include a specific description of documents which could be filed by fax in proposed section 2700.5(e). Rather, virtually any document could be filed by fax, subject to a 15-page length limit. Documents filed pursuant to 30 CFR 2700.70 (petitions for discretionary review), 30 CFR 2700.45 (temporary reinstatement proceedings) or 30 CFR subpart F (applications for temporary relief) could be filed by fax and would not be subject to the 15-page limit. Under the proposed rule, a notice designating a PDR as an opening brief would be filed by fax, as it certainly would be 15 pages or less. The Commission proposed that the effective date of filing would depend upon the method of delivery chosen. The Commission also proposed deleting references to permissible fax filing, presently found in other rules (*see* 29 CFR 2700.9(a), 2700.45(f), 2700.52(a), 2700.70(a), 2700.75(f)), to avoid the misperception that those are the only instances in which fax filing is permitted. The Commission further proposed in section 2700.7(c), revisions to the service requirements that conform with those set forth in proposed section 2700.5(e) related to filing requirements.

The Commission received one comment on the proposed rule which generally supported the proposed changes. The commenter expressed concern, however, that a litigant filing a document by fax may not be able to verify with certainty that the document had been filed if a question later arose. In addition, the commenter suggested that the Commission's rules should differentiate between business and calendar days, and that proposed Rule 5(e) should specify that when a document is filed by fax, the original document should be filed within three ''business'' days.

The Commission has determined to adopt Procedural Rule 5(e) as proposed. The Commission declines to confirm receipt of fax transmissions, as suggested, because such confirmation would unduly strain the Commission's limited resources. The Commission leaves such confirmation to parties who choose to file or serve documents by fax.

The Commission has further determined that it is unnecessary at this time to differentiate between business and calendar days in Procedural Rule 5(e) and throughout the Commission's rules. The Commission has concluded that it is appropriate to conform its rules more closely to federal rules of procedure, and federal rules generally do not differentiate between business and calendar days. The Commission believes that it is appropriate to continue the use of the terms only where necessary to avoid confusion, and that their use is not necessary in Procedural Rule 5(e).

Finally, the Commission has declined to codify its current practice of mailing

by certified mail, return receipt requested, Judges' decisions (after hearing), default orders, and orders that require timely action by a party. Such codification would not alter the Commission's practice or ultimately result in a benefit to parties.

Number of File Copies

In the NPRM, the Commission proposed redesignating current Commission Procedural Rule 5(e) as 5(f). Paragraph (e) of Rule 5 currently sets forth the number of copies to be submitted in cases before a Judge and the Review Commission, requiring represented parties to file two copies per docket in cases before Judges and seven copies in cases before the Review Commission. 29 CFR 2700.5(e). The rule further requires that when filing by fax a party must file the required number of copies with the Judge or Review Commission within 3 days of the facsimile transmission. *Id.*

In the ANPRM, the Commission stated that it was considering requiring fewer copies than were currently required by the rule. 69 FR 62632, October 27, 2004. All commenters supported reducing the number of copies that must be filed.

In newly redesignated Commission Procedural Rule 5(f), the Commission proposed requiring that only those parties represented by a lawyer needed to file, unless otherwise ordered, the original document and one copy for each docket in cases before a Judge, and the original document and six copies in cases before the Review Commission. 71 FR 555, January 5, 2006. The proposed rule further stated that filing the original document would be sufficient for ''part[ies] * * * not represented by a lawyer.'' *Id.* at 566. Under the proposed rule, when filing was by fax, the original document would have to be filed with the Judge or Review Commission within 3 days of transmission, but no other copies needed to be filed. The Commission proposed making a conforming change to 29 CFR 2700.75(g), setting forth the number of copies of briefs to be filed.

Commenters generally agreed with the Commission's proposed changes. One commenter, however, suggested that new Procedural Rule 5(f) should state that only ''pro se litigants'' are permitted to file the original document without copies. Another commenter requested that the reference to three days be changed to specify 3 ''business'' days.

The Commission has determined to adopt Procedural Rule 5(f) as proposed. The Commission declines to refer in the rule to a party who is permitted to file an original document without copies as a ''pro se litigant'' rather than as a ''party'' who is ''not represented by a lawyer.'' The term ''pro se litigant'' would overly restrict the scope of the exception to those representing themselves. The Commission intends that all parties with non-attorney representatives appearing in Commission proceedings, rather than only parties who are representing themselves, should be subject to the exception. In addition, as discussed above, the Commission has determined that it is unnecessary to differentiate between business and calendar days throughout the Commission's rules.

Form of Pleadings

In the NPRM, the Commission proposed redesignating current Commission Procedural Rule 5(f) as 5(g). Paragraph (f) of Rule 5 currently contains various format requirements for pleadings filed with the Commission, providing in part that ''failure to comply with the requirements * * * will be grounds for rejection of a brief.'' 29 CFR 2700.5(f). The rule was intended to permit rejection of all pleadings not meeting the format requirements, rather than only briefs. The Commission proposed revising redesignated Procedural Rule 5(g) to provide that any ''pleading'' not meeting the format requirements would be subject to rejection. 71 FR 555 through 556, January 5, 2006. The Commission also proposed redesignating 29 CFR 2700.5(g) as 29 CFR 2700.5(i). *Id.* at 556.

One commenter suggested that the rule be revised from providing that the failure to meet the format requirements ''will'' be grounds for rejection of a pleading to language providing that the failure to meet the format requirements ''may'' be grounds for rejection of the pleading. The Commission agrees with the suggested change because it clarifies that rejection of a pleading that does not meet format requirements is within the discretion of the Review Commission and its Judges. In addition, the Commission adopts the proposed revision described in the NPRM, referring to the documents within the scope of the rule as pleadings rather than briefs. *Id.*

Citations to Judges' Decisions

Commission Procedural Rule 72 currently provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation in a pleading to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR 62634, October 27, 2004. The Commission explained that such a revision would provide the reader with information regarding whether the citation is binding precedent for the proposition for which it is cited. *Id.*

The majority of commenters on the ANPRM did not oppose the suggested change. However, a few commenters suggested that a system for designating cases should be published. One commenter suggested that a change is unnecessary because citation to a Judge's decision without subsequent Commission history is presumptively an unreviewed decision.

In an effort to maximize clarity and precision in citation format, the Commission proposed adding a requirement that citations to a Judge's decision include ''(ALJ)'' at the end of the citation. 71 FR 556, January 5, 2006. The Commission explained that there was no current requirement that citations to Commission cases in pleadings differentiate between Judge and Review Commission decisions, regardless of whether the former are reviewed or unreviewed. *Id.* The Commission proposed including the requirement in Commission Procedural Rule 5 because such a change would be general and apply to pleadings before the Judges and the Review Commission. The Commission also proposed redesignating current Commission Procedural Rule 5(g) as 5(i) and placing the requirement regarding citation to a Judge's decision as a new provision in paragraph (h) of Procedural Rule 5. *Id.* In addition, the Commission further clarified that Judges' decisions are not binding precedent upon the Review Commission and included that clarification in 29 CFR 2700.69, which addresses Judges' decisions. *Id.* The Commission proposed deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use. *Id.*

One commenter suggested that proposed Procedural Rule 5(h) should be revised to provide that citations to Judges' decisions ''should,'' rather than ''shall,'' include the ''(ALJ)'' designation so as to allow the Review Commission and Judges discretion to reject documents not in compliance with the citation requirement. The Commission agrees with the suggested change and has revised the rule accordingly.

29 CFR 2700.8

Commission Procedural Rule 8 provides in part that the last day of a period computed shall be included unless that day is a Saturday, Sunday,

or Federal holiday, in which event the period runs until the next business day. 29 CFR 2700.8. The rule further provides that when a period of time prescribed in the rules is less than 7 days, intermediate Saturdays, Sundays, and Federal holidays shall be excluded in the computation of time. *Id.* Procedural Rule 8 also states that when the service of a document is by mail, 5 days shall be added to the time allowed by the rules for the filing of a response or other documents. *Id.*

In the ANPRM, the Commission stated that it was considering whether to more closely conform its time computation with Federal procedural rules. 69 FR 62633, October 27, 2004. It specified that the Commission was considering whether it should increase the period for which intervening Saturdays, Sundays, and Federal holidays shall be excluded, and decrease the number of days added for filing a response if service is by mail. *Id.* The Commission further stated that it was considering clarifying changes to Procedural Rule 8 that would dispel confusion regarding the circumstances and the types of mail and delivery that qualify for the additional days for filing when service is by mail. *Id.* Finally, the Commission stated that it was considering making explicit that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday. *Id.*

Most commenters on the ANPRM supported expanding the period in which intervening weekends and holidays would not be counted, in conformance with Federal procedural rules. The Secretary also agreed that the period should be expanded, but further stated that no additional time should be added to the time periods set forth in 29 CFR 2700.45 pertaining to temporary reinstatement proceedings. In addition, the Secretary suggested that Procedural Rule 8 should be revised to provide that the last day of a filing period should not be counted if the Commission's office is closed due to inclement weather or other conditions. Most commenters also supported clarifying Procedural Rule 8 to explain the circumstances in which 5 days are added to time periods when service is by mail. Most commenters did not support reducing the 5-day period added for filing when service is by mail. Most commenters supported making explicit that the Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday.

After considering these comments, the Commission determined that it would be appropriate to harmonize Procedural Rule 8 with Federal procedural rules in order to decrease confusion and to better afford parties ample time in which to prepare their pleadings. 71 FR 556 through 557, January 5, 2006. Federal procedural rules provide that when a period of time prescribed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Fed. R. Civ. P. 6(a); Fed. R. App. P. 26(a)(2). The Commission proposed revising Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days. *Id.* at 556.

However, adopting the 11-day period set forth in Federal procedural rules, without other Commission procedural rule changes, would have had an unintended negative impact on the efficient adjudication of proceedings before the Review Commission and its Judges. Under Commission Procedural Rule 10(d), a party has 10 days to respond to a motion. 29 CFR 2700.10(d). Under proposed Commission Procedural Rule 8, weekends and holidays that occur within the 10-day response time of current Procedural Rule 10(d) would not be counted, which could result in the return response period being unreasonably extended to nearly 3 weeks where parties are served by mail. In order to avoid this result, the Commission also proposed changing the period of time for responding to a motion set forth in 29 CFR 2700.10(d) from 10 days to 8 days. This proposed change would guarantee parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules.

The Commission agreed with the Secretary's comment that any proposed change to Procedural Rule 8 providing for an expanded response time should not apply to the time periods set forth in 29 CFR 2700.45 pertaining to temporary reinstatement proceedings. 71 FR 556 through 557, January 5, 2006. Section 105(c)(2) of the Mine Act requires the Commission to consider applications for temporary reinstatement on an expedited basis. 30 U.S.C. 815(c)(2). Therefore, the Commission proposed that Commission Procedural Rule 45 be amended to specify time periods in ''business'' days when the time period prescribed for action is less than 7 days, and ''calendar'' days when the time period prescribed is 7 or more days under that rule. This proposed change would maintain the same time frames currently provided in Procedural Rule 45. 71 FR 557.

The Commission also agreed with the Secretary's comment that Commission Procedural Rule 8 should be revised to recognize that the last day of a filing period should not be counted if the Commission's offices are closed due to inclement weather or other similar conditions. *Id.* The Commission proposed revising Procedural Rule 8 to include more general language stating that the last day of a prescribed period for action shall be the due date unless the Commission's offices are not open or the Commission is otherwise unable to accept filings. *Id.* This proposed revision would apply to deadlines for both Commission and party action. *Id.*

In addition, the Commission agreed with commenters that the 5-day period that is added under Procedural Rule 8 when service is by mail should not be reduced. *Id.* Commenters explained that for many operators in isolated areas, it would be unreasonable to expect delivery within a shorter period of time. In addition, there have been mail delays caused by security concerns and increased screening procedures. Nonetheless, the Commission proposed specifying that the 5 days added when service is by mail would be 5 additional ''calendar'' days. The rule is presently silent as to whether the 5 days are calendar days or business days.

Furthermore, in order to better explain the circumstances in which the 5 additional days would be added, the Commission proposed inserting language to clarify that 5 calendar days would be added to the due date for a responding party's reply to a pleading which has been served by a method of delivery other than one providing for same-day service. *Id.* This proposed change clarified that the 5-day period would be added when documents responded to a party's pleading, rather than when documents responded to orders from the Commission. Service by courier or fax would result in same-day delivery so that the 5 days would not be added to the time for response to such pleadings. However, service by U.S. Postal Service first-class mail or any other mail service resulting in other than same-day delivery would result in the addition of 5 days to the response time.

The Commission determined that, given these proposed changes, it did not need to further clarify that the Review Commission may act on a PDR on the first business day following the 40th day after the Judge's decision, where the 40th day falls on a weekend or Federal holiday. *Id.* Rather, the proposed changes to Procedural Rule 8

sufficiently clarified that the Review Commission may act on the PDR until the end of the next day that the Commission's offices are open. Such proposed language would apply to other deadlines for Commission action as well. *See*, *e.g.*, 30 U.S.C. 823(d)(2)(B) (providing the period within which the Review Commission may direct sua sponte review).

The various provisions of proposed Procedural Rule 8 could result in different determinations of due dates depending upon the order in which the provisions are applied. Therefore, the Commission proposed stating in the rule that its subsections apply in sequential order. 71 FR 557, January 5, 2006. That is, in computing time, a party must apply the subsections in order, beginning with subsection (a) and ending with subsection (c). The Commission proposed including as a part of the rule two examples demonstrating how the provisions would apply sequentially. *Id.*

The Commission received one comment on these proposed changes in which the commenter stated that while it generally supports the changes, it believes that the terms ''business'' and ''calendar'' days that are used in Procedural Rule 45 and a portion of Procedural Rule 8 should be used throughout the Commission's rules wherever time periods are set forth, including throughout Rule 8. The Commission has determined that it is unnecessary at this time to so differentiate between business and calendar days throughout the Commission's rules. In addition, the Commission has concluded that it is appropriate to conform its rules more closely to the Federal rules of procedure, and Federal rules do not generally use the business and calendar day terminology. The Commission believes that it is appropriate to continue the use of the terms, as set forth in the proposed rules, only where necessary in order to avoid confusion. For example, the use of the terms ''calendar'' or ''business'' days as proposed in Procedural Rules 8 and 45 is appropriate because such use forecloses the necessity of creating exceptions to the Commission's time computation rule. Accordingly, the Commission adopts Procedural Rule 8 as proposed.

29 CFR 2700.9

Commission Procedural Rule 9 currently provides in part that the time for filing or serving ''any document'' may be extended for good cause and that a motion for extension of time shall be received no later than 3 days prior to the expiration of time allowed for the filing or serving of the document. 29 CFR 2700.9(a). Experience has shown that a number of parties believe that they can seek an extension of time to file a petition for discretionary review. The Commission proposed revising the rule to clarify that the rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. 823(d)(2)(A)(i), and 29 CFR 2700.70(a). 71 FR 557, January 5, 2006.

The Commission received one comment on the proposed change, in which the commenter stated that it supported the change, but that the provision requiring that requests for extensions of time must be filed at least 3 days before the due date should be restated as 3 ''business'' days. The Commission has declined to make the suggested change because it believes that it is sufficiently clear from the proposed rule, read in conjunction with Commission Procedural Rule 8, that requests for extension must be made at least three ''business'' days prior to the due date of a pleading. In addition, as stated with respect to Procedural Rule 8, the Commission has concluded that it is appropriate to conform its rules more closely to the Federal rules of procedure, and such rules do not generally differentiate between business and calendar days. Accordingly, the Commission adopts Procedural Rule 9 as proposed.

29 CFR 2700.10(c)

Commission Procedural Rule 10(c) currently provides that prior to filing a ''procedural motion,'' the moving party shall make reasonable efforts to confer with other parties and state in the motion whether the other parties oppose the motion. 29 CFR 2700.10(c). In the ANPRM, the Commission stated that it was considering whether the phrase ''procedural motion'' should be changed to clarify that it refers to any non-dispositive motion. 69 FR 62633, October 27, 2004.

Most commenters on the ANPRM supported clarifying that movants must confer with opposing parties on non-dispositive motions. The Secretary stated that she did not oppose the change, provided that it was intended to exclude summary decision motions from the rule.

In an effort to dispel confusion created by the overly broad phrase ''procedural motion,'' the Commission proposed revising the rule to state that consultation with opposing parties is required for any motion other than a dispositive motion. 71 FR 557, January 5, 2006. The Commission believes that the phrase ''dispositive motion'' more accurately describes the type of motion about which parties need not confer. The Commission received no objections to the proposed change and adopts the rule as proposed.

29 CFR 2700.10(d)

As discussed in the section above regarding 29 CFR 2700.8, the Commission proposed decreasing the period of time for responding to a motion from 10 days to 8 days. Such a change was proposed in combination with the proposed changes to 29 CFR 2700.8. The Commission proposed revising Commission Procedural Rule 8 to expand the period in which intervening weekends and holidays are excluded from time computation from 7 to 11 days. 71 FR 557, January 5, 2006. If the Commission were to leave unchanged the time period for responding to a motion in current 29 CFR 2700.10(d), the response period could be unreasonably extended. The proposed change to Procedural Rule 10(d) guarantees parties 8 business days to respond to a motion, which is the greatest number of business days provided by the current rules.

The Commission received one comment on the proposed change in which the commenter suggested that the 8 days referred to in the proposed rule as the time for responding to a motion should be specified as 8 ''business'' days. The Commission declines to make the suggested change. As stated with respect to Procedural Rule 8, the Commission has concluded that it is appropriate to conform its rules more closely to Federal rules of procedure, which generally do not differentiate between business and calendar days.

Subpart B—Contests of Citations and Orders; Subpart C—Contests of Proposed Penalties

29 CFR 2700.25

Commission Procedural Rule 25 currently provides that the Secretary shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that such person shall have 30 days to notify the Secretary of any contest of the proposed penalty assessment. 29 CFR 2700.25.

The Commission received two comments on the ANPRM suggesting that the Commission adopt a time limit after a citation or order is issued for the Secretary to issue a proposed penalty assessment for the violations involved. The commenters stated that a time limit of 6 or 12 months would be appropriate

and that such a time limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable.

The Commission invited comment from members of the interested public regarding the imposition of a time limit on the issuance of a proposed penalty assessment and whether failing to issue a proposed penalty within the limit should establish a rebuttable presumption that the issuance of a proposed penalty beyond the specified time is unreasonable. 71 FR 558, January 5, 2006.

The Commission received two comments opposing the creation of any time limits or presumptions regarding the Secretary's filing of proposed penalty assessments. The Secretary argued that any such revised rule would not be a ''procedural rule'' because it would not merely alter the manner in which parties present their viewpoints to the Commission. Citing section 113(d)(2) of the Mine Act, 30 U.S.C. 823(d)(2), which gives the Commission authority to ''prescribe rules of procedure,'' the Secretary contended that the Commission lacks statutory authority to prescribe a substantive rule. In addition, the Secretary asserted that such a rule would be inconsistent with her interpretation of section 105(a) of the Mine Act, 30 U.S.C. 815(a), and with the decision in *Secretary of Labor* v. *Twentymile Coal Co.*, 411 F.3d 256 (D.C. Cir. 2005).

As noted by the Secretary, the change suggested by commenters on the ANPRM raises an array of issues, including an issue of statutory interpretation. The Commission has determined that the resolution of such matters is beyond the scope of this rulemaking, and leaves resolution of the matter to proceedings before the Review Commission and its Judges. Accordingly, the Commission retains Procedural Rule 25 without revision.

29 CFR 2700.26 and 2700.21

The Commission has dual filing requirements under subparts B and C that reflect the filing procedures set forth in sections 105(a) and (d) of the Mine Act, 30 U.S.C. 815(a) and (d). Subpart B sets forth the manner in which a party may contest a citation or order before the Secretary has proposed a civil penalty for the alleged violation described in the citation or order. Subpart C sets forth the manner in which a party may contest a civil penalty after a proposed penalty assessment has been issued. If a party chooses not to file a contest of a citation or order under subpart B, it may nonetheless contest the proposed penalty assessment under subpart C. In such circumstances, in addition to contesting the proposed penalty assessment, the party may challenge the fact of violation and any special findings alleged in the citation or order. *See* 29 CFR 2700.21. However, if a party files a contest of a citation or order under subpart B, it must also file additional pleadings under subpart C in order to challenge the proposed penalty assessment related to the citation or order.

In the ANPRM, the Commission stated that it was considering whether the filing requirements relating to contesting citations, orders, and proposed penalties could be streamlined while remaining consistent with the procedures set forth in sections 105(a) and (d) of the Mine Act. 69 FR 62633, October 27, 2004. It explained that the dual filing requirements under subparts B and C are inconsistent and can sometimes lead to confusion. *Id.* For instance, parties have failed to contest a proposed penalty assessment or to answer the Secretary's petition for assessment of penalty under subpart C based on the mistaken belief that they have been relieved of those obligations by having filed a notice of contest of a citation or order under subpart B. In such circumstances, a final order requiring the payment of the proposed penalty may have been entered against the party by default.

After publishing the ANPRM, the Commission considered streamlining the filing procedures by adding a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed the timely filing of a notice of contest of a proposed penalty assessment. The Commission discussed the provision with MSHA because such a provision would impact the manner in which MSHA processes notices of contests and issues proposed penalty assessments and related documents. During those discussions, the Commission was informed that, due to administrative and technological problems, the provision would be extremely difficult for MSHA to implement and that the expense of implementing it might not be justified by the relatively low number of default cases that would be eliminated.

The Commission determined that it was inadvisable to add a provision stating that the timely filing of a notice of contest of a citation or order shall also be deemed to include the timely filing of a notice of contest of a proposed penalty assessment. 71 FR 558, January 5, 2006. Rather, the Commission proposed adding a provision to Procedural Rule 26 which clarified that a party who wishes to contest a proposed penalty assessment must provide such notification regardless of whether that party has previously contested the underlying citation or order pursuant to 29 CFR 2700.20. *Id.* The Commission also proposed explaining, in Commission Procedural Rule 28(b), 29 CFR 2700.28(b), that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment.

The Commission also stated its intent to employ a number of informal practices in an effort to reduce the number of cases resulting in default. *Id.* Toward that end, the Commission has been working with MSHA to clarify the instructions provided to parties for the filing of various documents. The Commission also intends to distribute and make available to the interested public a document that summarizes the Commission's procedural rules in simple terms, and to place on its Web site a page of frequently asked questions and answers regarding Commission procedures.

The Commission received one comment that supported adding the proposed changes. The Commission adopts Procedural Rule 26 as proposed.

After publication of the NPRM, the Commission determined that it would be appropriate to make changes in subpart B that conform to the revisions to subpart C, set forth in Commission Procedural Rules 26 and 28(b)(2). Accordingly, the Commission revised Commission Procedural Rule 21 to state that the filing of a notice of contest of a citation or order under subpart B does not constitute a challenge to a proposed penalty assessment that may be subsequently issued by the Secretary based on that citation or order. The Commission set forth these conforming changes in a new paragraph (a) of Commission Procedural Rule 21. The current provisions of Procedural Rule 21 are set forth without change in new paragraph (b) of Rule 21.

29 CFR 2700.28(b)

Commission Procedural Rule 44(a), which pertains to a petition for the assessment of a penalty in a discrimination proceeding arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), currently provides that ''[t]he petition for assessment of penalty shall include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act.'' 29 CFR

2700.44(a), *citing* 30 U.S.C. 820(i). Procedural Rule 28, which sets forth the procedure for the Secretary to file a petition for assessment of penalty when an operator has contested a proposed penalty in non-discrimination cases, does not include the ''short and plain statement'' requirement of Procedural Rule 44(a). Rather, Procedural Rule 28(b) provides merely that the petition for assessment of penalty shall state whether the citation or order has been contested, the docket number of any contest, and that the party against whom a penalty petition is filed has 30 days to answer the petition. 29 CFR 2700.28(b).

In the ANPRM, the Commission stated that it was considering whether the provisions of Procedural Rules 44(a) and 28(b) should be made consistent by adding to Procedural Rule 28(b) the ''short and plain statement'' requirement of Procedural Rule 44(a) so as to provide notice to the party against whom the penalty is filed of the bases for the penalty. 69 FR 62633, October 27, 2004.

Most of the comments received by the Commission on the ANPRM supported requiring the Secretary to provide a short and plain statement of supporting reasons for a penalty based on the section 110(i) criteria. The reasons given in support of amending Procedural Rule 28 were that it would provide a better understanding of the bases for the Secretary's allegations, enable a more complete response to the petition, make Procedural Rule 28 consistent with Procedural Rule 44, and promote more expeditious disposition of the case. One commenter did not support making the change because it perceived that such a change would likely result in the consumption of additional resources and lead to delays in the issuance of paperwork. The Secretary stated that requiring a short and plain statement would be unnecessary because the supporting reasons for the penalty are set forth in the proposed penalty assessment (referred to by MSHA as ''Exhibit A''), which is attached to the petition for assessment of penalty.

In response to the comments on the ANPRM and upon further consideration, the Commission proposed revising Procedural Rule 28(b) by adding two requirements. First, as described in the section above regarding 29 CFR 2700.26, the Commission proposed adding to Procedural Rule 28(b) an explanation that an answer to a petition for assessment of penalty must be filed regardless of whether the party has already filed a notice of contest of the citation, order, or proposed penalty assessment. 71 FR 559, January 5, 2006.

In addition, the Commission proposed that the petition include a short and plain statement of the supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Mine Act, 30 U.S.C. 820(i). *Id.* at 558–59, 567. The Commission explained that the Secretary's regulations in part 100 describe three methods for calculating civil penalties: The regular assessment, the special assessment, and the single penalty assessment. *Id.* at 559, *citing* 30 CFR 100.3, 100.4, 100.5. For regular assessments, Exhibit A generally identifies in non-narrative form, among other things, the citation or order by number; whether the alleged violation is significant and substantial within the meaning of section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1); the date of issuance; the standard allegedly violated; and the points assigned to each of 10 listed factors listed, which correspond to 5 of the section 110(i) penalty criteria. The Secretary adds a narrative describing the bases of the penalty to Exhibit A only when she assesses a special assessment. However, in a proceeding in which individual liability is sought under section 110(c) of the Mine Act, 30 U.S.C. 820(c), Exhibit A does not include a narrative or other document explaining the proposed assessment. *See, e.g.*, *Wayne R. Steen*, 20 FMSHRC 381, 386 (April 1998) (applying the section 110(i) criteria in a section 110(c) agent case). The Commission stated its belief that inclusion of a narrative description for the bases of a penalty within a petition would better provide a party notice of the rationale behind the penalty amount. 71 FR 559. In addition, the Commission questioned whether Exhibit A provided an adequate explanation of the bases of a proposed assessment. *Id.*

When the Secretary issues a single penalty assessment, there is no enumeration of the points attributed for each criterion in Exhibit A. The Commission recognized that since single penalty assessments do not involve individualized application of section 110(i) criteria (*see Coal Employment Project* v. *Dole*, 889 F.2d 1127, 1134 (D.C. Cir. 1989)), a narrative description requirement may not apply to these penalties. 71 FR 559. Accordingly, the Commission invited comment from members of the interested public regarding whether, if a short and plain statement requirement were added to Procedural Rule 28(b), an exception to that requirement for single penalty assessments should be explicitly stated. *Id.*

The Commission further stated its belief that requiring the inclusion of a short and plain statement in a petition for assessment of penalty for regular and special assessments would not impose an onerous burden on the Secretary's resources. *Id.* It reasoned that while section 110(i) does not require the Secretary to make findings on the six criteria, the Secretary generally bears the burden of presenting the evidence concerning section 110(i) penalty criteria in support of her proposed assessment in a civil penalty proceeding. *Id., citing Hubb Corp.*, 22 FMSHRC 606, 613 (May 2000); *see also Sec'y of Labor on behalf of Hannah* v. *Consolidation Coal Co.*, 20 FMSHRC 1293, 1302 (December 1998) (noting that the Secretary ''must initially produce preliminary information that will assist the Judge in making findings concerning the statutory penalty criteria''). 71 FR 559. The Commission anticipated that providing the operator with notice of the bases of the Secretary's proposed penalty assessment and allowing the operator the opportunity to identify issues with respect to the proposed penalty would ultimately lead to a more efficient resolution of penalty cases. *Id.*

Moreover, the Commission noted that the revision would make the requirements for petitions for assessment of penalties in both discrimination and non-discrimination cases consistent under the Commission's procedural rules. *Id.* It observed that the Secretary's own regulations in 30 CFR part 100 consistently require the consideration of the same six criteria when proposing penalties in discrimination and non-discrimination cases. *Id., citing* 30 CFR 100.1.

The commenters objected to the addition of a requirement for a short and plain statement and did not address whether an exception to the requirement should be made for single penalty assessments. Both commenters reiterated the concern that the requirement would require the consumption of additional resources which might result in delay. The Secretary also reiterated her objection that there is no discernible need for the requirement because the operator already has notice of all of the matters in dispute when litigation begins. The Secretary further objected to the requirement on the basis that section 110(i) of the Mine Act gives her discretion in proposing penalties and explicitly states that the Secretary ''shall not'' be required to make findings of fact concerning the section 110(i) criteria.

Upon consideration of the comments on the NPRM, the Commission has

concluded that it is appropriate to add the requirement for a short and plain statement with an explicit exception for single penalty assessments. As the Commission responded to the ANPRM comments, the Commission does not believe that the requirement will result in an onerous burden on the Secretary. The additional requirement does not affect all proposed assessments and only applies to regular or special proposed assessments that have been contested by an operator. In those circumstances, the short and plain statement would be inserted in the Petition for Assessment of Penalty by the attorney drafting the Petition, completing the pleading cycle and assisting in framing the issues for the operator and the Judge. The Commission anticipates that the short and plain statement will not necessarily provide different information than that provided in Exhibit A, which is currently attached to the Petition for Assessment of Penalty. However, the narrative form of the short and plain statement will make that information more accessible and easier to comprehend. Currently, in order to comprehend the bases for a proposed penalty, an operator must refer to numbers listed in Exhibit A which are derived from the application of formulas set forth in the Secretary's regulations. The requirement for a short and plain statement also provides useful information for those contested penalties which do not currently have information provided by the attachment of Exhibit A, such as penalties proposed in cases arising under section 110(c) of the Mine Act, 30 U.S.C. 820(c).

The Commission further concludes that the requirement for a short and plain statement in the Petition for Assessment of Penalty is not precluded by the language of section 110(i) of the Mine Act, which states that ''[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to [her] and shall not be required to make findings of fact concerning the above factors.'' 30 U.S.C. 820(i). Section 110(i) provides that the Secretary need not make findings of fact relating to the six factors listed in section 110(i) in proposing a penalty. The short and plain statement requirement does not apply to the Secretary's proposal of a penalty. Rather, it is a pleading requirement that is confined to the Petition for Assessment of Penalty. The Petition for Assessment of Penalty is a pleading that is prepared by the Secretary's counsel after proposing a civil penalty and informing the operator of the proposed penalty, and the operator has opposed the proposed penalty. Thus, consistent with the language of section 110(i), the Secretary need not make findings of fact relating to the six factors listed in section 110(i) in proposing a penalty. However, if a proposed penalty is contested, the Secretary shall be required to provide a short and plain statement regarding the bases for the proposed penalty in the Petition for Assessment of Penalty.

Subpart E—Complaints of Discharge, Discrimination or Interference

29 CFR 2700.45

Judge's Jurisdiction

Commission Procedural Rule 45, 29 CFR 2700.45, sets forth procedures governing the temporary reinstatement of a miner alleging discrimination under section 105(c) of the Mine Act, 30 U.S.C. 815(c). Currently, as to a Judge's jurisdiction, Procedural Rule 45 states only that a Judge shall dissolve an order of temporary reinstatement if the Secretary's investigation reveals that the provisions of section 105(c)(1) of the Mine Act have not been violated. 29 CFR 2700.45(g). The rule further provides that an order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3). *Id.*

In the ANPRM, the Commission stated that it was considering whether to revise Rule 45 to codify the Review Commission's holding in *Secretary of Labor on behalf of York* v. *BR&D Enterprises, Inc.*, 23 FMSHRC 386, 388–89 (April 2001), that a Commission Judge retains jurisdiction over a temporary reinstatement proceeding pending issuance of a final Commission order on the underlying complaint of discrimination. 69 FR 62634, October 27, 2004. All commenters on the ANPRM agreed with the suggested change.

The Commission proposed revising Procedural Rule 45(e) by inserting a statement explaining that the Judge's order temporarily reinstating a miner is not a final decision within the meaning of 29 CFR 2700.69 and that the Judge shall retain jurisdiction over a temporary reinstatement proceeding except during Review Commission or court review of the Judge's order of temporary reinstatement. 71 FR 559 through 560, January 5, 2006. The Commission received comments supporting the proposed revisions to Procedural Rule 45(e). The Commission adopts the rule as proposed.

Effect of Section 105(c)(3) Action on Temporary Reinstatement Order

The Secretary submitted a comment on the ANPRM in which she suggested that Commission Procedural Rule 45(g) be amended to provide that once temporary reinstatement is ordered, absent agreement of the parties, the order of temporary reinstatement shall remain in effect until there is a final decision on the merits of the miner's complaint of discrimination even when the Secretary determines that there was no violation of section 105(c) of the Mine Act. The Secretary explained that the current language of 29 CFR 2700.45(g) suggests that if, after temporary reinstatement has been ordered, the Secretary determines not to proceed on the complaint of discrimination under section 105(c)(2) of the Act, but the miner files a complaint of discrimination under section 105(c)(3), the order of reinstatement should be dissolved. The Secretary contended that such a result is at odds with the meaning of section 105(c)(2). The Secretary reads section 105(c)(2) to require that the temporary reinstatement order remain in effect until the underlying discrimination complaint is resolved regardless of whether the complaint of discrimination is litigated by the Secretary under section 105(c)(2) of the Act or whether it is litigated by the miner under section 105(c)(3) of the Act.

The Commission declined proposing to revise Procedural Rule 45(g) in the manner suggested by the Secretary. 71 FR 560, January 5, 2006. The Commission explained that the Review Commission has not decided the issue of whether a temporary reinstatement order remains in effect during a miner's pursuit of his or her discrimination complaint before the Commission under section 105(c)(3). *Id.* The Commission stated its belief that the issue of statutory interpretation raised by the Secretary's comment is more appropriately addressed in the context of litigation rather than rulemaking. *Id.*

The Commission received comments requesting further revision to Procedural Rule 45(g). One commenter supported the initial revision suggested by the Secretary in her comments on the ANPRM that the rules should be revised to state that a Judge's reinstatement order should remain in effect pending a miner's discrimination complaint under section 105(c)(3). The Secretary, however, agreed with the Commission's conclusion in the NPRM that the issue of whether a temporary reinstatement order remains in effect during a miner's pursuit of his or her discrimination

complaint under section 105(c)(3) would best be resolved in the context of litigation. She observed, however, that current Procedural Rule 45(g) appears to address the issue and resolve it in the negative: That is, that a Judge's reinstatement order should not remain in effect pending a miner's discrimination complaint under section 105(c)(3). The Secretary requested that, because the matter should be resolved in litigation, the Commission should delete the current provision of Procedural Rule 45(g).

The Commission agrees with the Secretary that Procedural Rule 45(g) should be revised so that it does not appear to resolve the question of whether a temporary reinstatement order remains in effect pending a miner's discrimination complaint under section 105(c)(3). Accordingly, the Commission has deleted from Procedural Rule 45(g) the provision directing the Judge to enter an order dissolving an order of temporary reinstatement upon notification by the Secretary of her determination that the provisions of section 105(c)(1) have not been violated. The deletion of such language leaves open for litigation the issue of whether an order for temporary reinstatement remains in effect pending a miner's discrimination complaint under section 105(c)(3) of the Mine Act.

Time Computation

The Commission proposed that Procedural Rule 45 be amended to reflect time periods in ''business'' days when the time period described for action is less than 7 days, and ''calendar'' days when the time period prescribed is 7 or more days. 71 FR 560, January 5, 2006. The Commission explained that, as discussed in the section above regarding 29 CFR 2700.8, it does not intend the proposed rule revisions regarding time computation to affect the filing and service requirements of temporary reinstatement proceedings currently set forth in 29 CFR 2700.45. *Id.* The proposed change maintained the time frames currently provided in 29 CFR 2700.45. There were no objections to the proposed changes. The Commission adopts the rule as proposed.

Subpart G—Hearings

Amendment of Pleadings

The Commission received two comments on the ANPRM suggesting that the Commission adopt a rule limiting the amendment of pleadings by the Secretary. The Commission declined to do so, concluding that the issue should be determined on a case-by-case basis. 71 FR 560, January 5, 2006. The Commission explained that the comments raised an issue which falls within the sound discretion of the Commission's Judges. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (setting forth guidance in the exercise of discretion regarding amendment of pleadings).

The Secretary submitted a comment on the NPRM, agreeing with the Commission and stating that, in any event, any rule limiting the amendment of pleadings should apply to all parties and not just to the Secretary. The Commission declines to take further action and leaves the matter to the discretion of its Judges.

29 CFR 2700.51 and 2700.54

Commission Procedural Rule 54 currently provides in part that written notice of the time, place, and nature of a hearing shall be given to all parties at least 20 days before the date set for hearing. 29 CFR 2700.54. In the ANPRM, the Commission stated that it was considering whether Rule 54 should be revised to require a Judge to consult with all parties before setting a date for hearing. 69 FR 62634, October 27, 2004.

The comments on the ANPRM favored imposing a requirement that a Judge confer with the parties before establishing a hearing date. The comments noted that when hearing dates are set ex parte, one or both parties must often move for a continuance to avoid schedule conflicts. The Secretary added that the requirement to confer should be extended to the choice of a hearing site, while another commenter suggested at least 45 days' notice of a hearing should be required. Another commenter suggested that Judges should be required to hold the hearing without undue delay, and that a time frame within which the hearing must be held should be established.

The Mine Act requires that hearings before the Commission's Judges be held pursuant to 5 U.S.C. 554 of the APA. 30 U.S.C. 815(c), (d). The APA requires that in ''fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.'' 5 U.S.C. 554(b). Commission Procedural Rule 51 currently provides in part that a Judge shall give due regard to the convenience and necessity of parties or their representatives and witnesses in setting a hearing site. 29 CFR 2700.51.

Rather than propose changes to Procedural Rule 54, the Commission proposed that Procedural Rule 51 should be revised to explicitly require a Judge to consider the convenience of parties or their representatives and witnesses in setting the hearing date in addition to setting the site. 71 FR 560, January 5, 2006. The Commission declined to require Commission Judges to consult with all parties before setting a date for hearing. *Id.* The Commission explained that experience has revealed that requiring Judges to confer with parties prior to setting a hearing date may result in undue delay in situations in which it is difficult to contact a party or a party's representative. *Id.* For instance, difficulties can sometimes arise in contacting pro se parties or operators of seasonal or intermittent mining operations during periods when those facilities are not in operation. *Id.* In any event, many of the Commission's Judges confer with parties before setting a hearing in all cases, and others confer in certain types of cases, e.g., where discovery has been initiated and/or the case appears complex.

The Commission further declined to establish a time within which hearings must be held. *Id.* It explained that in practice, a hearing date is typically set within 45–90 days after the case has been assigned. *Id.* Later dates may be established with the agreement of the parties. The Commission noted that under the current and proposed rules, any party would be free to request or move for an expedited hearing in appropriate cases, pursuant to 29 CFR 2700.52. *Id.*

The Commission received one comment on the proposed changes. The commenter supported the proposed revision but stated further that Judges should be encouraged to set hearings without undue delay. As the Commission stated in the NPRM, any party is free to request or move for an expedited hearing pursuant to Commission Procedural Rule 52. *Id.* The Commission adopts Procedural Rule 51 as proposed.

29 CFR 2700.56(d) and (e)

Commission Procedural Rule 56(d) sets forth a time for initiating discovery, providing in part that ''[d]iscovery shall be initiated within 20 days after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section[s] 105(c) or 111 of the Act has been filed.'' 29 CFR 2700.56(d), *citing* 30 U.S.C. 815(c) and 821. Procedural Rule 56(e) sets forth a time for completing discovery, providing that ''[d]iscovery shall be completed within 40 days after its initiation.'' 29 CFR 2700.56(e).

In the ANPRM, the Commission stated that it was considering whether there should be no specific time frame

for initiating discovery, and whether 40 days is too short a period of time for the completion of discovery. 69 FR 62634, October 27, 2004.

The comments on the ANPRM favored eliminating the present rules' specific time periods for commencing and completing discovery, and suggested substituting language providing that discovery not cause undue delay and that it be completed 30 days in advance of a hearing. Several commenters noted that the present time frames are outmoded and, if enforced, would require initiation of potentially costly and burdensome discovery before settlement options could be explored. Several also noted that a specific provision should be added allowing the Judge to permit discovery within the 30-day period prior to the hearing for good cause shown.

The Commission proposed amending Procedural Rule 56 to permit discovery to begin with the filing of a responsive pleading and requiring that it be completed 20 days in advance of a scheduled hearing. 71 FR 560 through 561, January 5, 2006. The Commission explained that the 20-day period, combined with a general provision that discovery not unduly delay or otherwise impede disposition of the case, would assure that discovery be completed in time to allow the filing of comprehensive prehearing statements and full presentation of the case. *Id.* at 561.

The Commission received one comment supporting the proposed change. The Commission adopts Procedural Rule 56 as proposed.

29 CFR 2700.61 and 2700.62

Commission Procedural Rule 61 currently provides that a ''Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.'' 29 CFR 2700.61. Commission Procedural Rule 62 currently states that a ''Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness.'' 29 CFR 2700.62.

The Commission received two comments on the ANPRM suggesting that the Commission should modify Procedural Rule 62 to require disclosure of the names of miner witnesses, along with any documents containing statements by the miner witnesses, at the time of the filing of a prehearing statement or no later than 15 days before a scheduled hearing. The commenters suggested that the 2-day period precludes proper preparation for hearing. The commenters further stated that the Commission should also modify Procedural Rule 61 to provide that the Secretary cannot rely upon evidence from miner informants without providing the names of these informants and the substance of their testimony to the operator 15 days before the hearing.

In the NPRM, the Commission declined to propose any changes to Procedural Rules 61 and 62. *Id.* at 561. It explained that extending the time period for identifying anticipated miner witnesses from 2 days to 15 days before the start of a hearing, as suggested, would unacceptably weaken the protection afforded to miners under Procedural Rules 61 and 62. *Id.* It noted that in the majority of cases, an operator would be able to independently depose miners who might be witnesses well in advance of the trial and therefore would not be harmed by the 2-day limitation. *Id.* In most instances, the universe of potential witnesses, i.e., those with knowledge of the facts of a violative condition or an accident, is generally limited, and the operator would know who has knowledge of the facts of the alleged violation. Such information could also be available to the operator through discovery. If the potential miner informant/witness is an employee, the operator would be able to easily contact the employee for purposes of arranging a deposition. Moreover, the identification of miner witnesses, who may also be informants, 15 days in advance of a hearing would not be necessary to ensure the operator a fair trial in circumstances in which a hearing is continued to a later date or eliminated altogether for unrelated reasons.

The Commission further observed that its Judges have indicated that they generally have not experienced problems applying Procedural Rules 61 and 62 and have been able to balance the interests of all parties under the current rules. *Id.* The Commission also noted that because the 2-day period set forth in Procedural Rule 62 refers to 2 business days, under current Procedural Rule 8 and its revisions, the operator also could use weekend days contiguous to the 2-day period for depositions of miner witnesses. *Id.* In any event, should there be an occasion where the late identification of a miner witness or the late discovery of the scope of his testimony causes prejudice to the operator, the operator could request a continuance in order to have time to adequately prepare for the hearing.

The Commission received one comment on the NPRM supporting the Commission's determination not to revise Procedural Rules 61 and 62. The Commission retains Procedural Rules 61 and 62 without further revision.

29 CFR 2700.63(a)

Commission Procedural Rule 63(a) currently provides that ''[r]elevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible.'' 29 CFR 2700.63(a). The Commission received two comments on the ANPRM suggesting that the Commission modify its rule to require that hearsay evidence be supported by some evidence of reliability in order to be admissible.

In the NPRM, the Commission concluded that further rulemaking was not warranted because Commission precedent sufficiently addresses the commenters' concerns. 71 FR 561, January 5, 2006. Under Commission precedent, hearsay evidence is admissible in proceedings before the Commission's Judges as long as the evidence is ''material and relevant.'' *Kenny Richardson,* 3 FMSHRC 8, 12 n.7 (January 1981), *affd,* 689 F.2d 632 (6th Cir. 1982), *cert. denied,* 461 U.S. 928 (1983). Hearsay evidence can constitute substantial evidence supporting a Judge's decision only if that evidence ''is surrounded by adequate indicia of probativeness and trustworthiness.'' *Mid-Continent Res., Inc.,* 6 FMSHRC 1132, 1135–36 (May 1984) (citations omitted). The Commission received no comments on the NPRM on this issue. The Commission retains Procedural Rule 63(a) without further revision.

29 CFR 2700.67(a)

Commission Procedural Rule 67(a) currently provides that ''[a]t any time after commencement of a proceeding and no later than 10 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding.'' 29 CFR 2700.67(a).

In the ANPRM, the Commission stated that it was considering whether the filing deadline for a summary decision motion should be changed from 10 days to 20 or 30 days before the hearing, allowing the Judge a greater period of time to rule on the motion. 69 FR 62634, October 27, 2004.

Most of the comments received by the Commission on the ANPRM supported changing the time period for filing a motion for summary decision from 10 days to 20 days before the hearing date. The Secretary and another commenter favored increasing the time period to 30 days. That commenter further suggested adding a requirement that the Judge rule

on the motion at least 10 days before the hearing.

An appropriate deadline for filing a motion for summary decision prior to a hearing must be considered in light of other rule provisions governing filing and time computation. Under the present rules, which provide that filing is effective upon mailing (29 CFR 2700.5(d)), a party has 10 days to respond to a motion (29 CFR 2700.10(d)), and an additional 5 days is added to that time when the motion is served by mail (29 CFR 2700.8). Consequently, a party could file by mail a motion for summary decision 10 days prior to a hearing, and the opposition would not have to be filed by mail until 5 days after commencement of the hearing.

The Commission proposed revising Procedural Rule 67(a) to provide that a motion for summary decision may be filed no later than 25 days prior to a hearing, and that the filing of such motions and responses would be effective upon receipt. 71 FR 562, January 5, 2006. The Commission explained that the proposed revision should ensure adequate time for a Judge to review the motion and the opposition, and to make an informed decision as to whether a hearing will be necessary. *Id.* The Commission noted that, pursuant to 29 CFR 2700.9, a party may request an extension of time if it is unable to meet the deadline for filing a motion for summary decision. *Id.* The Commission further declined to revise the rule to require a Judge to decide a motion for summary decision by a time certain. *Id.* The Commission explained that under the proposed rule, the Judge may not have the opposition until approximately 10 days before the hearing. *Id.* Such a time period should be sufficient to allow the Judge to make an informed determination of whether to cancel, postpone, or go forward with the hearing, without inconveniencing the parties. Requiring a decision on the motion 10 days prior to hearing, as one commenter suggested, would not in all instances allow the Judge sufficient time to make a decision and prepare an opinion.

The Commission received one comment supporting the proposed change. The Commission adopts Procedural Rule 67(a) as proposed.

29 CFR 2700.67(c), (d), (e) and (f)

Commission Procedural Rule 67(c) currently sets forth the requirements for the form of a motion for summary decision and any supporting affidavits. 29 CFR 2700.67(c). After publication of the NPRM, proceedings before the Commission brought to light the need to include a provision setting forth a requirement that a statement of material facts as to which the moving party contends there is no genuine issue must be submitted with a motion for summary decision. The Commission also determined that it was necessary to clarify the procedure for opposing a motion for summary decision. The Commission is revising paragraph (c) of Procedural Rule 67 to add requirements for filing a statement of material facts with a motion for summary decision. In addition, the Commission is redesignating current paragraph (d) of Procedural Rule 67 as paragraph (f). Finally, the Commission is adding new paragraph (d), which sets forth requirements for opposing a motion for summary decision, and new paragraph (e), which sets forth the requirements for affidavits.

29 CFR 2700.69

Commission Procedural Rule 69(c) sets forth the procedure for correcting clerical errors in a Judge's decision. 29 CFR 2700.69(c). It provides that, at any time before the Review Commission has directed review of a Judge's decision, a Judge may correct clerical errors on his/her own motion, or on the motion of a party. *Id.* After the Review Commission has directed review of the Judge's decision or after the Judge's decision has become the final order of the Commission, the Judge may correct clerical errors with the leave of the Review Commission. *Id.*

In the ANPRM (69 FR 62634, Oct. 27, 2004), the Commission stated that it was considering inserting a provision which would make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR of the Judge's decision on the merits. *See Earl Begley,* 22 FMSHRC 943, 944 (August 2000).

Most of the comments received by the Commission on the ANPRM favored making the change. The Secretary, however, stated that a Judge's authority to correct decisions should be ''expanded'' in the rule to include errors that result from oversight or omission, and that such a corrected decision be appealable in its own right.

The Commission proposed amending Procedural Rule 69(c) to make explicit that clerical corrections made subsequent to the issuance of a Judge's decision do not toll the period for filing a PDR. 71 FR 562, January 5, 2006. The Commission further declined to make the change suggested by the Secretary because broadening a Judge's authority to alter or amend a decision to cover more substantive changes, like those addressed under Fed. R. Civ. P. 59(e) and 60(a), could create questions involving finality and appealability that could result in a delay in Commission proceedings. *Id.*

In addition, as described in the section-by-section analysis of 29 CFR 2700.5 and 2700.72, the Commission proposed adding Procedural Rule 69(d) to clarify that Judges' decisions are not binding precedent upon the Commission. *Id.*

The Commission received no objections to the proposed revisions. The Commission adopts Procedural Rule 69 as proposed.

Subpart H—Review by the Commission

29 CFR 2700.70(h)

Commission Procedural Rule 70(h) currently provides that a PDR that is not granted within 40 days after the issuance of a Judge's decision is deemed denied. 29 CFR 2700.70(h).

In the ANPRM, the Commission stated that it was considering making explicit its present practice under the rule that the Review Commission may act on a PDR on the 1st business day following the 40th day after a Judge's decision, where the 40th day would otherwise fall on a weekend or federal holiday. 69 FR 62634, October 27, 2004.

In the NPRM, the Commission declined to propose any changes to Procedural Rule 70. 71 FR 562, January 5, 2006. The Commission explained that it need not clarify in Procedural Rule 70 that the Review Commission may act on a PDR on the next day that the Commission's offices are open if the Commission's offices are closed on the 40th day. *Id.* It noted that the changes that the Commission had proposed with respect to Procedural Rule 8 would sufficiently clarify the Review Commission's authority in this respect. *Id.* The Commission received no objections to its determination that it need not revise Rule 70. The Commission retains Procedural Rule 70 without revision.

29 CFR 2700.72

As noted above in the section-by-section analysis of 29 CFR 2700.5, the Commission proposed deleting the current provisions of 29 CFR 2700.72, and reserving Commission Procedural Rule 72 for future use. Presently, Procedural Rule 72 provides that an unreviewed decision of a Judge is not a precedent binding upon the Commission. 29 CFR 2700.72. In the ANPRM, the Commission stated that it was considering adding the requirement that any citation to an unreviewed decision of a Judge should be designated parenthetically as such. 69 FR 62634, October 27, 2004.

The Commission proposed including in Procedural Rule 5 a requirement that citations to a Judge's decision shall include ''(ALJ)'' at the end of the citation. 71 FR 562, January 5, 2006. In addition, the Commission proposed adding to Procedural Rule 69 a provision stating that all Judge's decisions are not binding precedent upon the Commission. The Commission adopts those proposed changes and removes and reserves present Procedural Rule 72.

29 CFR 2700.74

Commission Procedural Rule 74 currently sets forth the provisions applicable to amicus curiae participation in Commission proceedings. 29 CFR 2700.74. After publication of the NPRM, proceedings before the Commission brought to light the need to clarify that, under Procedural Rule 74, a movant may seek to enter an appearance as an amicus curiae in a Commission proceeding, even if the movant does not specifically support any of the positions of the parties in that proceeding. The Commission is revising paragraph (a) of Procedural Rule 74 and adding a new paragraph (d). These revisions clarify the procedures for seeking participation as an amicus when the movant does not support a party in a Commission proceeding.

29 CFR 2700.75

As noted above in the section-by-section analysis regarding 29 CFR 2700.5, the Commission proposed to revise Commission Procedural Rule 5 to require that fewer copies be filed. The Commission proposed making conforming changes to 29 CFR 2700.75(g) which require that each party shall file the original and six copies of its brief with the Review Commission, or if the party is not represented by a lawyer, it need file only the original document. 71 FR 562, January 5, 2006.

In addition, the Commission proposed adding a new paragraph (h) to Commission Procedural Rule 75 requiring a table of contents for opening and response briefs filed with the Review Commission. *Id.* The Commission suggested that a table of contents in opening and response briefs would be helpful to the Review Commission and parties, particularly in lengthy briefs involving multiple issues. *Id.* As provided in current Procedural Rule 75(c), the table of contents would be excluded from the page limit allowed for such briefs. 29 CFR 2700.75(c).

The Commission received no objections on the proposed revisions. The Commission adopts Procedural Rule 75 as proposed.

29 CFR 2700.76

Commission Procedural Rule 76 currently sets forth the procedure for interlocutory review by the Commission. 29 CFR 2700.76. The rule provides for the simultaneous filing of briefs within 20 days of the order granting interlocutory review. 29 CFR 2700.76(c). While the rule specifies that the Review Commission's consideration is confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review (29 CFR 2700.76(d)), there is no description of what constitutes the record on interlocutory review. In the ANPRM, the Commission stated that it was considering whether Procedural Rule 76 should be revised to state what constitutes the record on interlocutory review. 69 FR 62634, October 27, 2004.

A few commenters on the ANPRM supported amending the rule to clarify what constitutes the record on interlocutory review, while others stated that such a change is unnecessary. The Secretary further suggested that Procedural Rule 76 should be revised to provide for the filing of briefs seriatim, and that the party seeking review should be permitted to file a reply brief.

After publication of the ANPRM, the Commission improved its internal processes to better provide the Review Commission with the record on interlocutory review in the event the parties do not supply the Commission with all the relevant record excerpts. Because the changes in the Commission's internal processes do not impose any additional or different requirements upon parties, the Commission determined that it need not revise Procedural Rule 76 to describe what constitutes the record on interlocutory review.

The Commission proposed, however, that Procedural Rule 76 should be amended to substitute for the rule's current briefing requirement, language stating that when the Commission grants interlocutory review, it will also issue an order addressing the sequence and timing of briefs, including any reply briefs. 71 FR 563, January 5, 2006. The Commission explained that, while it agrees with the Secretary that there may be occasions when it is useful for parties to file briefs seriatim or for the filing party to have the opportunity to file a reply brief, the briefing schedule for interlocutory appeals is best determined on a case-by-case basis. *Id.*

One commenter on the NPRM supported the proposed changes to Procedural Rule 76, while the other commenter stated a preference for a briefing schedule that requires briefs to be filed seriatim and provides an opportunity for the filing of a reply brief. For the reasons stated in the NPRM, the Commission has determined that it shall revise Procedural Rule 76 as proposed. In its petition for interlocutory review, a party may request a briefing schedule that requires briefs to be filed seriatim and provides an opportunity for the filing of a reply brief.

29 CFR 2700.78

Commission Procedural Rule 78(b) currently provides in part that, unless the Review Commission orders otherwise, the filing of a petition for reconsideration does not stay the effect of a Review Commission decision and does not affect the finality of a decision for purposes of review in the courts. 29 CFR 2700.78(b). In the ANPRM, the Commission stated that it was considering whether it should revise Rule 78 to state that the filing of a petition for reconsideration tolls the time period for filing an appeal for judicial review until the Review Commission has issued an order disposing of the petition for reconsideration. 69 FR 62634, October 27, 2004.

Some commenters on the ANPRM did not support revising the rule, stating that judicial review would simply be delayed, given the unlikelihood that the Review Commission would grant a petition for reconsideration, or that the revision could encourage parties to file petitions for reconsideration in order to delay court review, with the result being an increase in the duration of Commission proceedings. Another commenter supported the revision on the ground that it could help avoid unnecessary court review and expedite final resolution. The Secretary supported the revision on the ground that it would make the Commission's rules consistent with the decisions of Federal courts of appeal on the question.

In the NPRM, the Commission proposed deleting the present language that the filing of a petition for reconsideration with the Review Commission shall not affect the finality of a decision or order for purposes of judicial review. 71 FR 563, January 5, 2006. The Commission explained that such a revision is consistent with precedent recognizing that court review is precluded while a petition for reconsideration before an agency is pending. *Id., citing United Transportation Union* v. *ICC,* 871 F.2d 1114, 1116–18 (D.C. Cir. 1989) (*''UTU''*);

West Penn Power Co. v. *EPA,* 860 F.2d 581, 585 (3d Cir. 1988). Courts have reasoned that court review should be so precluded in order to prevent the waste of judicial resources and consideration of questions that may be disposed of by the agency when acting upon a reconsideration request. *See UTU,* 871 F.2d at 1116–18 (discussing rationale of the different courts addressing the issue). The Commission stated that it would otherwise leave to the courts the determination of the extent to which court review will proceed while a petition for reconsideration is before the Review Commission. 71 FR 563.

The Commission declined to insert a statement that filing a petition for reconsideration tolls the time period for filing an appeal for judicial review, however. *Id.* It reasoned that such an insertion may lead to the misperception that a Review Commission decision that is the subject of a petition for reconsideration is non-final with respect to even those parties who did not petition for reconsideration. *Id.* Courts generally have determined that a pending reconsideration request at the administrative level does not make the underlying decision non-final for parties who do not seek administrative reconsideration. *ICG Concerned Workers Ass'n* v. *United States,* 888 F.2d 1455 (D.C. Cir. 1989).

One commenter supported the proposed revision. Another commenter suggested that the Commission should revise the rule to incorporate an explanation of how courts have precluded judicial review during the pendency of a reconsideration request sought by those parties that filed for reconsideration, but not for those parties that did not seek reconsideration. The Commission has determined that it is not appropriate at this time to codify court precedent on the issue, particularly given the paucity of precedent directly applying relevant provisions of the Mine Act. In the absence of such codification, parties may seek guidance on the issue from court precedent. Accordingly, the Commission adopts Procedural Rule 78 as proposed.

Subpart I—Miscellaneous

29 CFR 2700.80

Commission Procedural Rule 80(a) presently provides that ''[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.'' 29 CFR 2700.80(a).

The Commission proposed revising Procedural Rule 80(a) to clarify that certain ethical conduct is required of individuals practicing before the Review Commission or practicing before Commission Judges. 71 FR 563, January 5, 2006. It noted that, by its literal terms, the standard could be misinterpreted to require certain ethical conduct of: (a) Individuals practicing before the Review Commission; and (b) Commission Judges. *Id.* The Commission explained that the rule was intended to require certain ethical conduct of individuals practicing in Commission proceedings, and that other Commission rules explicitly impose standards of conduct upon Judges. *Id.*, *citing* 29 CFR 2700.81 (recusal and disqualification); 29 CFR 2700.82 (ex parte communications).

One commenter did not object to the proposed change. Another commenter suggested that Procedural Rule 80 should be revised to specifically cite the American Bar Association Model Rules of Professional Conduct as the applicable ethical standard for individuals practicing in Commission proceedings. That commenter further suggested that Procedural Rule 80 should also be revised to cite the American Bar Association Model Code of Judicial Conduct as the applicable standard of conduct for Commission Judges. The Commission declines to specify the standards of ethical conduct required in Commission proceedings as beyond the scope of this procedural rulemaking. The Commission adopts Procedural Rule 80 as proposed.

29 CFR 2700.84

As discussed in the section above regarding 29 CFR 2700.1, the Commission has revised Commission Procedural Rule 1 to add a provision stating the effective date of amendments to the Commission's procedural rules. The Commission has repealed Commission Procedural Rule 84, which states the effective date of the Commission's procedural rules which were revised and republished in 1993.

B. Part 2704—Implementation of the Equal Access to Justice Act in Commission Proceedings

Interplay of parts 2700 and 2704

Experience under the agency's EAJA rules of procedure has highlighted procedural matters in Commission EAJA proceedings that are governed by the Commission's rules of procedure in 29 CFR part 2700. Issues including scope of review by the Review Commission once review has been granted (29 CFR 2700.70(g)); motion practice (29 CFR 2700.10); and standards of conduct (29 CFR 2700.80), for example, are not separately covered in the Commission's EAJA rules. These rules stand in contrast to other rules in part 2700 that clearly are applicable only to Mine Act proceedings, such as 29 CFR 2700.25 (proposed penalty assessments). Therefore, the Commission proposed revising its EAJA rule at 29 CFR 2704.100 to clarify that its rules of procedure at part 2700 apply to EAJA proceedings where appropriate. 71 FR 564, January 5, 2006. The Commission received no comments on the proposed revision. The Commission adopts EAJA Rule 100 as proposed.

Eligibility for Fees

In *Colorado Lava, Inc.*, 27 FMSHRC 186, 188–95 (March 2005), the Review Commission ruled unanimously that prevailing parties are not eligible for fees under the ''excessive and unreasonable demand'' prong of EAJA and the Commission's regulations implementing it. As currently written, the Commission's regulations are silent as to whether prevailing parties may obtain fees under this provision. The Commission proposed clarifying these rules and revising 29 CFR 2704.100, 2704.104, 2704.105, and 2704.206 to make it clear, consistent with its decision in *Colorado Lava*, that only non-prevailing parties may be awarded fees under EAJA's ''excessive and unreasonable demand'' provision. 71 FR 564, January 5, 2006. The Commission received no comments on the proposed changes and adopts the rules as proposed.

Aggregation of Assets and Employees of Prevailing Parties

Commission EAJA Rule 104(b)(2) presently provides for the aggregation of assets or employees of affiliates of a prevailing party to determine eligibility for an EAJA award. 29 CFR 2704.104(b)(2). In response to the ANPRM, one commenter requested that the Commission revise its present rules by deleting the requirement for aggregation of assets or employees of affiliates. In the NPRM, the Commission asked for further comments on the rule and requested commenters to focus their attention on judicial and administrative developments since the Commission last revised its EAJA rules in 1998. 71 FR 564, Jan. 5, 2006, *citing Tri-State Steel Constr. Co.* v. *Herman*, 164 F.3d 973 (6th Cir. 1999), and 70 FR 22785, 22787, May 3, 2005. In response to the NPRM, the Commission received one comment in support of the present rule. After considering the comments on the ANPRM and NPRM and recent judicial and administrative developments, the Commission has determined to repeal EAJA Rule 104(b)(2).

SBA Rule Changes

Commission EAJA Rule 104(c) cross references the regulations of the Small Business Administration (''SBA'') that establish the standards for the eligibility of an applicant who has been the subject of an excessive and unreasonable demand from MSHA. Since the last publication of the Commission's EAJA rules (63 FR 63172 through 63178, November 12, 1998), there have been minor changes in the SBA rules governing when applicants qualify as ''small entities,'' as defined in 5 U.S.C. 601. Therefore, for the convenience of the public, the Commission has reproduced the annual-receipts and number-of-employees standards, for various mining entities, identified by the North American Classification System (''NAICS'') code, which is established by the SBA at 13 CFR 121.201.

NAICS codes	NAICS U.S. industry title	Size standard in millions of dollars	Size standard in number of employees
Subsector 212—Mining (Except Oil and Gas)			
212111	Bituminous Coal and Lignite Surface		500
212112	Bituminous Coal Underground Mining		500
212113	Anthracite Mining		500
212210	Iron Ore Mining		500
212221	Gold Ore Mining		500
212222	Silver Ore Mining		500
212231	Lead Ore and Zinc Ore Mining		500
212234	Copper Ore and Nickel Ore Mining		500
212291	Uranium-Radium-Vanadium Ore Mining		500
212299	All Other Metal Ore Mining		500
212311	Dimension Stone Mining and Quarrying		500
212312	Crushed and Broken Limestone Mining and Quarrying		500
212313	Crushed and Broken Granite Mining and Quarrying		500
212319	Other Crushed and Broken Stone Mining and Quarrying		500
212321	Construction Sand and Gravel Mining		500
212322	Industrial Sand Mining		500
212324	Kaolin and Ball Clay Mining		500
212325	Clay and Ceramic and Refractory Minerals Mining		500
212391	Potash, Soda, and Borate Mineral Mining		500
212392	Phosphate Rock Mining		500
212393	Other Chemical and Fertilizer Mineral Mining		500
212399	All Other Nonmetallic Mineral Mining		500
Subsector 213—Support Activities for Mining			
213111	Drilling Oil and Gas Wells		500
213112	Support Activities for Oil and Gas Operations	$6.5	
213113	Support Activities for Coal Mining	$6.5	
213114	Support Activities for Metal Mining	$6.5	
213115	Support Activities for Nonmetalic Minerals (except Fuels)	$6.5	

Standards for Awards

Commission EAJA Rule 105(b) presently provides that a non-prevailing party may establish that the Secretary's demand is excessive when compared to the Commission's decision and that the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to the decision. 29 CFR 2704.105(b). The Commission received a comment on the ANPRM that EAJA Rule 105(b) improperly places the burden of proof on EAJA applicants to show that the Secretary's demand is both excessive and unreasonable. In the NPRM, the Commission declined to make any revisions to the rule. 71 FR 564, January 5, 2006. The Commission explained that Commission EAJA Rules 105(b) and 203(a) require that the EAJA applicant ''show'' that the Secretary's demand is excessive, while the Secretary can only avoid an award by establishing that the demand is not unreasonable when compared to the Commission's decision. *Id., citing* 29 CFR 2704.203(a). The Commission reasoned that contrary to the commenter's suggestion, the rule does not require the applicant to prove that the penalty is unreasonable. 71 FR at 564. The Commission further noted that experience under the rules has not indicated any change to the pleading requirements is necessary. *Id., citing L&T Fabrication & Constr., Inc.*, 22 FMSHRC 509, 514 (April 2000). The Commission received one comment on the NPRM supporting its determination not to revise EAJA Rule 105(b). The Commission retains EAJA Rule 105(b) without revision.

Hourly Rate

Commission EAJA Rule 106(b) currently provides that the award for the fee of an attorney or agent to those parties who are successful on EAJA claims may not exceed $125 per hour, except as provided in 29 CFR 2704.107. 29 CFR 2704.106(b). The Commission received one comment on the ANPRM recommending that the Commission amend the rule to provide for an automatic increase in the $125 hourly rate. The Commission considered the recommendation but stated in the NPRM that no change was necessary because no party had sought an increase in the present rate for attorney's fees since the rule was revised in 1998. 71 FR 564, January 5, 2006. Further, the Commission noted that 29 CFR 2704.107(a) allows parties to petition the Review Commission or its Judges for a higher rate. *Id.* The Commission received one comment on the NPRM supporting its determination not to revise EAJA Rule 106(b). The Commission retains EAJA Rule 106(b) without revision.

EAJA Application Deadline

Commission EAJA Rule 206(a) requires that an application be filed no later than 30 days after the Commission's final disposition of the underlying proceeding (or 30 days after a final and nonappealable court judgment in a Commission case). 29 CFR 2704.206(a). Commission EAJA Rule 206(c) currently defines ''final disposition'' as the date on which a case on the merits becomes final pursuant to sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. 815(d) and 823(d). 29 CFR 2704.206(c). As currently written, it is not clear whether this term means ''final and not appealable.''

In the NPRM, the Commission proposed amending the definition of ''final disposition'' in EAJA Rule 206(c) to clarify that it means the date on which a decision or order on the merits becomes final and unappealable. 71 FR 564, January 5, 2006. The Commission explained that the proposed revision is consistent with court precedent holding that an EAJA application is due 30 days following the expiration of the time for an appeal on the merits—that is, the time for appeal must lapse or the appeal be completed before the 30-day deadline begins to run. *Id.*, *citing Scafar Contracting, Inc.* v. *Sec'y of Labor*, 325 F.3d 422 (3d Cir. 2003); *Adams* v. *SEC*, 287 F.3d 183 (D.C. Cir. 2002).

The Commission received no objections to the proposed change and adopts EAJA Rule 206(c) as proposed.

Automatic Stay of Proceedings

Commission EAJA Rule 206(b) currently provides that if review or reconsideration is sought or taken of a decision on the merits, EAJA proceedings shall be stayed pending final disposition of the underlying case. 29 CFR 2704.206(b). The Secretary submitted a comment on the ANPRM stating that generally she files a motion for stay in these circumstances, and that the stay is routinely granted. The Secretary suggested that the Commission revise EAJA Rule 206(b) to provide that the stay of EAJA proceedings is automatic, which will make the filing of such motions unnecessary.

In the NPRM, the Commission declined to revise EAJA Rule 206(b) in the manner suggested by the Secretary. 71 FR 564, January 5, 2006. The Commission explained that the issuance of an order in response to a motion creates certainty as to the procedural posture of a case. *Id.* It noted that the absence of a stay order could lead to uncertainty among the parties, particularly those unfamiliar with the Commission's procedures, and that the advantage of certainty among the parties is not outweighed by the minimal hardship imposed on the Secretary when she is required to file a stay motion. *Id.*

The Secretary submitted a comment on the NPRM reiterating the suggestion that the rule should be revised to state that the stay of an EAJA proceeding is automatic pending final disposition of the underlying case. The Secretary stated that an automatic stay would clarify that a party who appeals a Judge's decision need not file an EAJA application until the Commission has finished its review of the merits proceeding. The Commission declines to revise EAJA Rule 206(b) in the manner suggested. An explicit stay order from a Judge is preferable because it makes clear the procedural posture of the case. In addition, revisions to EAJA Rule 206(c) regarding EAJA application deadlines sufficiently clarify when an EAJA application must be filed.

Effect of Stay on Filing Answer

Commission EAJA Rule 302(a), as currently worded, sets forth time frames for the filing of an answer in an EAJA proceeding without taking into account the possible existence of a stay. 29 CFR 2704.302(a). The Commission received a comment on the ANPRM from the Secretary stating that the Commission should consider revising this rule to address the interplay of Commission EAJA Rule 206(b), 29 CFR 2704.206(b) (providing for a stay of EAJA proceedings under certain circumstances) and the 30-day requirement for answering the EAJA application. The Secretary suggested that the Commission should revise its rules to require that the Secretary file an answer within 30 days after service of an application unless the matter has been stayed under Rule 206(b), in which case the Secretary must file an answer within 30 days after the expiration of the stay.

In the NPRM, the Commission agreed with the Secretary's suggestion and proposed amending EAJA Rule 302(a), which provides guidance regarding the filing of an answer, to clarify that an answer must be filed within 30 days after service of an application unless the matter has been stayed under EAJA Rule 206(b). 71 FR 565, January 5, 2006. The Commission received no objections to the proposed change and adopts the rule as proposed.

C. Part 2705—Privacy Act Implementation

29 CFR 2705.1

Privacy Act Rules and the Commission's Case Files Under the Mine Act

After publication of the ANPRM, the Commission examined its practices under the Privacy Act of 1974, 5 U.S.C. 552a (2000), to determine whether any revisions to its rules implementing the Privacy Act were necessary. In the NPRM, the Commission proposed revising 29 CFR 2705.1 to clarify that the Commission's Privacy Act rules do not apply to its files generated under the Mine Act. 71 FR 565, January 5, 2006. The Commission recognized that its files that pertain to its personnel are covered by the Privacy Act. *Id.* Certain Commission files are retrievable by a ''personal identifier,'' one of the criteria for coverage under the Privacy Act. Those files involve circumstances arising under the Mine Act when a case adjudicatory file may bear the name of an individual, such as miner discrimination complaints under 30 U.S.C. 815(c); violations involving operators that do business as sole proprietorships; violations involving individual directors, owners, or officers under 30 U.S.C. 820(c); violations involving miners for carrying smoking materials under 30 U.S.C. 820(g); and persons charged with giving advance notice of mine inspections under 30 U.S.C. 820(e). The Commission explained, however, that while these files are retrievable by a personal identifier, it is not apparent that files generated in Mine Act enforcement proceedings are ''records'' within the meaning of the Privacy Act. *Id.*

The Commission received no comments on the issue. The Commission adopts the rule as proposed.

Miscellaneous

Electronic Filing

The Commission is considering the feasibility of electronic filing and may consider initiating a program that would permit the electronic filing of limited categories of documents in proceedings on a voluntary basis. If the Commission determines that electronic filing is feasible, the Commission will amend its rules as necessary.

III. Matters of Regulatory Procedure

The Commission has determined that these rules are not subject to the Office of Management and Budget (''OMB'') review under Executive Order 12866, 58 FR 51735, September 30, 1993.

The Commission has determined under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) that these rules will not have a significant economic impact on a substantial number of small entities. Therefore, a Regulatory Flexibility Statement and Analysis has not been prepared.

The Commission has determined that the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) does not apply because these rules do not contain any information collection requirements that require the approval of the OMB.

List of Subjects

29 CFR Part 2700

Administrative practice and procedure, Mine safety and health, Penalties, Whistleblowing.

29 CFR Part 2704

Claims, Equal access to justice, Lawyers.

29 CFR Part 2705

Privacy.

■ For the reasons stated in the preamble, the Commission amends 29 CFR parts 2700, 2704, and 2705 as follows:

PART 2700—PROCEDURAL RULES

■ 1. The authority citation for part 2700 continues to read as follows:

Authority: 30 U.S.C. 815, 820, and 823.

■ 2. Section 2700.1 is amended by revising paragraphs (a) and (b) to read as follows:

§ 2700.1 Scope; applicability of other rules; construction.

(a) *Scope.* (1) This part sets forth rules applicable to proceedings before the Federal Mine Safety and Health Review Commission (''the Commission'') and its Administrative Law Judges. The Commission is an adjudicative agency that provides administrative trial and appellate review of legal disputes arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (''the Act''). The Commission is an independent agency, not a part of nor affiliated in any way with the U.S. Department of Labor or its Mine Safety and Health Administration (''MSHA''). The location of the Commission's headquarters is at 601 New Jersey Avenue, NW., Suite 9500, Washington, DC 20001; its primary phone number is 202–434–9900; and the fax number of its Docket Office is 202–434–9954. The Commission maintains a Web site at *http://www.fmshrc.gov* where these rules, recent and many past decisions of the Commission and its Judges, and other information regarding the Commission, can be accessed.

(2) Unless the Commission provides otherwise, amendments to these rules are effective 60 days following publication in the **Federal Register**, and apply to cases initiated after they take effect. They also apply to further proceedings in cases pending on the effective date, except to the extent that application of the amended rules would not be feasible, or would work injustice, in which event the former rules of procedure would continue to apply.

(b) *Applicability of other rules.* On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

* * * * *

■ 3. Section 2700.5 is amended by redesignating paragraphs (d), (e), (f), and (g) as (e), (f), (g), and (i), revising newly redesignated paragraphs (e), (f), and (g), and adding new paragraphs (d) and (h) to read as follows:

§ 2700.5 General requirements for pleadings and other documents; status or informational requests.

* * * * *

(d) *Privacy considerations.* Persons submitting information to the Commission shall protect information that tends to identify certain individuals or tends to constitute an unwarranted intrusion of personal privacy in the following manner:

(1) All but the last four digits of social security numbers, financial account numbers, driver's license numbers, or other personal identifying numbers, shall be redacted or excluded;

(2) Minor children shall be identified only by initials;

(3) If dates of birth must be included, only the year shall be used;

(4) Parties shall exercise caution when filing medical records, medical treatment records, medical diagnosis records, employment history, and individual financial information, and shall redact or exclude certain materials unnecessary to a disposition of the case.

(e) *Manner and effective date of filing.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be filed with a Judge or the Commission by any means of delivery a party chooses, including facsimile transmission. With the exception of documents filed pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings), or subpart F (Applications for temporary relief), documents filed by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. Parties filing by facsimile are also required to file the original document with the Judge or Commission within 3 days of the facsimile transmission.

(2) When filing is by personal delivery or facsimile, filing is effective upon successful receipt by the Commission. When filing is by mail, filing is effective upon mailing, except that the filing of a petition for discretionary review, a petition for review of a temporary reinstatement order, a motion for extension of time, a motion for summary decision, or a motion to exceed page limit is effective upon receipt. *See* §§ 2700.9(a), 2700.45(f), 2700.67(a), 2700.70(a), (f), and 2700.75(f).

(f) *Number of copies.* In cases before a Judge, unless otherwise ordered, the original document, along with one copy for each docket, shall be filed; in cases before the Commission, the original and six copies shall be filed; but if the filing party is not represented by a lawyer, the original shall be sufficient. When filing is by facsimile transmission, the original must be filed with the Judge or Commission within 3 days of the facsimile transmission, but no additional copies should be filed.

(g) *Form of pleadings.* All printed material shall appear in at least 12-point type on paper 8½ by 11 inches in size, with margins of at least 1 inch on all four sides. Text and footnotes shall appear in the same size type. Text shall be double spaced. Headings and footnotes may be single spaced. Quotations of 50 words or more may be single spaced and indented left and right. Excessive footnotes are prohibited. The failure to comply with the requirements of this paragraph or the use of compacted or otherwise compressed printing features may be grounds for rejection of a pleading.

(h) *Citation to a decision of a Judge.* Each citation to a decision of a Judge should include ''(ALJ)'' at the end of the citation.

* * * * *

■ 4. Section 2700.7 is amended by revising paragraph (c) to read as follows:

§ 2700.7 Service.

* * * * *

(c) *Methods of service.* Unless otherwise provided for in the Act, these rules, or by order:

(1) Documents may be served by any means of delivery a party chooses, including facsimile transmission. With the exception of documents served pursuant to §§ 2700.70 (Petitions for discretionary review), 2700.45 (Temporary reinstatement proceedings),

or subpart F (Applications for temporary relief), documents served by facsimile transmission shall not exceed 15 pages, excluding the facsimile cover sheet. When filing by facsimile transmission (*see* § 2700.5(e)), the filing party must also serve by facsimile transmission or, if service by facsimile transmission is impossible, the filing party must serve by a third-party commercial overnight delivery service or by personal delivery.

(2) When service is by personal delivery or facsimile, service is effective upon successful receipt by the party intended to be served. When service is by mail, service is effective upon mailing.

* * * * *

■ 5. Section 2700.8 is revised to read as follows:

§ 2700.8 Computation of time.

Except to the extent otherwise provided herein (see, *e.g.*, § 2700.45), the due date for a pleading or other deadline for party or Commission action (hereinafter ''due date'') is determined sequentially as follows:

(a) When the period of time prescribed for action is less than 11 days, Saturdays, Sundays, and Federal holidays shall be excluded in determining the due date.

(b) When a party serves a pleading by a method of delivery other than same-day service, the due date for party action in response is extended 5 additional calendar days beyond the date otherwise prescribed, after consideration of paragraph (a) of this section where applicable.

(c) The day from which the designated period begins to run shall not be included in determining the due date. The last day of the prescribed period for action, after consideration of paragraphs (a) and (b) of this section where applicable, shall be included and be the due date, unless it is a Saturday, Sunday, Federal holiday, or other day on which the Commission's offices are not open or the Commission is open but unable to accept filings, in which event the due date shall be the next day which is not one of the aforementioned days.

Example 1: A motion is filed with the Commission on Friday, July 1, 2005. Under § 2700.10(d), other parties in the proceeding have 8 days in which to respond to the motion. Because the response period is less than 11 days, intervening weekends and holidays, such as Monday, July 4, 2005, are excluded in determining the due date. A response is thus due by Thursday, July 14, 2005. In addition, those parties not served with the motion on the day it was filed, such as by facsimile or messenger, have 5 additional calendar days in which to respond, or until Tuesday, July 19, 2005.

Example 2: A Commission Judge issues his final decision in a case on Friday, July 1, 2005. Under § 2700.70(a), parties have until July 31, 2005, to file with the Commission a petition for discretionary review of the Judge's decision. Even though the decision was mailed, 5 additional calendar days are not added, because paragraph (b) of this section only applies to actions in response to parties'' pleadings. However, because July 31, 2005, is a Sunday, the actual due date for the petition is Monday, August 1, 2005.

■ 6. Section 2700.9 is amended by revising paragraph (a) and adding a new paragraph (c) to read as follows:

§ 2700.9 Extensions of time.

(a) The time for filing or serving any document may be extended for good cause shown. Filing of a motion requesting an extension of time is effective upon receipt. A motion requesting an extension of time shall be received no later than 3 days prior to the expiration of the time allowed for the filing or serving of the document, and shall comply with § 2700.10. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

(c) This rule does not apply to petitions for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Act, 30 U.S.C. 823(d)(2)(A)(i), and § 2700.70(a).

■ 7. Section 2700.10 is amended by revising paragraph (c) and the first sentence of paragraph (d) to read as follows:

§ 2700.10 Motions.

* * * * *

(c) Prior to filing any motion other than a dispositive motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion.

(d) A statement in opposition to a written motion may be filed by any party within 8 days after service upon the party. * * *

■ 8. Section 2700.21 is amended by:

■ A. Revising the heading;

■ B. Designating the existing text as paragraph (b); and

■ C. Adding new paragraph (a).

The revision and addition read as follows:

§ 2700.21 Effect of filing notice of contest of citation or order

(a) The filing of a notice of contest of a citation or order issued under section 104 of the Act, 30 U.S.C. 814, does not constitute a challenge to a proposed penalty assessment that may subsequently be issued by the Secretary under section 105(a) of the Act, 30 U.S.C. 815(a), which is based on that citation or order. A challenge to such a proposed penalty assessment must be filed as a separate notice of contest of the proposed penalty assessment. *See* § 2700.26.

* * * * *

■ 9. Section 2700.26 is revised to read as follows:

§ 2700.26 Notice of contest of proposed penalty assessment.

A person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty assessment. A person who wishes to contest a proposed penalty assessment must provide such notification regardless of whether the person has previously contested the underlying citation or order pursuant to § 2700.20. The Secretary shall immediately transmit to the Commission any notice of contest of a proposed penalty assessment.

■ 10. Section 2700.28 is amended by revising paragraph (b) to read as follows:

§ 2700.28 Filing of petition for assessment of penalty with the Commission.

* * * * *

(b) *Contents.* The petition for assessment of penalty shall:

(1) List the alleged violations and the proposed penalties. Each violation shall be identified by the number and date of the citation or order and the section of the Act or regulations alleged to be violated.

(2) Include a short and plain statement of supporting reasons based on the criteria for penalty assessment set forth in section 110(i) of the Act, 30 U.S.C. 820(i), unless a single penalty assessment has been proposed under 30 CFR 100.4.

(3) State whether the citation or order has been contested pursuant to § 2700.20 and the docket number of any contest proceeding.

(4) Advise the party against whom the petition is filed that an answer to the petition must be filed within 30 days pursuant to § 2700.29 and that the answer must be filed regardless of whether the party has already filed a notice of contest of the citation, order,

or proposed penalty assessment involved.

* * * * *

■ 11. Section 2700.45 is amended by revising paragraph (a), the first and last sentences of paragraph (c), and paragraphs (e), (f), and (g) to read as follows:

§ 2700.45 Temporary reinstatement proceedings.

(a) *Service of pleadings.* A copy of each document filed with the Commission in a temporary reinstatement proceeding shall be expeditiously served on all parties, such as by personal delivery, including courier service, by express mail, or by facsimile transmission.

* * * * *

(c) *Request for hearing.* Within 10 calendar days following receipt of the Secretary's application for temporary reinstatement, the person against whom relief is sought shall advise the Commission's Chief Administrative Law Judge or his designee, and simultaneously notify the Secretary, whether a hearing on the application is requested.

* * * If a hearing on the application is requested, the hearing shall be held within 10 calendar days following receipt of the request for hearing by the Commission's Chief Administrative Law Judge or his designee, unless compelling reasons are shown in an accompanying request for an extension of time.

* * * * *

(e) *Order on application.* (1) Within 7 calendar days following the close of a hearing on an application for temporary reinstatement, the Judge shall issue a written order granting or denying the application. However, in extraordinary circumstances, the Judge's time for issuing an order may be extended as deemed necessary by the Judge.

(2) The Judge's order shall include findings and conclusions supporting the determination as to whether the miner's complaint has been frivolously brought.

(3) The parties shall be notified of the Judge's determination by the most expeditious means reasonably available. Service of the order granting or denying the application shall be by certified or registered mail, return receipt requested.

(4) A Judge's order temporarily reinstating a miner is not a final decision within the meaning of § 2700.69, and except during appellate review of such order by the Commission or courts, the Judge shall retain jurisdiction over the temporary reinstatement proceeding.

(f) *Review of order.* Review by the Commission of a Judge's written order granting or denying an application for temporary reinstatement may be sought by filing with the Commission a petition, which shall be captioned ''Petition for Review of Temporary Reinstatement Order,'' with supporting arguments, within 5 business days following receipt of the Judge's written order. The filing of any such petition is effective upon receipt. The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances. Any response shall be filed within 5 business days following service of a petition. Pleadings under this rule shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery. The Commission's ruling on a petition shall be made on the basis of the petition and any response (any further briefs will be entertained only at the express direction of the Commission), and shall be rendered within 10 calendar days following receipt of any response or the expiration of the period for filing such response. In extraordinary circumstances, the Commission's time for decision may be extended.

(g) *Dissolution of order.* If, following an order of temporary reinstatement, the Secretary determines that the provisions of section 105(c)(1), 30 U.S.C. 815(c)(1), have not been violated, the Judge shall be so notified. An order dissolving the order of reinstatement shall not bar the filing of an action by the miner in his own behalf under section 105(c)(3) of the Act, 30 U.S.C. 815(c)(3), and § 2700.40(b) of these rules.

■ 12. Section 2700.51 is revised to read as follows:

§ 2700.51 Hearing dates and sites.

All cases will be assigned a hearing date and site by order of the Judge. In fixing the time and place of the hearing, the Judge shall give due regard to the convenience and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors.

■ 13. Section 2700.52 is amended by revising the first sentence of paragraph (a) to read as follows:

§ 2700.52 Expedition of proceedings.

(a) *Motions.* In addition to making a written motion pursuant to § 2700.10, a party may request expedition of proceedings by oral motion, with concurrent notice to all parties. * * *

* * * * *

■ 14. Section 2700.56 is amended by revising paragraphs (d) and (e) to read as follows:

§ 2700.56 Discovery; general.

* * * * *

(d) *Initiation of discovery.* Discovery may be initiated after an answer to a notice of contest, an answer to a petition for assessment of penalty, or an answer to a complaint under section 105(c) or 111 of the Act has been filed. 30 U.S.C. 815(c) and 821.

(e) *Completion of discovery.* Discovery shall not unduly delay or otherwise impede disposition of the case, and must be completed at least 20 days prior to the scheduled hearing date. For good cause shown, the Judge may extend or shorten the time for discovery.

■ 15. Section 2700.67 is amended by:

■ A. Revising paragraph (a);

■ B. Revising paragraph (c);

■ C. Redesignating paragraph (d) as (f); and

■ D. Adding new paragraphs (d) and (e).

The revisions and additions read as follows:

§ 2700.67 Summary decision of the Judge.

(a) *Filing of motion for summary decision.* At any time after commencement of a proceeding and no later than 25 days before the date fixed for the hearing on the merits, a party may move the Judge to render summary decision disposing of all or part of the proceeding. Filing of a summary decision motion and an opposition thereto shall be effective upon receipt.

* * * * *

(c) *Form of motion.* A motion shall be accompanied by a memorandum of points and authorities specifying the grounds upon which the party seeks summary decision and a statement of material facts specifying each material fact as to which the party contends there is no genuine issue. Each material fact set forth in the statement shall be supported by a reference to accompanying affidavits or other verified documents.

(d) *Form of opposition.* An opposition to a motion for summary decision shall include a memorandum of points and authorities specifying why the moving party is not entitled to summary decision and may be supported by affidavits or other verified documents. The opposition shall also include a separate concise statement of each genuine issue of material fact necessary to be litigated, supported by a reference

to any accompanying affidavits or other verified documents. Material facts identified as not in issue by the moving party shall be deemed admitted for purposes of the motion unless controverted by the statement in opposition. If a party does not respond in opposition, summary decision, if appropriate, shall be entered in favor of the moving party.

(e) *Affidavits.* Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to the affidavit or be incorporated by reference if not otherwise a matter of record. The judge shall permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, admissions, or further affidavits.

■ 16. Section 2700.69 is amended by adding a new last sentence to paragraph (c) and a new paragraph (d) to read as follows:

§ 2700.69 Decision of the Judge.

* * * * *

(c) *Correction of clerical errors.* * * * Neither the filing of a motion to correct a clerical error, nor the issuance of an order or amended decision correcting a clerical error, shall toll the time for filing a petition for discretionary review of the Judge's decision on the merits.

(d) *Effect of decision of Judge.* A decision of a Judge is not a precedent binding upon the Commission.

■ 17. Section 2700.70 is amended by revising the second sentence of paragraph (a) and paragraph (f) to read as follows:

§ 2700.70 Petitions for discretionary review.

(a) *Procedure.* * * * Filing of a petition for discretionary review is effective upon receipt. * * *

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit shall be received not less than 3 days prior to the date the petition for discretionary review is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

* * * * *

§ 2700.72 [Removed]

■ 18. Section 2700.72 is removed and reserved.

■ 19. Section 2700.74 is amended by revising the third sentence of paragraph (a) and adding a new paragraph (d) to read as follows:

§ 2700.74 Procedure for participation as amicus curiae.

(a) * * * A motion for participation as amicus curiae shall set forth the interest of the movant; indicate which party's position, if any, the movant supports; the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case; and show that the granting of the motion will not unduly delay the proceeding or prejudice any party; * * *

* * * * *

(d) Any person who does not support a party in the proceeding must file its motion for participation as amicus curiae and brief no later than 20 days after initial briefs are filed (*see* § 2700.75(a)(1)). A motion for participation as amicus curiae must comply with the requirements set forth in paragraph (a) of this section. A brief of amicus curiae must comply with § 2700.75(c).

■ 20. Section 2700.75 is amended by revising paragraphs (f) and (g) and adding new paragraph (h) to read as follows:

§ 2700.75 Briefs.

* * * * *

(f) *Motion for leave to exceed page limit.* A motion requesting leave to exceed the page limit for a brief shall be received not less than 3 days prior to the date the brief is due to be filed, shall state the total number of pages proposed, and shall comply with § 2700.10. Filing of a motion requesting an extension of page limit is effective upon receipt. The motion and any statement in opposition shall include proof of service on all parties by a means of delivery no less expeditious than that used for filing the motion, except that if service by facsimile transmission is impossible, the filing party shall serve by a third-party commercial overnight delivery service or by personal delivery.

(g) *Number of copies.* As provided in § 2700.5(f), each party shall file the original and six copies of its brief. If the filing party is not represented by a lawyer, the original shall be sufficient. When filing is by facsimile transmission, the original must be filed with the Commission within 3 days of the facsimile transmission, but no additional copies should be filed.

(h) *Table of contents.* Each opening and response brief filed with the Commission shall contain a table of contents. Unless otherwise ordered by the Commission, a party is not required to submit a table of contents for a previously filed petition for discretionary review that has been designated as the party's opening brief pursuant to paragraph (a) of this section.

■ 21. Section 2700.76 is amended by revising paragraph (c) to read as follows:

§ 2700.76 Interlocutory review.

* * * * *

(c) *Briefs.* When the Commission grants interlocutory review, it shall also issue an order which addresses page limits on briefs and the sequence and schedule for filing of initial briefs, and, if permitted by the order, reply briefs.

* * * * *

■ 22. Section 2700.78 is amended by revising paragraph (b) to read as follows:

§ 2700.78 Reconsideration.

* * * * *

(b) Unless the Commission orders otherwise, the filing of a petition for reconsideration shall not stay the effect of a decision or order of the Commission.

■ 23. Section 2700.80 is amended by revising paragraph (a) to read as follows:

§ 2700.80 Standards of conduct; disciplinary proceedings.

(a) *Standards of conduct.* Individuals practicing before the Commission or before Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

* * * * *

§ 2700.84 [Removed]

■ 24. Section 2700.84 is removed.

PART 2704—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN COMMISSION PROCEEDINGS

■ 25. The authority citation for part 2704 continues to read as follows:

Authority: 5 U.S.C. 504(c)(1); Public Law 99–80, 99 Stat. 183; Public Law 104–121, 110 Stat. 862.

■ 26. Section 2704.100 is revised to read as follows:

§ 2704.100 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504, provides for the award of

attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (called ''adversary adjudications'') before this Commission. An eligible party may receive an award when it prevails over the U.S. Department of Labor, Mine Safety and Health Administration (''MSHA''), unless the Secretary of Labor's position in the proceeding was substantially justified or special circumstances make an award unjust. In addition to the foregoing ground of recovery, a non-prevailing eligible party may receive an award if the demand of the Secretary is substantially in excess of the decision of the Commission and unreasonable, unless the applicant party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. The rules in this part describe the parties eligible for each type of award. They also explain how to apply for awards, and the procedures and standards that this Commission will use to make the awards. In addition to the rules in this part, the Commission's general rules of procedure, part 2700 of this chapter, apply where appropriate.

■ 27. Section 2704.104 is amended by removing paragraph (b)(2), redesignating paragraphs (b)(3) and (b)(4) as paragraphs (b)(2) and (b)(3), and revising paragraph (c) to read as follows:

§ 2704.104 Eligibility of applicants.

* * * * *

(c) For the purposes of awards for non-prevailing parties under § 2704.105(b), eligible applicants are small entities as defined in 5 U.S.C. 601, subject to the annual-receipts and number-of-employees standards as set forth by the Small Business Administration at 13 CFR part 121.

* * * * *

■ 28. Section 2704.105 is amended by revising paragraph (b) introductory text to read as follows:

§ 2704.105 Standards for awards.

* * * * *

(b) If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant who does not prevail the fees and expenses related to defending against the excessive demand, unless the applicant has committed a willful violation of law or otherwise acted in bad faith or special circumstances make an award unjust. The burden of proof is on the applicant to establish that the Secretary's demand is substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand is not unreasonable when compared to that decision. As used in this section, ''demand'' means the express demand of the Secretary which led to the adversary adjudication, but does not include a recitation by the Secretary of the maximum statutory penalty—

* * * * *

■ 29. Section 2704.206 is amended by revising the second sentence of paragraph (a) and paragraph (c) to read as follows:

§ 2704.206 When an application may be filed.

(a) * * * An application may also be filed by a non-prevailing party when a demand by the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision. * * *

* * * * *

(c) For purposes of this part, final disposition before the Commission means the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final (pursuant to sections 105(d) and 113(d) of the Mine Act (30 U.S.C. 815(d) and 823(d)) and unappealable, both within the Commission and to the courts (pursuant to section 106(a) of the Mine Act (30 U.S.C. 816(a)).

■ 30. Section 2704.302 is amended by revising the second sentence of paragraph (a) to read as follows:

§ 2704.302 Answer to application.

(a) * * * Unless counsel requests an extension of time for filing, files a statement of intent to negotiate under paragraph (b), or a proceeding is stayed pursuant to § 206(b), failure to file an answer within the 30-day period may be treated as a consent to the award requested.

* * * * *

PART 2705—PRIVACY ACT IMPLEMENTATION

■ 31. The authority citation for part 2705 continues to read as follows:

Authority: 5 U.S.C. 552a; Public Law 93–579, 88 Stat. 1896.

■ 32. Section 2705.1 is amended by republishing the introductory text and revising paragraph (a) to read as follows:

§ 2705.1 Purpose and scope.

The purposes of these regulations are to:

(a) Establish a procedure by which an individual can determine if the Federal Mine Safety and Health Review Commission, hereafter the ''Commission,'' maintains a system of records which includes a record pertaining to the individual. This does not include Commission files generated in adversary proceedings under the Federal Mine Safety and Health Act; and

* * * * *

Dated: July 28, 2006.

Michael F. Duffy,

Chairman, Federal Mine Safety and Health Review Commission.

[FR Doc. 06–6642 Filed 8–3–06; 8:45 am]

BILLING CODE 6735–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[CGD13–06–038]

RIN 1625–AA08

Special Local Regulations, Seattle Seafair, Lake Washington, WA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary special local regulations (SLR) for the Seattle Seafair, Lake Washington, Washington. These special local regulations limit the movement of non-participating vessels in the regulated race area and provide for a viewing area for spectator craft. This rule is needed to provide for the safety of life on navigable waters during Seafair. The rule adds four hours to the effective time period of the existing SLR to accommodate the addition of a fireworks display in this year's Seafair.

DATES: This rule is effective from 8 p.m. (PDT) until 11:59 p.m. (PDT) on August 5, 2006 unless sooner cancelled by the Captain of the Port.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket [CGD13–06–038] and are available for inspection or copying at the Waterways Management Division, Coast Guard Sector Seattle, 1519 Alaskan Way South, Seattle, WA 98134, between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.