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1.1. (Rule 1.1) Ethics.

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.


1.2. (Rule 1.2) Construction.

These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, and within the extent permitted by statute, the Commission may permit deviations from the rules.


1.3. (Rule 1.3) Definitions.

(a) "Adjudicatory" proceedings are: (1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.

(b) "Category," "categorization," or "categorized" refers to the procedure whereby a proceeding is determined to be an "adjudicatory," "ratesetting," or "quasi-legislative" proceeding.
(c) "Person" means a natural person or organization.

(d) "Quasi-legislative" proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry.

(e) "Ratesetting" proceedings are proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities). "Ratesetting" proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future. Other proceedings may be categorized as ratesetting, as described in Rule 7.1(e)(2).

(f) "Scoping memo" means an order or ruling describing the issues to be considered in a proceeding and the timetable for resolving the proceeding, as described in Rule 7.3.


1.4. (Rule 1.4) Participation in Proceedings.

(a) A person may become a party to a proceeding by:

(1) filing an application (other than an application for rehearing pursuant to Rule 16.1), petition, or complaint;

(2) filing (i) a protest or response to an application (other than an application for rehearing pursuant to Rule 16.1) or petition, or (ii) comments in response to a rulemaking;

(3) making an oral motion to become a party at a prehearing conference or hearing; or

(4) filing a motion to become a party.

(b) A person seeking party status by motion pursuant to subsection (a)(3) or (a)(4) of this rule shall:
(1) fully disclose the persons or entities in whose behalf the filing, appearance or motion is made, and the interest of such persons or entities in the proceeding; and

(2) state the factual and legal contentions that the person intends to make and show that the contentions will be reasonably pertinent to the issues already presented.

(c) The assigned Administrative Law Judge may, where circumstances warrant, deny party status or limit the degree to which a party may participate in the proceeding.

(d) Any person named as a defendant to a complaint, or as a respondent to an investigation or a rulemaking, is a party to the proceeding.


1.5. (Rule 1.5) Form and Size of Tendered Documents.

Documents tendered for filing must be typewritten, printed, or reproduced on paper 8 1/2 inches wide and 11 inches long. Any larger attachments must be legibly reduced or folded to the same size. The body text type must be no smaller than 12 points and footnote text type must be no smaller than 11 points. The impression must use 1 1/2-line or double spacing, except that footnotes and quotations in excess of a few lines may be single-spaced. Both sides of the paper must be used, where practicable. Pages must be numbered. The left margin must be at least one inch from the left edge of the page and the right margin at last ½ inch from the right edge of the page. A document of more than one page must be bound on the left side or upper left-hand corner. If a transmittal letter is submitted (see Rule 1.13(a)), it must not be bound to the tendered document. All copies must be clear and permanently legible.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

1.6. (Rule 1.6) Title Page Requirements.

(a) All documents tendered for filing must have a blank space of at least 1 1/2 inches tall by 2 1/2 inches wide in the upper right-hand corner for a docket stamp and must show on the first page:
(1) at the top, the heading "BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA";

(2) in the upper left below the heading, the caption for the proceeding;

(3) to the right of the caption, the docket number (if one has been assigned) or a space for the docket number (if the document initiates a new proceeding);

(4) below the caption and docket number, the title of the document and the name of or shortened designation for the person tendering the document.

(b) Persons and corporations regulated by the Commission must include their assigned Case Information System (CIS) Identification Number in the captions of documents initiating new proceedings and in the titles of other documents filed in existing cases (e.g., "Application of Pacific Bell (U 1001 C) for Rehearing of Decision 91-01-001").

(c) For documents of more than 20 pages, the title page shall set forth the name, mailing address, telephone number, and, if available, electronic mail address of the person authorized to receive service and other communications on behalf of the person tendering the document, and date of signing. For documents of 20 pages or less, this information may be set forth following the signature at the end of the document (see Rule 1.8).

(d) The title page may extend to additional pages if these required items cannot be set forth on one page.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

1.7. (Rule 1.7) Scope of Filing.

(a) Separate documents must be used address unrelated subjects or to ask the Commission or the Administrative Law Judge to take essentially different types of action (e.g., a document entitled "Complaint and Motion to File Under Seal" would be improper; two separate documents must be used for the complaint and for the motion). Motions that seek leave to file another document (e.g., to accept a later filing or to file a document under seal) shall be tendered concurrently and separately with the document that is the subject of the motion.

(b) Except as otherwise required or permitted by these Rules or the
Commission's decisions, general orders, or resolutions, prepared testimony shall not be filed or tendered to the Docket Office. If prepared testimony is issued in support of a filing at the time the filing is made, it shall be served (i) on the service list together with the filing, and (ii) on the Administrative Law Judge or, if none is yet assigned, on the Chief Administrative Law Judge.


1.8. (Rule 1.8) Signatures.

(a) A document tendered for filing must have a signature at the end of the document and must state the date of signing, the signer's address, the signer's telephone number, and (if consenting to service by electronic mail) the signer's electronic mail address.

(b) A signature on a document tendered for filing certifies that the signer has read the document and knows its contents; that to the signer's best knowledge, information, and belief, formed after reasonable inquiry, the facts are true as stated; that any legal contentions are warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; that the document is not tendered for any improper purpose; and that the signer has full power and authority to sign the document. (See Rule 1.1.)

(c) A document tendered for filing must be signed either by the person on whose behalf it is tendered for filing or by the attorney or representative of the person. If the document is signed by the person, it must be signed as follows:

(1) If the person is an individual or sole proprietorship, by the individual or proprietor.

(2) If the person is a corporation, trust, or association, by an officer.

(3) If the person is a partnership or limited partnership, by a partner or general partner, respectively.

(4) If the person is a governmental entity, by an officer, agent, or authorized employee.

(d) If a document is tendered for filing on behalf of more than one person, only one person (or one person's attorney or representative) need sign the document unless otherwise required by these rules. The title or first
paragraph of the document must identify all persons on whose behalf the document is tendered and state their Case Information System Identification Numbers, if applicable (see Rule 1.6(b)). The signature of a person in these circumstances certifies that the signer has been fully authorized by the indicated persons to sign and tender the document and to make the representations stated in subsection (b) on their behalf.

(e) Except as otherwise required in these rules or applicable statute, a copy of the original signature page is acceptable for tendering for filing in hard copy, and a signature page containing a signature made by electronic or mechanical means is acceptable for tendering for electronic filing, provided that the signer retains the signed original, and produces it at the Administrative Law Judge's request, until the Commission's final decision in the proceeding is no longer subject to judicial review.

(f) The Commission may summarily deny a person's request, strike the person's pleadings, or impose other appropriate sanctions for willful violation of subsections (b) or (d) of this rule. The Commission may seek appropriate disciplinary action against an attorney for a willful violation of subsections (b) or (d) of this rule.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

1.9. (Rule 1.9) Service Generally.

(a) Except as otherwise provided in these rules or applicable statute, a requirement to serve a document means that a copy of the document must be served on each person whose name is on the official service list for the proceeding and on the assigned Administrative Law Judge (or, if none is yet assigned, on the Chief Administrative Law Judge).

(b) Except as otherwise provided in these rules or applicable statute, all documents that are tendered for filing pursuant to Rule 1.13 must be served.

(c) Service of a document may be effected by personally delivering a copy of the document to the person or leaving it in a place where the person may reasonably be expected to obtain actual and timely receipt, mailing a copy of the document by first-class mail, or electronically mailing the document as provided in Rule 1.10, except that documents that are electronically tendered for filing as provided in Rule 1.14 must be served by e-mail as provided in Rule 1.10. Service by first-class mail is complete when the
document is deposited in the mail. Service by e-mail is complete when the e-mail message is transmitted, subject to Rule 1.10(e). The Administrative Law Judge may direct or any party may consent to service by other means not listed in this rule (e.g., facsimile transmission).

(d) A person may serve a Notice of Availability in lieu of hard copy service under this rule or e-mail service under Rule 1.10:

(1) if the entire document, including attachments, exceeds 50 pages; or

(2) if a document or part of the document is not reproducible in electronic format, or would cause the entire e-mail message, including all attachments, to exceed 3.5 megabytes in size, or would be likely to cause e-mail service to fail for any other reason; or

(3) if the document is made available at a particular Uniform Resource Locator (URL) on the World Wide Web in a readable, downloadable, printable, and searchable format, unless use of such formats is infeasible; or

(4) with the prior permission of the assigned Commissioner or Administrative Law Judge; except that the document must be served on any person who has previously informed the serving person of its desire to receive the document.

The Notice must comply with Rule 1.6(a), and shall state the document's exact title and summarize its contents, and provide the name, telephone number, and e-mail address, if any, of the person to whom requests for the document should be directed. The document shall be served within one business day after receipt of any such request.

If the document is made available at a particular URL, the Notice of Availability must contain a complete and accurate transcription of the URL or a hyperlink to the URL at which the document is available, and must state the date on which the document was made available at that URL. Such document must be maintained at that URL until the date of the final decision in the proceeding. If changes to the web site change the URL for the document, the serving person must serve and file a notice of the new URL.

(e) A copy of the certificate of service must be attached to each copy of the document (or Notice of Availability) served and to each copy filed with the Commission. If a Notice of Availability is served, a copy of the Notice must also be attached to each copy of the document filed with the Commission. The certificate of service must state: (1) the caption for the proceeding, (2)
the docket number (if one has been assigned), (3) the exact title of the document served, (4) the place, date, and manner of service, and (5) the name of the person making the service. The certificate filed with the original of the document must be signed by the person making the service (see Rule 1.8(e)). The certificate filed with the original of the document must also include a list of the names, addresses, and, where relevant, the e-mail addresses of the persons and entities served and must indicate whether they received the complete document or a Notice of Availability. (See Rule 18.1, Form No. 4.)

(f) The Process Office shall maintain the official service list for each pending proceeding and post the service list on the Commission's web site. The official service list shall include the following categories:

(1) Parties, as determined pursuant to Rule 1.4,

(2) State Service, for service of all documents (available to California State employees only), and

(3) Information Only, for electronic service of all documents only, unless otherwise directed by the Administrative Law Judge.

Persons will be added to the official service list, either as State Service or Information Only, upon request to the Process Office. It is the responsibility of each person or entity on the official service list to ensure that its designated person for service, mailing address and/or e-mail address shown on the official service list are current and accurate. A person may change its mailing address or e-mail address for service or its designation of a person for service by sending a written notice to the Process Office.

(g) The Administrative Law Judge may establish a special service list that includes some, but not all, persons on the official service list for service of documents related to a portion of a proceeding, provided that all persons on the official service list are afforded the opportunity to be included on the special service list. A special service list may be established, for example, for one phase of a multi-phase proceeding or for documents related to issues that are of interest only to certain persons.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. References: Sections 311.5 and 1704, Public Utilities Code.
1.10. (Rule 1.10) Electronic Mail Service.

(a) By providing an electronic mail (e-mail) address for the official service list in a proceeding, a person consents to e-mail service of documents in the proceeding, and may use e-mail to serve documents on persons who have provided an e-mail address for the official service list in the proceeding.

(b) Documents served by e-mail need not be otherwise served on persons who appear in the "Information Only" category of the official service list and have not provided an e-mail address for the official service list. Nothing in this rule excuses persons from serving copies of documents on persons who appear in the "Parties" and "State Service" categories of the official service list and have not provided an e-mail address for the official service list.

(c) E-mail service shall be made by sending the document, a link to the filed version of the document, or the Notice of Availability (see Rule 1.9(c)), as an attachment to an e-mail message to all e-mail addresses shown on the official service list on the date of service. The certificate of service shall be attached to the e-mail message as a separate document. Documents must be in readable, downloadable, printable, and searchable formats, unless use of such formats is infeasible. The subject line of the e-mail message must include in the following order (1) the docket number of the proceeding, (2) a brief name of the proceeding, and (3) a brief identification of the document to be served, including the name of the serving person. The text of the e-mail message must identify the electronic format of the document (e.g., PDF, Excel), whether the e-mail message is one of multiple e-mail messages transmitting the document or documents to be served and, if so, how many e-mails, and the name, telephone number, e-mail address, and facsimile transmission number of the person to whom problems with receipt of the document to be served should be directed. The total size of a single e-mail message and all documents attached to it may not exceed 3.5 megabytes.

(d) By utilizing e-mail service, the serving person agrees, in the event of failure of e-mail service, to re-serve the document, no later than the business day after the business day on which notice of the failure of e-mail service is received by the serving party. The serving person is not required to re-serve, after failure of e-mail service, any person listed on the official service list as Information Only.

(e) In addition to any other requirements of this rule, the serving person must provide a paper copy of all documents served by e-mail service to the assigned Administrative Law Judge (or, if none is yet assigned, to the Chief Administrative Law Judge), unless the Administrative Law Judge orders otherwise.
(f) The Commission may serve any document in a proceeding by e-mail service, and/or by making it available at a particular URL, unless doing so would be contrary to state or federal law.

(g) Nothing in this rule alters any of the rules governing filing of documents with the Commission.

(h) The assigned Commissioner or Administrative Law Judge may issue any order consistent with these rules to govern e-mail service in a particular proceeding.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 311.5, Public Utilities Code; and Section 11104.5, Government Code.

1.11. (Rule 1.11) Verification.

(a) Whenever a document is required to be verified by these rules, statute, order, or ruling, the verification must be made either by affidavit sworn or affirmed before a notary public or by declaration under penalty of perjury. When the verification is made by the person who signs the document, the verification must be separately stated and signed.

(b) The verification must be signed (see Rule 1.8(e)), and state that the contents of the document are true of the verifying person's own knowledge, except as to matters that are stated on information or belief, and as to those matters that he or she believes them to be true. (See Rule 18.1.)

(c) If these rules require a person to verify a document, it must be verified as follows (except as provided in subsection (d)):

(1) If the person is an individual or sole proprietorship, by the individual or sole proprietor.

(2) If the person is a corporation, trust, or association, by an officer.

(3) If a person is a partnership or limited partnership, by a partner or general partner, respectively.

(4) If the person is a governmental entity, by an officer, agent, or authorized employee.

(d) A person's attorney or representative may verify a document on behalf of a person if the person is absent from the county where the attorney's or
representative's office is located, or if the party for some other reason is unable to verify the document. When a document is verified by the attorney or representative, he or she must set forth in the affidavit or declaration why the verification is not made by the person and must state that he or she has read the document and that he or she is informed and believes, and on that ground alleges, that the matters stated in it are true.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 446, Code of Civil Procedure.

1.12. (Rule 1.12) Amendments and Corrections.

(a) An amendment is a document that makes a substantive change to a previously filed document. An amendment to an application, protest, complaint, or answer must be filed prior to the issuance of the scoping memo.

(b) The time for filing a reply, response, protest, or answer to an amended document is calculated from the date the amendment is filed. Parties who have filed a reply, response, protest or answer to the previously filed document need not file an additional reply, response, protest or answer to the amendment. If the time for filing a reply, response, protest, or answer to the original document has passed, the Administrative Law Judge may limit or prohibit any further reply, response, protest, or answer to the amended document.

(c) Minor typographical or wording corrections that do not alter the substance of a filed document or the relief requested therein are not to be filed.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.


Documents may be tendered for filing in hard copy or electronically, as follows, except that a utility whose gross intrastate revenues, as reported in the utility's most recent annual report to the Commission, exceed $10 million shall electronically file all documents unless otherwise prohibited or excused by these rules:
(a) Hard copy:

(1) Documents must be tendered for filing at the Commission's Docket Office at the State Building, 505 Van Ness Avenue, San Francisco, California 94102, or at the Commission's Offices in the State Building, 320 West 4th Street, Suite 500, Los Angeles. All documents tendered by mail must be addressed to the Commission's Docket Office in San Francisco. Only hand-delivered documents will be accepted by the Los Angeles office. First-class postage charges to San Francisco must be paid at the time documents are tendered to the Los Angeles office. Payment of postage charges may be made by check or money order.

(2) Except for Proponent’s Environmental Assessments (see Rule 2.4(b)) and complaints (see Article 4), an original and six exact copies of the document (including any attachments but not including the transmittal letter, if any) shall be tendered. After assignment of the proceeding to an Administrative Law Judge, an original and three copies of the document shall be tendered. In lieu of the original, one additional copy of the document may be tendered. If a copy is tendered instead of the original, the person tendering the document must retain the original, and produce it at the Administrative Law Judge's request, until the Commission's final decision in the proceeding is no longer subject to judicial review.

(b) Electronic:


   (i) Documents must be transmitted in PDF Archive format (PDF/A). This PDF document must be searchable unless creation of a searchable document is infeasible.

   (ii) A single transmission may not exceed 20.0 megabytes in size. Documents tendered in a transmission that exceeds this limit shall not be filed electronically.

   (iii) The certificate of service must be transmitted with the document as a separate attachment.

(2) Electronically tendered documents will not be filed under seal. Documents which a person seeks leave to file under seal (Rule 11.4)
must be tendered by hard copy. However, redacted versions of such documents may be electronically tendered for filing.

(3) A Notice of Acknowledgment of Receipt of the document is immediately available to the person tendering the document confirming the date and time of receipt of the document by the Docket Office for review. In the absence of a Notice of Acknowledgment of Receipt, it is the responsibility of the person tendering the document to obtain confirmation that the Docket Office received it.

(4) The Docket Office shall deem the electronic filing system to be subject to a technical failure on a given day if it is unable to accept filings continuously or intermittently over the course of any period of time greater than one hour after 12:00 noon that day, in which case filings due that day shall be deemed filed that day if they are filed the next day the system is able to accept filings.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

1.14. (Rule 1.14) Review and Filing of Tendered Documents

(a) Tendered documents are not filed until they have been reviewed and accepted for filing by the Docket Office in San Francisco.

(b) If a document is accepted for filing, it will be recorded as of the date it was first tendered for filing at the Commission's San Francisco or Los Angeles office.

(1) Hard copy: The Docket Office will provide an acknowledgment of the filing on request, provided the person tendering the document furnishes at the time the document is tendered, an extra copy of the document and a self-addressed envelope with postage fully prepaid. The extra copy of the document will be stamped with the filing stamp and docket number and returned by mail.

(2) Electronic: Upon the filing of any document tendered electronically, the document will be stamped with the electronic filing stamp and, in the case of an initiating document, a docket number and the Docket Office shall electronically transmit to the person tendering the document a Confirmation of Acceptance and a link to the filed stamped copy of the document on the Commission's website. Electronically filed documents
so endorsed carry the same force and effect as a manually affixed endorsement stamp.

(c) If a tendered document does not comply with applicable requirements, the Docket Office may reject the document for filing. Documents submitted in response to a rejected document will not be filed.

(1) Hard copy: The Docket Office will return the rejected document with a statement of the reasons for the rejection.

(2) Electronic: The Docket Office will electronically transmit to the person tendering the document a Notice of Rejection setting forth the ground for rejecting the document.

(d) If a tendered document is in substantial, but not complete, compliance with applicable requirements, the Docket Office may notify the person tendering the document of the defect. If the document would initiate a new proceeding, the document will be filed as of the date that the defect is cured. For all other documents, if the defect is cured within seven days of the date of this notification, the document will be filed as of the date it was tendered for filing, provided that the document was properly served as required by these Rules on or before the date the document was tendered for filing.

(e) Acceptance of a document for filing is not a final determination that the document complies with all requirements of the Commission and is not a waiver of such requirements. The Commission, the Executive Director, or the Administrative Law Judge may require amendments to a document, and the Commission or the Administrative Law Judge may entertain appropriate motions concerning the document's deficiencies.

(f) If a document initiates a new proceeding, the proceeding will be assigned a docket number when the document is accepted for filing. The Chief Administrative Law Judge shall maintain a docket of all proceedings.

(g) Specific types of documents may be subject to additional requirements stated in other articles of these rules. Additional or different requirements for certain types of filings are stated in the Public Utilities Code or in the Commission's decisions, General Orders, or resolutions.

    Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.
1.15. (Rule 1.15) Computation of Time.

When a statute or Commission decision, rule, order, or ruling sets a time limit for performance of an act, the time is computed by excluding the first day (i.e., the day of the act or event from which the designated time begins to run) and including the last day. If the last day falls on a Saturday, Sunday, holiday or other day when the Commission officers are closed, the time limit is extended to include the first day thereafter. If an act occurs after 5:00 p.m., it is deemed as having been performed on the next day.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 12, Code of Civil Procedure.

1.16. (Rule 1.16) Filing Fees.

Filing fees required by the Public Utilities Code are set forth in the Table of Filing Fees at the end of the Rules. If the fee in the table conflicts with the fee stated in the appropriate statute, the statute prevails.

Filing fees for documents tendered by hard copy shall be paid by check, money order or credit card. Filing fees for documents tendered electronically shall be paid by credit card.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 1001, 1007, 1008, 1036, 1904, 2754, 2756, 3902, 4006, 5136, 5371.1, 5373.1 and 5377.1, Public Utilities Code.

1.17. (Rule 1.17) Daily Calendar.

A Daily Calendar of newly filed proceedings, proceedings set for hearings, submission of proceedings and newly filed recommended decisions shall be available for public inspection at the Commission's San Francisco and Los Angeles offices. The Daily Calendar shall indicate the time and place of the next three regularly scheduled Commission meetings. Electronic access to the Daily Calendar is available at the Commission's website (www.cpuc.ca.gov).

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.
ARTICLE 2. APPLICATIONS GENERALLY

2.1. (Rule 2.1) Contents.

All applications shall state clearly and concisely the authorization or relief sought; shall cite by appropriate reference the statutory provision or other authority under which Commission authorization or relief is sought; shall be verified by at least one applicant (see Rule 1.11); and, in addition to specific requirements for particular types of applications, shall state the following:

(a) The exact legal name of each applicant and the location of principal place of business, and if an applicant is a corporation, trust, association, or other organized group, the State under the laws of which such applicant was created or organized.

(b) The name, title, address, telephone number, facsimile transmission number, and, if the applicant consents to e-mail service, the e-mail address, of the person to whom correspondence or communications in regard to the application are to be addressed. Notices, orders and other papers may be served upon the person so named, and such service shall be deemed to be service upon applicant.

(c) The proposed category for the proceeding, the need for hearing, the issues to be considered, and a proposed schedule. (See Article 7.) The proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

(d) Such additional information as may be required by the Commission in a particular proceeding.


2.2. (Rule 2.2) Organization and Qualification to Transact Business.

All applicants other than natural persons shall submit with their applications a copy of the entity's organizing documents and evidence of the applicant's qualification to transact business in California. If current documentation has previously been filed with the Commission, the application need only make specific reference to such filing.
2.3. (Rule 2.3) Financial Statement.

Wherever these rules provide that a financial statement shall be attached to the application, such statement, unless otherwise provided herein, shall be prepared as of the latest available date, and shall show the following information:

(a) Amount and kinds of stock authorized by articles of incorporation and amount outstanding.

(b) Terms of preference of preferred stock, whether cumulative or participating, or on dividends or assets, or otherwise.

(c) Brief description of each security agreement, mortgage and deed of trust upon applicant's property, showing date of execution, debtor and secured creditor, mortgagor and mortgagee and trustor and beneficiary, amount of indebtedness authorized to be secured thereby, and amount of indebtedness actually secured, together with any sinking fund provisions.

(d) Amount of bonds authorized and issued, giving name of the public utility which issued same, describing each class separately, and giving date of issue, par value, rate of interest, date of maturity and how secured, together with amount of interest paid thereon during the last fiscal year.

(e) Each note outstanding, giving date of issue, amount, date of maturity, rate of interest, in whose favor, together with amount of interest paid thereon during the last fiscal year.

(f) Other indebtedness, giving same by classes and describing security, if any, with a brief statement of the devolution or assumption of any portion of such indebtedness upon or by any person or corporation if the original liability has been transferred, together with amount of interest paid thereon during the last fiscal year.

(g) Rate and amount of dividends paid during the five previous fiscal years, and the amount of capital stock on which dividends were paid each year.

(h) A balance sheet as of the latest available date, together with an income statement covering period from close of last year for which an annual report has been filed with the Commission to the date of the balance sheet attached to the application.
2.4. (Rule 2.4) CEQA Compliance.

(a) Applications for authority to undertake any projects that are subject to the California Environmental Quality Act of 1970, Public Resources Code Sections 21000 et seq. (CEQA) and the guidelines for implementation of CEQA, California Code of Regulations, Title 14, Sections 15000 et seq., shall be consistent with these codes and this rule.

(b) Any application for authority to undertake a project that is not statutorily or categorically exempt from CEQA requirements shall include a Proponent’s Environmental Assessment (PEA). The PEA shall include all information and studies required under the Commission's Information and Criteria List adopted pursuant to Chapter 1200 of the Statutes of 1977 (Government Code Sections 65940 through 65942), which is published on the Commission's Internet website. The original and three copies of the PEA shall be tendered with the application, the copies of which may be tendered for filing in a CD-ROM/DVD format.

(c) Any application for authority to undertake a project that is statutorily or categorically exempt from CEQA requirements shall so state, with citation to the relevant authority.

2.5. (Rule 2.5) Fees for Recovery of Costs in Preparing EIR.

(a) For any project where the Commission is the lead agency responsible for preparing the Environmental Impact Report (EIR) or Negative Declaration, the proponent shall be charged a fee to recover the Commission's actual cost of preparing the EIR or Negative Declaration. A deposit shall be charged the proponent as set forth below:

A deposit of thirty dollars ($30) for each one thousand dollars ($1,000) of the estimated capital cost of the project up to one hundred thousand dollars ($100,000), ten dollars ($10) for each one thousand dollars ($1,000) over one hundred thousand dollars ($100,000) and up to one million dollars ($1,000,000), five dollars ($5) for each one thousand dollars ($1,000) over one million dollars ($1,000,000) and up to five million dollars ($5,000,000), two dollars ($2) for each one thousand
dollars ($1,000) over five million dollars ($5,000,000) and up to ten million dollars ($10,000,000), one dollar ($1) for each one thousand dollars ($1,000) over ten million dollars ($10,000,000) and up to one hundred million dollars ($100,000,000), and fifty cents ($0.50) for each one thousand dollars ($1,000) over one hundred million dollars ($100,000,000). A minimum deposit of five hundred dollars ($500) shall be charged for projects with an estimated capital cost of sixteen thousand dollars ($16,000) or less.

If a project lacks a capital cost basis, the Commission, assigned Commissioner, or Administrative Law Judge shall determine, as early as possible, the deposit to be charged.

(b) The deposit shall be collected whenever an EIR or Negative Declaration is requested or required. The costs of preparing the EIR or Negative Declaration shall be paid from such deposits.

(c) Proponent shall pay the applicable deposit in progressive payments due as follows: One-third of the deposit at the time the application or pleading is filed, an additional one-third no later than 120 days after the time the application or pleading is filed, and the remaining one-third no later than 180 days after the time the application or pleading is filed. Failure to remit full payment of the deposit no later than 180 days after the time the application or pleading is filed may subject the proponent to a fine not exceeding 10 percent of the outstanding amount due. If the costs exceed such deposit the proponent shall pay for such excess costs within 20 days of the date stated on the Commission’s bill for any excess costs. If the costs are less than the deposit paid by the proponent, the excess shall be refunded to the proponent.


2.6. (Rule 2.6) Protests, Responses, and Replies.

(a) Unless otherwise provided by rule, decision, or General Order, a protest or response must be filed within 30 days of the date the notice of the filing of the application first appears in the Daily Calendar.

(b) A protest objecting to the granting, in whole or in part, of the authority sought in an application must state the facts or law constituting the grounds for the protest, the effect of the application on the protestant, and the reasons the protestant believes the application, or a part of it, is not justified. If the protest requests an evidentiary hearing, the protest must
state the facts the protestant would present at an evidentiary hearing to support its request for whole or partial denial of the application.

(c) Any person may file a response that does not object to the authority sought in an application, but nevertheless presents information that the person tendering the response believes would be useful to the Commission in acting on the application.

(d) Any person protesting or responding to an application shall state in the protest or response any comments or objections regarding the applicant's statement on the proposed category, need for hearing, issues to be considered, and proposed schedule. Any alternative proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding).

(e) An applicant may file replies to protests and responses within 10 days of the last day for filing protests and responses, unless the Administrative Law Judge sets a different date. Replies must be served on all protestants, all parties tendering responses, and the assigned Administrative Law Judge.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

2.7. (Rule 2.7) Copy of Document on Request.

Applicants, protestants, and parties tendering responses must promptly furnish a copy of their applications, protests, or responses to each person requesting one.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

ARTICLE 3. PARTICULAR APPLICATIONS

3.1. (Rule 3.1) Construction or Extension of Facilities.

Applications, under Section 1001 of the Public Utilities Code, to construct or extend facilities shall contain the following information:
(a) A full description of the proposed construction or extension, and the manner in which the same will be constructed.

(b) The names and addresses of all utilities, corporations, persons or other entities, whether publicly or privately operated, with which the proposed construction is likely to compete, and of the cities or counties within which service will be rendered in the exercise of the requested certificate. Whenever a public utility applies to the Commission to extend or establish its water service within a county water district, a public utility or municipal utility district, or other water or utility district, or any area served by such district, such district shall also be named, if it furnishes a like service. The application shall contain a certification that a copy of the application has been served upon or mailed to each such person named.

(c) A map of suitable scale showing the location or route of the proposed construction or extension, and its relation to other public utilities, corporations, persons, or entities with which the same is likely to compete.

(d) A statement identifying the franchises and such health and safety permits as the appropriate public authorities have required or may require for the proposed construction or extension.

(e) Facts showing that public convenience and necessity require, or will require, the proposed construction or extension, and its operation.

(f) A statement detailing the estimated cost of the proposed construction or extension and the estimated annual costs, both fixed and operating associated therewith. In the case of a utility which has not yet commenced service or which has been rendering service for less than twelve months, the applicant shall file as a part of the application supporting statements or exhibits showing that the proposed construction is in the public interest and whether it is economically feasible.

(g) Statements or exhibits showing the financial ability of the applicant to render the proposed service together with information regarding the manner in which applicant proposes to finance the cost of the proposed construction or extension.

(h) A statement of the proposed rates to be charged for service to be rendered by means of such construction or extension. If the application proposes any increase in rates, it shall comply with Rule 3.2(a).

(i) A statement corresponding to the statement required by Section 2 of General Order No. 104-A, as to all known matters which both (a) are
designated by said section for inclusion in the annual report but occurred or were proposed subsequent to the period covered by the last previous annual report filed by the applicant and (b) are, or will be, connected with the construction or extension proposed in the application; or, if no such matters are known to have so occurred or are then known to be proposed, a statement to that effect; provided, that an applicant whose capital stock, or that of its parent company, is listed on a "national securities exchange," as defined in the Securities Exchange Act of 1934 (15 U.S.C. 78(a) et seq.), in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company if not previously filed with the Commission, provided, further, that an applicant whose capital stock, or that of its parent company, is registered with the Securities and Exchange Commission (SEC) pursuant to the provisions of Section 12(g) of said Securities Exchange Act of 1934, in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company containing the information required by the rules of the SEC if not previously filed with the Commission.

(j) In the case of a telephone utility, the estimated number of customers and their requirements for the first and fifth years in the future.

(k) In the case of a gas utility seeking authority to construct a pipeline:

(1) Regarding the volumes of gas to be transported:

   (A) A statement of the volumes to be transported via the proposed pipeline including information on the quality of gas and the maximum daily and annual average daily delivery rates.

   (B) A statement that copies of summaries of all contracts for delivery and receipt of gas to be transported via the proposed pipeline and information on the reserves and delivery life pertaining thereto will be made available for inspection on a confidential basis by the Commission or any authorized employee thereof. The terms and provisions of individual contracts for gas supply and data as to reserves or delivery life of individual gas suppliers shall not be required to be stated in the application or in the record of the proceedings, and if disclosed to the commission or to any officer or employee of the Commission on a confidential bases as herein provided, shall not be made public or be open to public inspection.

(2) A summary of the economic feasibility, the market requirements and other information showing the need for the new pipeline and supply.
(3) Where the gas to be transported through the pipeline is to be purchased by the applicant from, or transported by the applicant for, an out-of-state supplier:

(A) A copy of the proposed tariff under which the gas will be purchased or transported.

(B) A statement that the out-of-state pipeline supplier has agreed: (1) to file with this Commission copies of annual reports which it files with the Federal Power Commission; (2) to file with this Commission monthly statements of its revenues, expenses and rate base components; (3) to file with this Commission copies of its tariffs as filed from time to time with the Federal Power Commission; and (4) at all times to permit this Commission or its staff reasonable opportunity for field inspection of facilities and examination of books and records, plus assurance that reasonable requests for operating information otherwise prepared in the course of business will be supplied in connection with any proceeding before the Federal Power Commission.

(l) In the case of an electric utility proposing to construct an electric generating plant:

(1) Load and resource data setting forth recorded and estimated loads (energy and demands), available capacity and energy, and margins for two years actual and three years estimated, on an average year basis.

(2) Existing rated and effective operating capacity of generating plants and the planned additions for a three-year period.

(3) Estimated capital and operating costs of power to be generated by the proposed plant for all competitive fuels which may be used under legislative restrictions in the proposed plant.

(4) For any nuclear plant, a statement indicating that the requisite safety and other license approvals have been obtained or will be applied for, and that a copy of the application to this Commission has been furnished to the State Coordinator of Atomic Energy Development and Radiation Protection.

(m) In the case of a water utility:

(1) An estimate of the number of customers and the requirements for water for the first and fifth years in the future, and the ultimate future development anticipated by applicant, together with a description of the proposed normal, and emergency standby, water facilities for production, storage and pressure to serve the area for which the certificate is sought.
(2) A statement of the estimated operating revenues and estimated expenses, by major classes, including taxes and depreciation, for the first and fifth years in the future attributable to operations in the proposed area.

(3) If the applicant has operated as a water utility elsewhere in the State of California for a period in excess of one year prior to filing the application, a general statement of the operating plans for the proposed area, including a statement whether a new area will be served by existing personnel or will constitute a separate district to be served by new personnel. If the applicant has not operated as a water utility elsewhere in the State of California for a period in excess of one year prior to filing the application, a description of the operating plans for the proposed area, including, to the extent available, but not necessarily limited to, such items as qualifications of management and operating personnel, proposed operating pressures for the system, plans for water treatment, availability of utility personnel to customers, billing procedures, emergency operation plans and provision for handling customer complaints.

(n) In the case of an application by a water utility in an area in which the facilities have already been constructed, extended or installed:

(1) A detailed statement of the amount and basis of the original cost (estimated if not known) of all plant and of the depreciation reserve applicable thereto.

(2) If the facilities have been rendering service in the area for which the certificate is sought, and

(A) The rates proposed are the same as the tariff rates in the district which includes the area to be certificated, the application shall also include a summary of earnings on a depreciated rate base with respect to such area for the test period or periods upon which applicant bases its justification for the rates to be applied in such area; otherwise

(B) The application shall also comply with Rule 3.2, including the furnishing of the information specified in subsections (a)(5) and (6) thereof but made applicable to the proposed rates; provided, however, the information required by subsections (a)(2) and (3) thereof need be furnished only when increases are proposed.

(o) Such additional information and data as may be necessary to a full understanding of the situation.
3.2. (Rule 3.2) Authority to Increase Rates.

(a) Applications for authority to increase rates, or to implement changes that would result in increased rates, shall contain the following data, either in the body of the application or as exhibits annexed thereto or accompanying the application:

(1) A balance sheet as of the latest available date, together with an income statement covering period from close of last year for which an annual report has been filed with the Commission to the date of the balance sheet attached to the application.

(2) A statement of the presently effective rates, fares, tolls, rentals, or charges which are proposed to be increased, or of the classification, contract, practice, or rule proposed to be altered. Such statement need not be in tariff form.

(3) A statement of the proposed increases or changes which will result in increases, which applicant requests authority to make effective. Such statement need not be in tariff form, but shall set forth the proposed rate structure with reasonable clarity. Except as to carriers, the statement shall also show the amount of proposed gross revenues, together with the percentage of increase, if in excess of one percent, estimated to result from the proposed rates. In the case of common carriers, where a general rate increase application is filed, the statement shall include an estimate of the amount of additional annual gross revenue estimated to result from the increase, which shall be based on the amount of involved traffic handled for the preceding calendar year and shall indicate the percentage by which such estimate exceeds the gross revenues on the involved traffic for the preceding calendar year, if more than one percent. In the case of gas, electric, telephone, telegraph, water and heat utilities, the proposed revenue increase, including the percentage of increase, if in excess of one percent, shall be shown by appropriate rate classifications. If the percentage of increase in revenue is one percent or less, applicant shall so state in its application.

(4) A general rate increase application shall contain a general description of applicant's property and equipment, or reference to such description in a recent prior application, and a statement of the original cost thereof, together with a statement of the depreciation reserve applicable thereto.
If it is impossible to state original cost, the facts creating such impossibility shall be set forth.

(5) A summary of earnings (rate of return summary) on a depreciated rate base for the test period or periods upon which applicant bases its justification for an increase. If adjusted or estimated results are shown for successive periods, they should be on a consistent basis. Wherever adjusted results are shown, the recorded results for the same periods should also be shown.

(6) In rate applications involving a utility having more than one department, district or exchange, the earnings results should be presented for the total utility operations for the company, as well as for the part of the operation for which rate increases are sought.

(7) The application of a gas, electric, telephone, telegraph, water or heat utility for a general rate increase shall contain a statement by the applicant as to which of the optional methods provided in the Internal Revenue Code applicant has elected to employ in computing the depreciation deduction for the purpose of determining its federal income tax payments, and whether applicant has used the same method or methods in calculating federal income taxes for the test period for rate fixing purposes.

(8) The application of a gas, electric, telephone, telegraph, water or heat utility for a general rate increase shall contain a statement corresponding to the statement required by Section 2 of General Order No. 104-A, as to all known matters designated by said section for inclusion in the annual report but occurring or proposed subsequent to the period covered by the last annual report filed by applicant; or, if no such matters are known to have so occurred or are known to be then proposed, a statement to that effect; provided, that an applicant whose capital stock, or that of its parent company, is listed on a "national securities exchange," as defined in the Securities Exchange Act of 1934 (15 U.S.C. 78(a) et seq.) in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company if not previously filed with the Commission, provided, further, that an applicant whose capital stock, or that of its parent company, is registered with the Securities and Exchange Commission (SEC) pursuant to the provisions of Section 12(g) of said Securities Exchange Act of 1934, in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company containing the information required by the rules of the SEC if not previously filed with the Commission.
(9) In a general rate increase application involving a telephone utility having an annual operating revenue exceeding $25,000, the rate of return on a depreciated rate base shall be shown separately for its aggregate exchange operations, for its toll operations, and for the total telephone utility operations of applicant.

(10) The application of electrical, gas, heat, telephone, water, or sewer system corporations shall separately state whether or not the increase reflects and passes through to customers only increased costs to the corporation for the services or commodities furnished by it.

(b) Applicants for authority to increase rates shall, within 20 days after filing the application with the Commission, serve notice to the following stating in general terms the proposed increases in rates or fares: (1) the Attorney General and the Department of General Services, when the State is a customer or subscriber whose rates or fares would be affected by the proposed increase; (2) the County Counsel (or District Attorney if the county has no County Counsel) and County Clerk, and the City Attorney and City Clerk, listed in the current Roster published by the Secretary of State in each county and city in which the proposed increase is to be made effective; and (3) any other persons whom applicant deems appropriate or as may be required by the Commission.

(c) Gas, electric, telephone, telegraph, water or heat utilities, within 20 days after the filing of the application, shall publish at least once in a newspaper of general circulation in the county in which the increases are proposed to be made effective a notice, in general terms, of the proposed increases in rates. Such notice shall state that a copy of said application and related exhibits may be examined at the offices of the California Public Utilities Commission in San Francisco and in such offices of the applicant as are specified in the notice, and shall state the locations of such offices. Applicants shall maintain documentation of compliance with this subsection, and shall provide it to any person upon request.

(d) Electric, gas, heat, telephone, water, or sewer system corporations, within 45 days, if the corporation operates on a 30-day billing cycle, or within 75 days, if the corporation operates on a 60-day or longer billing cycle, after the filing of an application to increase any rate of charge, other than a change reflecting and passing through to customers only new costs to the corporation which do not result in changes in revenue allocation, for the services or commodities furnished by it, shall furnish to its customers affected by the proposed increase notice of its application either by
electronically linking to such notice for customers that receive their bills electronically or, for customers that receive their bills by mail, by mailing such notice postage prepaid or including such notice with the regular bill. The notice shall state the amount of the proposed rate change expressed in both dollar and percentage terms for the entire rate change as well as for each customer classification, a brief statement of the reasons the change is required or sought, and the mailing, and if available, the e-mail, address of the Commission to which any customer inquiries may be directed regarding how to participate in, or receive further notices regarding the date, time, and place of any hearing on the application, and the mailing address of the corporation to which any customer inquiries may be directed.

(e) Applicants shall file proof of compliance with the notice requirements of subsections (b), (c) and (d) within 20 days after compliance with the last of these subsections that is applicable. Proof of compliance with subsection (c) shall include a sworn verification listing the newspapers and publication dates, and a sample of each different notice.


3.3. (Rule 3.3) Certificate to Operate.

(a) Applications for a certificate to operate as a vessel common carrier or passenger stage corporation shall contain the following information:

(1) The type of service being performed by applicant, a general description of it, and a reference to the authority under which existing service is performed.

(2) The specific authority requested and the particular statutory provision under which the certificate is requested.

(3) If a carrier of property, a description of specified commodities proposed to be transported, and, if general commodities with exceptions are proposed to be transported, a statement specifying such exceptions.

(4) The geographical scope of the proposed operation, including the termini and other points proposed to be served, and a concise narrative description of the proposed route.

(5) A map or sketch of the route and points to be served, drawn to suitable indicated scale, and showing present and proposed operation by distinctive coloring or marking.
(6) A statement of the rates or fares proposed to be charged and rules governing service. Applications for certificates need not contain tariffs, but shall indicate the level and nature of proposed rates and rules and may refer to tariffs on file with or issued by the Commission.

(7) A statement indicating the frequency of the proposed service. If "on call" service is proposed, the application shall set forth conditions under which such service would be performed.

(8) The kind and approximate number of units of equipment to be employed in the proposed service.

(9) A statement of financial ability to render the proposed service.

(10) Facts showing that the proposed operation is required by public convenience and necessity.

(b) Every applicant for a passenger stage certificate shall forward a copy of the application to each public transit operator operating in any portion of the territory sought to be served by the applicant. The applicant shall also mail a notice that the application has been filed with the Commission to all city and county governmental entities and regional transportation planning agencies within whose boundaries passengers will be loaded or unloaded. This notice shall state in general terms the authority sought, including the proposed routes, schedules, fares and equipment. Said notice shall also state that a copy of the application and related exhibits will be furnished by applicant upon written request. A copy of the notice and a certificate of service shall be filed with the application.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 701, 1007, 1032 and 1701, Public Utilities Code.

3.4. (Rule 3.4) Abandon Passenger Stage Service.

Applications for authority to abandon passenger stage service, or reduce service to less than one trip per day (excluding Saturday and Sunday), shall include the following information: NOTE: If more than one point, route, or route segment is included in the application, the indicated data are to be separately stated for each point, route, or route segment.

(a) A listing of points, routes, and route segments to be abandoned, including identification and a brief description of any other passenger transportation service available at the points or along the routes affected.
(b) Maps to scale showing each point, route, and route segment to be abandoned.

(c) Current and proposed timetables covering the affected points and routes.

(d) Current and proposed certificate authorities covering the affected points and routes.

(e) Traffic data for a recent representative period, showing numbers of interstate and intrastate passengers (by classification if more than one type of ticket is sold) destined to and originating from each point to be abandoned; also package express shipments similarly stated.

(f) Description of the fares and rates applicable to the affected services.

(g) Calculation of the annual interstate and intrastate passenger, express, and other revenues which accrue as a result of the service to be abandoned, along with an explanation of how the revenues were calculated and of any assumptions underlying the calculations.

(h) Calculations of route miles, annual bus miles, and schedule operating time to be eliminated for each point, route, or route segment to be abandoned.

(i) Calculation in the Uniform System of Accounts for Common and Contract Motor Carriers of Passengers, of the variable costs of operating each affected service, with an explanation of how the costs were calculated, and of any assumptions underlying the calculations (assumptions should be consistent with those used to calculate revenues). Any labor costs included shall also be separately identified and described.

(j) Description of any present operating subsidies or financial assistance applicable to the affected service, including identification of source, amounts, duration, and any significant terms or conditions applicable; also description of any proposals or discussions with respect to operating subsidies or financial assistance which have occurred during the year preceding the filing of the application.

(k) Any additional evidence or legal argument applicant believes to be relevant to the application.

3.5. (Rule 3.5) Debt and Equity.

Applications to issue stock or evidences of indebtedness, or to assume liabilities, under Sections 816 through 830 of the Public Utilities Code shall contain the following information:

(a) A general description of applicant's property and its field of operation, the original cost of its property and equipment, individually or by class, and the cost thereof to applicant and the depreciation and amortization reserves applicable to such property and equipment, individually or by class. If it is impossible to state original cost, the facts creating such impossibility shall be stated.

(b) The amount and kind of stock, or other evidence of interest or ownership, which applicant desires to issue, and, if preferred, the nature and extent of the preference; the amount of bonds, notes or other evidences of indebtedness which applicant desires to issue, with terms, rate of interest, and whether and how to be secured; the amount and description of the indebtedness which applicant desires to assume.

(c) The purposes for which the securities are to be issued:

(1) If for property acquisition, a detailed description thereof, the consideration to be paid therefor, and the method of arriving at the amount.

(2) If for construction, completion, extension or improvement of facilities, a description thereof in reasonable detail, the cost or estimated cost thereof, and the reason or necessity for the expenditures.

(3) If for improvement of service, a statement of the character of the improvements proposed, or if for maintenance of service, a statement of the reasons why service should be maintained from capital.

(4) If for discharge or refunding of obligations, a full description of the obligations to be discharged or refunded, including the character, principal amount, discount or premium applicable thereto, date of incurrence, date of maturity, rate of interest, and other material facts concerning such obligations, together with a statement showing the purposes for which such obligations had been incurred, or the proceeds expended, and the Commission's decisions, if any, authorizing the incurrence of such obligations.

(5) If for the financing of the acquisition and installation of electrical and plumbing appliances and agricultural equipment which are sold by other
than a public utility, for use within the service area of the public utility, a statement of the reason or necessity for such financing.

(6) If for reorganization or readjustment of indebtedness or capitalization, or for retirement or exchange of securities, a full description of the indebtedness or capitalization to be readjusted or exchanged; complete terms and conditions of the merger, consolidation, exchange or other reorganization; a pro forma balance sheet, if possible, giving effect to such reorganization, readjustment or exchange; and a statement of the reason or necessity for the transaction.

(7) If for reimbursement of moneys actually expended from income, or from any other moneys in the treasury, a general description of the expenditures for which reimbursement is sought, the source of such expenditures, the periods during which such expenditures were made, and the reason or necessity for such reimbursement.

(d) A complete description of the obligation or liability to be assumed by applicant as guarantor, indorser, surety or otherwise, the consideration to be received by applicant, and the reason or necessity for such action.

(e) A statement corresponding to the statement required by Section 2 of General Order No. 104-A, as to all known matters designated by said section for inclusion in the annual report but occurring or proposed subsequent to the period covered by the last annual report filed by applicant; or if no such matters are known to have so occurred or are then known to be proposed, a statement to that effect; provided, that an applicant whose capital stock, or that of its parent company, is listed on a "national securities exchange," as defined in the Securities Exchange Act of 1934 (15 U.S.C. 78(a) et seq.), in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company if not previously filed with the Commission, provided, further, that an applicant whose capital stock, or that of its parent company, is registered with the Securities and Exchange Commission (SEC) pursuant to the provisions of Section 12 (g) of said Securities Exchange Act of 1934, in lieu of the statement required by this rule shall include in the application a copy of the latest proxy statement sent to stockholders by it or its parent company containing the information required by the rules of the SEC if not previously filed with the Commission.

(f) Copy of deeds of trust, security agreements, mortgages, conditional sales contracts, notes or other instruments (excluding stock certificates) defining the terms of the proposed securities. If the same have already been filed, the application need only make specific reference to such filings.
(g) Copy of each plan, offer or agreement for the reorganization or readjustment of indebtedness or capitalization or for the retirement or exchange of securities.

Note: Authority cited: Section 1701, Public Utilities Code; and Article 12, Section 2, California Constitution. Reference: Section 829, Public Utilities Code.

3.6. (Rule 3.6) Transfers and Acquisitions.

Applications to sell, lease or encumber utility property or rights, to merge or consolidate facilities, to acquire stock of another utility, or to acquire or control a utility under Sections 851 through 854 of the Public Utilities Code shall be signed by all parties to the proposed transaction, except the lender, vendor under a conditional sales contract, or trustee under a deed of trust, unless such person is a public utility. In addition, they shall contain the following data:

(a) The character of business performed and the territory served by each applicant.

(b) A description of the property involved in the transaction, including any franchises, permits, or operative rights; and, if the transaction is a sale, lease, assignment, merger or consolidation, a statement of the book cost and the original cost, if known, of the property involved.

(c) Detailed reasons upon the part of each applicant for entering into the proposed transaction, and all facts warranting the same.

(d) The agreed purchase price and the terms for payment. If a merger or consolidation, the full terms and conditions thereof.

(e) In consolidation and merger proceedings, a financial statement as outlined in Rule 2.3. In other transfer proceedings, a balance sheet as of the latest available date, together with an income statement covering period from close of last year for which an annual report has been filed with the Commission to the date of the balance sheet attached to the application.

(f) Copy of proposed deed, bill of sale, lease, security agreement, mortgage, or other encumbrance document, and contract or agreement therefor, if any, and copy of each plan or agreement for purchase, merger or consolidation.

(g) If a merger or consolidation, a pro forma balance sheet giving effect thereto.
(h) Applications that involve a certificate or operative right as vessel common carrier or passenger stage corporation shall also state, as to the seller, whether it is a party to any through routes or joint rates or fares with any other carrier, and whether operation under the rights involved is presently being conducted. If there has been any suspension or discontinuance of service during the preceding three years, the application shall state those facts and circumstances.

Note: Authority cited: Article 12, Section 2, California Constitution; and Section 1701, Public Utilities Code. Reference: Sections 1007, 1010 and 1032.

3.7. (Rule 3.7) Public Road Across Railroad.

Applications to construct a public road, highway, or street across a railroad must be made by the municipal, county, state, or other governmental authority which proposes the construction. Such applications shall be served on the affected railroad corporations, and shall contain the following information:

(a) The rail milepost and either a legal description of the location of the proposed crossing or a location description using a coordinate system that has accuracy comparable to a legal description.

(b) Crossing identification numbers of the nearest existing public crossing on each side of the proposed crossing. (Numbers may be obtained from the crossing sign at the crossing, or from the office of the railroad.)

(c) If the proposed crossing is at-grade,

(1) a statement showing the public need to be served by the proposed crossing;

(2) a statement showing why a separation of grades is not practicable; and

(3) a statement showing the signs, signals, or other crossing warning devices which applicant recommends be provided at the proposed crossing.

(d) A map of suitable scale (50 to 200 feet per inch) showing accurate locations of all streets, roads, property lines, tracks, buildings, structures or other obstructions to view for a distance of at least 400 feet along the
railroad and 200 feet along the highway in each direction from the proposed crossing. Such map shall show the character of surface or pavement and width of same, either existing or proposed, on the street or road adjacent to the proposed crossing and on each side thereof.

(e) A map of suitable scale (1,000 to 3,000 feet per inch) showing the relation of the proposed crossing to existing roads and railroads in the general vicinity of the proposed crossing.

(f) A profile showing the ground line and grade line and rate of grades of approach on all highways and railroads affected by the proposed crossing.


3.8. (Rule 3.8) Alter or Relocate Existing Railroad Crossing.

An application to alter or relocate an existing railroad crossing shall comply with Rule 3.7, except that it shall state the crossing identification number of the affected crossing, instead of the nearest crossings, and shall state if the affected crossing will remain within the existing right-of-way.


3.9. (Rule 3.9) Railroad Across Public Road.

An application to construct a railroad across a public road, highway or street shall be served on the municipal, county, state or other governmental authority having jurisdiction and control over the highway or charged with its construction and maintenance, and shall include, in addition to the information required by Rule 3.7, the following information:

(a) A copy of the franchise or permit, if any be requisite, from the authority having jurisdiction, which allows the railroad to cross the public road, highway, or street involved. If such franchise or permit has already been filed, the application need only make specific reference to such filing.

(b) The proposed crossing identification number.

(c) The map referred to in Rule 3.7(d) shall also show, by distinct colorings or lines, all new tracks or changes in existing tracks, within the limits of the drawing, which are to be made in connection with the construction of the proposed crossing.
3.10. (Rule 3.10) Railroad Across Railroad.

Applications to construct a railroad or street railroad across a railroad or street railroad shall be served on the affected railroad or street railroad corporations, and shall contain the following:

(a) The rail milepost and either a legal description of the location of the proposed crossing or a location description using a coordinate system that has accuracy comparable to a legal description.

(b) A map of suitable scale (50 to 200 feet per inch) showing accurate locations of all streets, roads, property lines, tracks, buildings, structures or other obstructions to view in the immediate vicinity.

(c) A map of suitable scale (1,000 to 3,000 feet per inch) showing the relation of the proposed crossing to existing railroads in the general vicinity.

(d) A profile showing the ground line and grade line of approaches on all railroads affected.

(e) A true copy of the contract executed by the parties, or other evidence that the carrier to be crossed is willing that the crossing be installed.

3.11. (Rule 3.11) Light-Rail Transit System Crossings.

Applications to construct crossings or intersections of a light-rail transit system and a public road, street, highway or railroad pursuant to General Order 143-B, Section 9.08, shall comply with the appropriate requirements of Rules 3.7 through 3.10.


Applications for exemption from the rules in Decision 80864 (74 CPUC 454) for undergrounding electric and telephone lines shall include the following information:

(a) A statement of facts justifying exemption from undergrounding rules.

(b) The name of the development or subdivision, if any.

(c) A map showing the location of the project and any related development or subdivision.

(d) A legal description, as recorded, of the subdivision or property to which the lines will be extended.

(e) The length of the line extension proposed.

(f) The names of the public utilities that will provide service via the line extension.

(g) Whether the deviation from underground requirements will be permanent or temporary, and, if temporary, the approximate period such facilities will be in place before permanent underground facilities are constructed.

(h) Whether electric or telephone lines can be installed in joint trenches with water, gas, or sewer lines.

(i) Whether a Master Plan, Preliminary Map, or Tentative Map was filed pursuant to the Subdivision Map Act before May 5, 1970, the date of filing, and the agency in which the document was filed.

(j) The minimum parcel size within the subdivision or development.

(k) Whether deed restrictions allow more than one single-family dwelling or accommodation on each parcel or any portions of parcels of less than three acres.

(l) Any unusual environmental circumstances which would cause:

   (1) Injury or danger to persons.

   (2) Landslides, soil erosion, or exposure of trenches.
(3) Widespread, long-term, or permanent destruction of vegetation.

(4) Serious property damage.

(5) Hindrance to other construction or excessive relocation costs in the case of a temporary deviation.

(m) The identity of scenic highways, state or national parks, or any other areas determined by any governmental agency to be of unusual scenic value to the public within 1,000 feet of the proposed overhead lines; a description of the part of the highway, park, or area within 1,000 feet of the line; and a statement whether the lines will be visible from the highway, park, or area.

(n) Estimates of the costs of undergrounding electric and telephone lines, assuming joint trenching, and of constructing the lines overhead.

(o) Copies of the following documents:

(1) Environmental Impact Statement, Environmental Impact Report, or Negative Declaration prepared by any public agency having permit authority over the project.

(2) Local ordinances requiring undergrounding.

(3) Local ordinances or land use plans permitting parcels of less than 3 acres.

(4) Local ordinances allowing more than one single-family dwelling or accommodation on each parcel or portion of a parcel of less than 3 acres.

(5) Applications to the utilities for service, all correspondence pertaining to those applications, and a statement whether an agreement to provide overhead service was concluded with the utility before May 5, 1972.

(6) A list of other public agencies (federal, state, regional, county, district, or municipal) from which approval either has been obtained or will be required, and a summary of any action taken by those agencies with respect to the project.

ARTICLE 4. COMPLAINTS

4.1. (Rule 4.1) Who May Complain.

(a) A complaint may be filed by:

(1) any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission; or

(2) any local government, alleging that a holder of a state franchise to construct and operate video service pursuant to Public Utilities Code Section 5800 et seq. is in violation of Section 5890; or

(3) a public utility that offers competitive services, for a finding by the Commission that condemnation of a property for the purpose of competing with another entity in the offering of those competitive services would serve the public interest, pursuant to Public Utilities Code Section 625.

(b) No complaint shall be entertained by the Commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it be signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electric, water, or telephone service.

Note: Authority cited: Section 1702, Public Utilities Code. Reference: Sections 625, 1702 and 5890(g), Public Utilities Code.

4.2. (Rule 4.2) Form and Contents of Complaint.

(a) Complaints shall state the full name, address and telephone number of each complainant and his attorney, if any, and of each defendant. The specific act complained of shall be set forth in ordinary and concise language. The complaint shall be so drawn as to completely advise the
defendant and the Commission of the facts constituting the grounds of the complaint, the injury complained of, and the exact relief which is desired. At least one complainant must verify the complaint and any amendments thereto. (See Rule 1.11.) The complaint shall state the proposed category for the proceeding, the need for hearing, the issues to be considered, and a proposed schedule. The proposed schedule shall be consistent with the categorization of the proceeding, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding). (See Article 7.)

(b) A complaint which does not allege that the matter has first been brought to the staff for informal resolution may be referred to the staff to attempt to resolve the matter informally.


4.3. (Rule 4.3) Service of Complaints and Instructions to Answer.

When a complaint is accepted for filing (see Rule 1.13), the Docket Office shall serve on each defendant (a) a copy of the complaint and (b) instructions to answer, with a copy to the complainant, indicating (1) the date when the defendant's answer shall be filed and served, and (2) the Administrative Law Judge assigned to the proceeding. The instructions to answer shall also indicate the category of the proceeding and the preliminary determination of need for hearing, as determined by the Chief Administrative Law Judge in consultation with the President of the Commission.


4.4. (Rule 4.4) Answers.

The answer must admit or deny each material allegation in the complaint and shall set forth any new matter constituting a defense. Its purpose is to fully advise the complainant and the Commission of the nature of the defense. At least one of the defendants filing an answer must verify it, but if more than one answer is filed in response to a complaint against multiple defendants, each answer must be separately verified. (See Rule 1.11.)

The answer should also set forth any defects in the complaint which require amendment or clarification. Failure to indicate jurisdictional defects does not
waive these defects and shall not prevent a motion to dismiss made thereafter.

The answer must state any comments or objections regarding the complainant's statement on the need for hearing, issues to be considered, and proposed schedule. The proposed schedule shall be consistent with the categorization of the proceeding, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding). (See Article 7.)

Answers must include the full name, address, and telephone number of defendant and the defendant's attorney, if any, and indicate service on all complainants.


4.5. (Rule 4.5) Expedited Complaint Procedure.

(a) This procedure is applicable to complaints against any electric, gas, water, heat, or telephone company where the amount of money claimed does not exceed the jurisdictional limit of the small claims court referenced in Pub. Util. Code § 1702.1.

(b) No attorney at law shall represent any party other than himself under the Expedited Complaint Procedure.

(c) No pleading other than a complaint and answer is necessary.

(d) A hearing without a reporter shall be held within 30 days after the answer is filed.

(e) Separately stated findings of fact and conclusions of law will not be made, but the decision may set forth a brief summary of the facts.

(f) Complaints calendared under the Expedited Complaint Procedure are exempt from the categorizing and scoping requirements of Article 7 and the requirements of Article 8 regarding communications with decisionmakers and Commissioners' advisors.

(g) The Commission or the presiding officer, when the public interest so requires, may at any time prior to the filing of a decision terminate the Expedited Complaint Procedure and recalendar the matter for hearing under the Commission's regular procedure.
(h) The parties shall have the right to file applications for rehearing pursuant to Section 1731 of the Public Utilities Code. If the Commission grants an application for rehearing, the rehearing shall be conducted under the Commission's regular hearing procedure.

(i) Decisions rendered pursuant to the Expedited Complaint Procedure shall not be considered as precedent or binding on the Commission or the courts of this state.


ARTICLE 5. INVESTIGATIONS

5.1. (Rule 5.1) Investigations.

The Commission may at any time institute investigations on its own motion. Orders instituting investigation shall indicate the nature of the matters to be investigated.

Investigations directed at specific utilities or regulated entities will be served on them. However, investigations affecting as a class railroads, pipelines, passenger stage corporations, charter-party carriers, or vessels may only be noticed on the Daily Calendar.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 701, 703, 705, 728, 728.5, 729, 730, 3502, 3541, 5102 and 5112, Public Utilities Code.

5.2. (Rule 5.2) Responses to Investigations.

A respondent need not file a response to the investigatory order unless so directed therein.

Any person filing a response to an order instituting investigation shall state in the response any objections to the preliminary scoping memo regarding the need for hearing, issues to be considered, or schedule. Any recommended changes to the proposed schedule shall be consistent with the category of the proceeding, including a deadline for resolving the proceeding within 12 months or less (adjudicatory proceeding) or 18 months or less (ratesetting or quasi-legislative proceeding). (See Article 7.)
ARTICLE 6. RULEMAKING

6.1. (Rule 6.1) Rulemaking.

The Commission may at any time institute rulemaking proceedings on its own motion (a) to adopt, repeal, or amend rules, regulations, and guidelines for a class of public utilities or of other regulated entities; (b) to amend the Commission's Rules of Practice and Procedure; or (c) to modify prior Commission decisions which were adopted by rulemaking.

Rulemaking proceedings shall be noticed on the Daily Calendar. Orders instituting rulemaking shall be served on all respondents and known interested persons.


6.2. (Rule 6.2) Comments.

Any person filing comments on an order instituting rulemaking shall state any objections to the preliminary scoping memo regarding the category, need for hearing, issues to be considered, or schedule. Any recommended changes to the proposed schedule shall be consistent with the proposed category, including a deadline for resolving the proceeding within 18 months or less (ratesetting or quasi-legislative proceeding).

All comments which contain factual assertions shall be verified. Unverified factual assertions will be given only the weight of argument.


6.3. (Rule 6.3) Petition for Rulemaking.

(a) Pursuant to this rule, any person may petition the Commission under Public Utilities Code Section 1708.5 to adopt, amend, or repeal a regulation. The proposed regulation must apply to an entire class of entities or activities over which the Commission has jurisdiction and must apply to future
conduct.

(b) Form and Content. A petition must concisely state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation. In addition, a petition must state whether the issues raised in the petition have, to the petitioner's knowledge, ever been litigated before the Commission, and if so, when and how the Commission resolved the issues, including the name and case number of the proceeding (if known). A petition that contains factual assertions must be verified. Unverified factual assertions will be given only the weight of argument. The caption of a petition must contain the following wording: "Petition to adopt, amend, or repeal a regulation pursuant to Pub. Util. Code § 1708.5."

(c) Service and Filing. Petitions must be served upon Executive Director, Chief Administrative Law Judge, Director of the appropriate industry division, and Public Advisor. Prior to filing, petitioners must consult with the Public Advisor to identify any additional persons upon whom to serve the petition. If a petition would result in the modification of a prior Commission order or decision, then the petition must also be served on all parties to the proceeding or proceedings in which the decision that would be modified was issued. The assigned Administrative Law Judge may direct the petitioner to serve the petition on additional persons.

(d) Responses and Replies. Responses to a petition must be filed and served on all parties who were served with the petition within 30 days of the date that the petition was served, unless the assigned Administrative Law Judge sets a different date. The petitioner and any other party may reply to responses to the petition. Replies must be filed and served within 10 days of the last day for filing responses, unless the Administrative Law Judge sets a different date.

(e) The requirements of Article 8 regarding communications with decisionmakers and Commissioners' advisors do not apply to petitions for rulemaking.

(f) The Commission will not entertain a petition for rulemaking on an issue that the Commission has acted on or decided not to act on within the preceding 12 months.

ARTICLE 7. CATEGORIZING AND SCOPING PROCEEDINGS

7.1. (Rule 7.1) Categorization, Need for Hearing.

(a) Applications. By resolution at each Commission business meeting, the Commission shall preliminarily determine, for each proceeding initiated by application filed on or after the Commission's prior business meeting, the category of the proceeding and the need for hearing. The preliminary determination may be held for one Commission business meeting if the time of filing did not permit an informed determination. The preliminary determination is not appealable, but shall be confirmed or changed by assigned Commissioner's ruling pursuant to Rule 7.3, and such ruling as to the category is subject to appeal under Rule 7.6.

(b) Complaints. For each proceeding initiated by complaint, the Chief Administrative Law Judge, in consultation with the President of the Commission, shall determine the category of the proceeding and shall preliminarily determine the need for hearing. These determinations will be stated in the instructions to answer. The determination as to the category is appealable under Rule 7.6.

(c) Investigations. An order instituting investigation shall determine the category of the proceeding, preliminarily determine the need for hearing, and attach a preliminary scoping memo. The order, only as to the category, is appealable under the procedures in Rule 7.6.

(d) Rulemakings. An order instituting rulemaking shall preliminarily determine the category and need for hearing, and shall attach a preliminary scoping memo. The preliminary determination is not appealable, but shall be confirmed or changed by assigned Commissioner's ruling pursuant to Rule 7.3, and such ruling as to the category is subject to appeal under Rule 7.6.

(e) Commission Discretion in Categorization.

(1) When a proceeding may fit more than one category as defined in Rules 1.3(a), (d) and (e), the Commission may determine which category appears most suitable to the proceeding, or may divide the subject matter of the proceeding into different phases or one or more new proceedings.

(2) When a proceeding does not clearly fit into any of the categories as defined in Rules 1.3(a), (d), and (e), the proceeding will be conducted under the rules applicable to the ratesetting category unless and until the
Commission determines that the rules applicable to one of the other categories, or some hybrid of the rules, are best suited to the proceeding.

(3) In exercising its discretion under this rule, the Commission shall so categorize a proceeding and shall make such other procedural orders as best to enable the Commission to achieve a full, timely, and effective resolution of the substantive issues presented in the proceeding.


7.2. (Rule 7.2) Prehearing Conference.

(a) In any proceeding in which it is preliminarily determined that a hearing is needed, the assigned Commissioner shall set a prehearing conference for 45 to 60 days after the initiation of the proceeding or as soon as practicable after the Commission makes the assignment. The ruling setting the prehearing conference may also set a date for filing and serving prehearing conference statements. Such statements may address the schedule, the issues to be considered, and any other matter specified in the ruling setting the prehearing conference.

(b) The assigned Commissioner has the discretion not to set a prehearing conference in any proceeding in which it is preliminarily determined that a hearing is not needed and (1) in a proceeding initiated by application, complaint, or order instituting investigation, no timely protest, answer, or response is filed, or (2) in any proceeding initiated by Commission order, no timely request for hearing is filed.


7.3. (Rule 7.3) Scoping Memos.

(a) At or after the prehearing conference (if one is held), the assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed. In an adjudicatory proceeding, the scoping memo shall also designate the presiding officer. In a proceeding initiated by application or order instituting rulemaking, the scoping memo shall also determine the category and need for hearing.

(b) The assigned Commissioner has the discretion not to issue a scoping memo in any proceeding in which it is preliminarily determined that a
hearing is not needed and (1) in a proceeding initiated by application, complaint, or order instituting investigation, no timely protest, answer, or response is filed, or (2) in any proceeding initiated by Commission order, no timely request for hearing is filed.


7.4. (Rule 7.4) Consolidation.

Proceedings involving related questions of law or fact may be consolidated.


7.5. (Rule 7.5) Changes to Preliminary Determinations.

If the assigned Commissioner, pursuant to Rule 7.3(a), changes the preliminary determination on need for hearing, the assigned Commissioner's ruling shall be placed on the Commission's Consent Agenda for approval of that change.


7.6. (Rule 7.6) Appeals of Categorization.

(a) Any party may file and serve an appeal to the Commission, no later than 10 days after the date of: (1) an assigned Commissioner's ruling on category pursuant to Rule 7.3(a); (2) the instructions to answer pursuant to Rule 7.1(b); or (3) an order investigation pursuant to Rule 7.1(c). Such appeal shall state why the designated category is wrong as a matter of law or policy. The appeal shall be served on the Commission's General Counsel, the Chief Administrative Law Judge, the President of the Commission, and all persons who were served with the ruling, instructions to answer, or order.

(b) Any party, no later than 15 days after the date of a categorization from which timely appeal has been taken pursuant to subsection (a) of this rule, may file and serve a response to the appeal. The response shall be served on the appellant and on all persons who were served with the ruling, instructions to answer, or order. The Commission is not obligated to withhold a decision on an appeal to allow time for responses. Replies to responses are not permitted.
ARTICLE 8. COMMUNICATIONS WITH DECISIONMAKERS AND ADVISORS

8.1. (Rule 8.1) Definitions.

For purposes of this Article, the following definitions apply:

(a) "Commission staff of record" includes staff from the Division of Ratepayer Advocates assigned to the proceeding, staff from the Consumer Protection and Safety Division assigned to an adjudicatory proceeding or to a ratesetting proceeding initiated by complaint, and any other staff assigned to an adjudicatory proceeding in an advocacy capacity.

"Commission staff of record" does not include the following staff when and to the extent they are acting in an advisory capacity to the Commission with respect to a formal proceeding: (1) staff from any of the industry divisions; or (2) staff from the Consumer Protection and Safety Division in a quasi-legislative proceeding, or in a ratesetting proceeding not initiated by complaint.

(b) "Decisionmaker" means any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge.

(c) "Ex parte communication" means a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

(1) concerns any substantive issue in a formal proceeding,

(2) takes place between an interested person and a decisionmaker, and

(3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.

Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications.

(d) "Interested person" means any of the following:
(1) any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them;

(2) any person with a financial interest, as described in Article I (commencing with Section 87100) of Chapter 7 of Title 9 of the Government Code, in a matter at issue before the Commission, or such person's agents or employees, including persons receiving consideration to represent such a person; or

(3) a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, even if that association is not a party to the proceeding.


8.2. (Rule 8.2) Communications with Advisors.

Communications with Commissioners' personal advisors are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in ratesetting proceedings are permitted without the restrictions of Rule 8.3(c)(1) and (2).


8.3. (Rule 8.3) Ex Parte Requirements.

(a) In any quasi-legislative proceeding, ex parte communications are allowed without restriction or reporting requirement.

(b) In any adjudicatory proceeding, ex parte communications are prohibited.

(c) In any ratesetting proceeding, ex parte communications are subject to the reporting requirements set forth in Rule 8.4. In addition, the following restrictions apply:

(1) All-party meetings: Oral ex parte communications are permitted at any time with a Commissioner provided that the Commissioner involved (i) invites all parties to attend the meeting or sets up a conference call in which all parties may participate, and (ii) gives notice of this meeting or
call as soon as possible, but no less than three days before the meeting or call.

(2) Individual oral communications: If a decisionmaker grants an ex parte communication meeting or call to any interested person individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decisionmaker. The interested person requesting the initial individual meeting shall notify the parties that its request has been granted, and shall file a certificate of service of this notification, at least three days before the meeting or call.

(3) Written ex parte communications are permitted at any time provided that the interested person making the communication serves copies of the communication on all parties on the same day the communication is sent to a decisionmaker.

(4) Ratesetting Deliberative Meetings and Ex Parte Prohibitions:

(A) The Commission may prohibit ex parte communications for a period beginning not more than 14 days before the day of the Commission Business Meeting at which the decision in the proceeding is scheduled for Commission action, during which period the Commission may hold a Ratesetting Deliberative Meeting. If the decision is held, the Commission may permit such communications for the first half of the hold period, and may prohibit such communications for the second half of the period, provided that the period of prohibition shall begin not more than 14 days before the day of the Business Meeting to which the decision is held.

(B) In proceedings in which a Ratesetting Deliberative Meeting has been scheduled, ex parte communications are prohibited from the day of the Ratesetting Deliberative Meeting at which the decision in the proceeding is scheduled to be discussed through the conclusion of the Business Meeting at which the decision is scheduled for Commission action.

(d) Notwithstanding Rule 8.5, unless otherwise directed by the assigned Administrative Law Judge with the approval of the assigned Commissioner, the provisions of subsections (b) and (c) of this rule, and any reporting requirements under Rule 8.4, shall cease to apply, and ex parte communications shall be permitted, in any proceeding in which (1) no timely answer, response, protest, or request for hearing is filed, (2) all such responsive pleadings are withdrawn, or (3) a scoping memo has issued determining that a hearing is not needed in the proceeding.

(e) Ex parte communications concerning categorization of a given
proceeding are permitted, but must be reported pursuant to Rule 8.4.

(f) Ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment of a proceeding to another Administrative Law Judge, are prohibited. For purposes of this rule, "ex parte communications" include communications between an Administrative Law Judge and other decisionmakers about a motion for reassignment of a proceeding assigned to that Administrative Law Judge.

(g) The requirements of this rule, and any reporting requirements under Rule 8.4, shall apply until (1) the date when the Commission serves the decision finally resolving any application for rehearing, or (2) where the period to apply for rehearing has expired and no application for rehearing has been filed.

(h) Upon the filing of a petition for modification, the requirements of this rule, and any reporting requirements under Rule 8.4, that applied to the proceeding in which the decision that would be modified was issued shall apply until and unless (1) no timely response, protest or request for hearing is filed, (2) all such responsive pleadings are withdrawn, or (3) a scoping memo has issued determining that a hearing is not needed in the proceeding or that a different category shall apply.

(i) Where a proceeding is remanded to the Commission by a court or where the Commission re-opens a proceeding, the requirements of this rule and any reporting requirements under Rule 8.4 that previously applied to the proceeding shall apply until and unless a Commission order or a scoping memo has issued determining that a hearing is not needed in the proceeding or that a different category shall apply.

(j) When the Commission determines that there has been a violation of this rule or of Rule 8.4, the Commission may impose penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest.

(k) The Commission shall render its decision based on the evidence of record. Ex parte communications, and any notice filed pursuant to Rule 8.4, are not a part of the record of the proceeding.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Sections 1701.1(a), 1701.2(b), 1701.3(c) and 1701.4(b), Public Utilities Code.
8.4. (Rule 8.4) Reporting Ex Parte Communications.

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. Notice of ex parte communications shall be filed within three working days of the communication. The notice may address multiple ex parte communications in the same proceeding, provided that notice of each communication identified therein is timely. The notice shall include the following information:

(a) The date, time, and location of the communication, and whether it was oral, written, or a combination;

(b) The identities of each decisionmaker (or Commissioner's personal advisor) involved, the person initiating the communication, and any persons present during such communication;

(c) A description of the interested person's, but not the decisionmaker's (or Commissioner's personal advisor's), communication and its content, to which description shall be attached a copy of any written, audiovisual, or other material used for or during the communication.


8.5. (Rule 8.5) Ex Parte Requirements Prior to Final Categorization.

(a) Applications.

(1) The ex parte requirements applicable to ratesetting proceedings shall apply from the date the application is filed through the date of the Commission's preliminary determination of category pursuant to Rule 7.1(a).

(2) The ex parte requirements applicable to the category preliminarily determined by the Commission pursuant to Rule 7.1(a) shall apply until the date of the assigned Commissioner's scoping memo finalizing the determination of categorization pursuant to Rule 7.3.

(b) Rulemakings. The ex parte requirements applicable to the category preliminarily determined by the Commission pursuant to Rule 7.1(d) shall apply until the date of the assigned Commissioner's ruling on scoping memo finalizing the determination of category pursuant to Rule 7.3.
(c) Complaints. The ex parte requirements applicable to adjudicatory proceedings shall apply until the date of service of the instructions to answer finalizing the determination of category pursuant to Rule 7.1(b).


The following requirements apply to proceedings filed before January 1, 1998:

(a) In any investigation or complaint where the order instituting investigation or complaint raises the alleged violation of any provision of law or Commission order or rule, ex parte communications and communications with Commissioners' personal advisors are prohibited after the proceeding has been submitted to the Commission.

(b) Ex parte communications and communications with Commissioners' personal advisors are permitted, and shall not be reported, in rulemakings and in investigations consolidated with rulemakings to the extent that the investigation raises the identical issues raised in the rulemaking.

(c) All other ex parte communications and communications with Commissioners' personal advisors are permitted, and are subject to the reporting requirements of Rule 8.4.

(d) The Commission, or the assigned Administrative Law Judge with the approval of the assigned Commissioner, may issue a ruling tailoring these requirements to the needs of any specific proceeding.

ARTICLE 9. ADMINISTRATIVE LAW JUDGES

9.1. (Rule 9.1) Authority.

The Administrative Law Judge may administer oaths; issue subpoenas; receive evidence; hold appropriate conferences before or during hearings; rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument; and fix the time for the filing of briefs. The Administrative Law Judge may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.


9.2. (Rule 9.2) Motion for Reassignment on Peremptory Challenge.

(a) A party to a proceeding preliminarily or finally determined to be adjudicatory may file a motion, once only, for automatic reassignment of that proceeding to another Administrative Law Judge in accordance with the provisions of this subsection. The motion shall be filed and served on all parties, and on the Chief Administrative Law Judge and the President of the Commission. The motion shall be supported by declaration under penalty of perjury (or affidavit by an out-of-state person) in substantially the following form:

__________________, [declares under penalty of perjury:] That [s]he is [a party] [attorney for a party] to the above-captioned adjudicatory proceeding. That [declarant] believes that [s]he cannot have a [fair] [expeditious] hearing before Administrative Law Judge [to whom the proceeding is assigned]. That declarant [or the party declarant represents] has not filed, pursuant to Rule 9.2, any prior motion for reassignment on peremptory challenge in the proceeding. Dated ____________________, at ____________________, California.

__________________ [Signature]

Where there is more than one complainant or similar party, or more than one defendant or similar party, only one peremptory challenge for each side may be made, and the declaration shall include a showing that either (1) no previous peremptory challenge has been filed in the proceeding, or (2) the interests of the moving party are substantially adverse to those of any party who previously moved for reassignment under this rule.
(b) A party to a proceeding preliminarily or finally determined to be ratesetting, or a person filing a concurrent motion to become a party under Rule 1.4(a)(4), may file a motion, once only, for reassignment of that proceeding to another Administrative Law Judge in accordance with the provisions of this subsection; however, no more than two reassignments pursuant to this subsection shall be permitted in the same proceeding. The motion shall be filed and served as provided in subsection (a) of this rule, and shall be supported by a declaration similar in form and substance to that set forth in subsection (a) of this rule.

(c) Any motion filed pursuant to this rule shall be filed no later than 10 days after the date of the notice of the assignment or ruling, if any, on reassignment.

(d) The Chief Administrative Law Judge shall issue either a ruling reassigning the proceeding to another Administrative Law Judge or, in consultation with the President of the Commission, a ruling explaining why the motion is not proper under this rule.


9.3. (Rule 9.3) Motion for Reassignment for Prior Service.

(a) Irrespective of the limits in Rule 9.2 on number of motions for reassignment, a party may move for reassignment in any adjudicatory proceeding or ratesetting proceeding in which the assigned Administrative Law Judge (1) has, within the previous 12 months, served in any capacity in an advocacy position at the Commission or been employed by a regulated public utility, or (2) has been a party or served in a representative capacity in the proceeding.

(b) A motion under this subsection shall be supported by declaration under penalty of perjury (or affidavit by an out-of-state person) setting forth the factual basis for the motion, and shall be filed and served as provided in Rule 9.2(a).

(c) Any motion filed pursuant to this rule shall be filed no later than 10 days after the date of the notice of the assignment.

(d) The Chief Administrative Law Judge shall issue either a ruling reassigning the proceeding to another Administrative Law Judge or, in consultation with
the President of the Commission, a ruling explaining the basis for denial of
the motion.

Note: Authority cited: Section 1701, Public Utilities Code. Reference:
Section 1701.2, Public Utilities Code.

9.4. (Rule 9.4) Motion for Reassignment for Cause.

(a) Irrespective of the limits in Rule 9.2 on number of motions for
reassignment, a party may move for reassignment in any proceeding in
which the assigned Administrative Law Judge:

(1) has a financial interest in the subject matter in a proceeding or in a
party to the proceeding. An Administrative Law Judge shall be deemed to
have a financial interest if:

   (A) A spouse or minor child living in the Administrative Law Judge's
   household has a financial interest; or

   (B) The Administrative Law Judge or his or her spouse is a fiduciary who
   has a financial interest.

(2) has bias, prejudice, or interest in the proceeding.

(b) A motion filed pursuant to this rule shall be supported by a declaration
under penalty of perjury (or affidavit by an out-of-state person) setting forth
the factual basis for the motion, and shall be filed and served as provided in
Rule 9.2(a).

(c) A motion filed pursuant to this rule shall be filed at the earliest
practicable opportunity and in any event no later than 10 days after the date
the party discovered or should have discovered facts set forth in the
declaration filed pursuant to this rule.

(d) Any written response by the assigned Administrative Law Judge to a
motion for reassignment for cause shall be filed and served in the
proceeding where the motion was filed.

(e) The Chief Administrative Law Judge, in consultation with the President of
the Commission, and after considering any response from the assigned
Administrative Law Judge, shall issue a ruling addressing the motion.

(f) For the purposes of this rule, "financial interest" means ownership of
more than a 1 percent legal or equitable interest in a party, or a legal or
equitable interest in a party of a fair market value in excess of one thousand
five hundred dollars ($1,500), or a relationship as director, advisor or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those securities held by the organization unless the Administrative Law Judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.


9.5. (Rule 9.5) Circumstances Not Constituting Cause.

It shall not be cause for reassignment for cause that the Administrative Law Judge:

(a) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.

(b) Has experience, technical competence, or specialized knowledge of or has in any capacity expressed a view on a legal, factual or policy issue presented in the proceeding, except as provided in Rule 9.3.

(c) Has, as a representative or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding unless the Administrative Law Judge believes that the prior involvement was such as to prevent the Administrative Law Judge from exercising unbiased and impartial judgment in the proceeding.


The Administrative Law Judge shall request reassignment and withdraw from a proceeding in which there are grounds for reassignment for cause unless the parties waive the reassignment pursuant to Rule 9.7.


An Administrative Law Judge, after determining that there is basis for his or her reassignment for cause, shall disclose the basis on the record, and may ask the parties whether they wish to waive the reassignment. A waiver of reassignment shall recite the basis for reassignment and is effective only when signed by all parties, and included in the record. The Administrative Law Judge shall not seek to induce a waiver and shall avoid any effort to discover which representatives or parties favored or opposed a waiver of reassignment.


If a proceeding is reassigned, the rulings made up to that time shall not be set aside in the absence of good cause.


ARTICLE 10. DISCOVERY

10.1. (Rule 10.1) Discovery from Parties.

Without limitation to the rights of the Commission or its staff under Pub. Util. Code Sections 309.5 and 314, any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence, unless the burden, expense, or
intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence.


10.2. (Rule 10.2) Subpoenas.

(a) A party may request the issuance of a subpoena to direct the attendance of a non-party witness or to direct the production of documents or other things under the non-party witness's control. Requests may be made to the Administrative Law Judge assigned to the proceeding. If no Administrative Law Judge is assigned to the proceeding, requests may be made to the Executive Director. Subpoenas may be issued by the Commission, each Commissioner, the Executive Director, the Assistant Executive Director, or the Administrative Law Judge.

(b) When it is issued, the subpoena will be signed and sealed but will otherwise be blank. All appropriate portions of the blank subpoena must be completed by the party before it is served.

(c) If the subpoena seeks the production of documents or other things, it must be served with a copy of an affidavit showing good cause for the production of the documents or other things described in the subpoena, specify the exact documents or things to be produced, set forth in full detail the materiality of the requested documents or things to the issues raised in the proceeding, and state that the requested documents or things are in the possession or under the control of the witness. The party requesting production of the documents or other things must retain the original affidavit, and produce it at the request of the Administrative Law Judge, until either all requested documents or other things have been produced or all motions related to the subpoena have been finally resolved.

(d) Service of a subpoena must be made by delivering a copy to the witness personally, giving or offering to the witness at the same time, if demanded by him or her, the fees to which he or she is entitled under Public Utilities Code Section 1791 (see Government Code Section 68093). The service must be made early enough to allow the witness a reasonable time for preparation and travel to the place of attendance. Service may be made by any person.

(e) The provisions of Section 1985.3 of the Code of Civil Procedure apply to subpoenas of a consumer's personal records, as defined by Section 1985.3(a) of the Code of Civil Procedure.
(f) Anyone who disobeys a subpoena issued pursuant to this rule may be found to be in contempt of superior court and punished accordingly, as provided in Public Utilities Code Sections 1792 and 1793. In appropriate circumstances, such disobedience may be found to be a violation of Rule 1.1, punishable as contempt of the Commission under Public Utilities Code Section 2113.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 1792, 1793 and 2113, Public Utilities Code; Section 1991, Code of Civil Procedure.

10.3. (Rule 10.3) Computer Model Documentation.

(a) Any party who sponsors testimony or exhibits which are based in whole, or in part, on a computer model shall provide to any party upon request, the following information:

(1) A description of the source of all input data;

(2) The complete set of input data (input file) as used in the sponsoring party's computer run(s);

(3) Documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output, including but not limited to a manual which includes:

(A) A complete list of variables (input record types), input record formats, and a description of how input files are created and data entered as used in the sponsoring party's computer model(s).

(B) A complete description of how the model operates and its logic. This description may make use of equations, algorithms, flow charts, or other descriptive techniques.

(C) A description of a diagnostics and output report formats as necessary to understand the model's operation.

(4) A complete set of output files relied on to prepare or support the testimony or exhibits; and

(5) A description of post-processing requirements of the model output.

(b) If a sponsoring party modifies its computer model or the data base, and sponsors the modified results in the proceeding, such party shall provide the
modified model or data to any requesting party who has previously requested access to the original model or data base.

(c) Parties shall maintain copies of computer models and data bases in unmodified form until 90 days after the date of issuance of the Commission's last order or decision in the proceeding, including order or decision on application for rehearing, to the extent that those computer models and data bases continue to provide the basis, in whole or in part, for their showing.


10.4. (Rule 10.4) Computer Model and Data Base Access.

(a) Any party seeking access to a computer model or data base shall serve on the sponsoring party a written explanation of why it requests access to the information and how its request relates to its interest or position in the proceeding.

(b) Any sponsoring party shall provide timely and reasonable access to, and explanation of, that computer model or data base to all parties complying with subsection (a).

(c) If a party requests access to a data base, the sponsoring party may, at its election, either

1. provide such access on its own computer,
2. perform any data sorts requested by the requesting party,
3. make the data base available to the requesting party to run on the requesting party's own computer, or
4. make the data base available through an external computer service.

(d) If a party requests access to a computer model, the sponsoring party, may at its election, either

1. make the requested runs on its own computer,
2. make the model available to the requesting party to run on that party's own computer, or
3. have the requested model run produced for the requesting party by an external computer service.
(e) The sponsoring party is not required to modify its computer model or data base in order to accommodate a request, or to install its model on the requesting party’s computer, or to provide detailed training on how to operate the model beyond provision of written documentation. The sponsoring party is not required to provide a remote terminal or other direct physical link to its computer for use by the requesting party. The sponsoring party may take reasonable precautions to preclude access to other software or data not applicable to the specific model or data base being used.

(f) Within five business days of receipt of a request from a requesting party pursuant to this Rule, the sponsoring party shall indicate whether the request is clear and complete and shall provide the requesting party a written estimate of the date of completion of the response.


ARTICLE 11. LAW AND MOTION

11.1. (Rule 11.1) Motions.

(a) A motion is a request for the Commission or the Administrative Law Judge to take a specific action related to an open proceeding before the Commission.

(b) A motion may be made at any time during the pendency of a proceeding by any party to the proceeding. A motion may also be made by a person who is not a party if it is accompanied by a motion, pursuant to Rule 1.4, to become a party.

(c) Written motions must be filed and served. The Administrative Law Judge may permit an oral motion to be made during a hearing or conference.

(d) A motion must concisely state the facts and law supporting the motion and the specific relief or ruling requested.

(e) Responses to written motions must be filed and served within 15 days of the date that the motion was served, except as otherwise provided in these Rules or unless the Administrative Law Judge sets a different date. Responses to oral motions may be made as permitted by the Administrative Law Judge.
(f) With the permission of the Administrative Law Judge, the moving party may reply to responses to the motion. Written replies must be filed and served within 10 days of the last day for filing responses under subsection (e) unless the Administrative Law Judge sets a different date. A written reply must state in the opening paragraph that the Administrative Law Judge has authorized its filing and must state the date and the manner in which the authorization was given (i.e., in writing, by telephone conversation, etc.).

(g) Nothing in this rule prevents the Commission or the Administrative Law Judge from ruling on a motion before responses or replies are filed.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.

11.2. (Rule 11.2) Motion to Dismiss.

A motion to dismiss a proceeding based on the pleadings (other than a motion based upon a lack of jurisdiction) shall be made no later than five days prior to the first day of hearing.


11.3. (Rule 11.3) Motion to Compel or Limit Discovery.

(a) A motion to compel or limit discovery is not eligible for resolution unless the parties to the dispute have previously met and conferred in a good faith effort to informally resolve the dispute. The motion shall state facts showing a good faith attempt at an informal resolution of the discovery dispute presented by the motion, and shall attach a proposed ruling that clearly indicates the relief requested.

(b) Responses to motions to compel or limit discovery shall be filed and served within 10 days of the date that the motion was served.


11.4. (Rule 11.4) Motion for Leave to File Under Seal.

(a) A motion for leave to file under seal shall attach a proposed ruling that clearly indicates the relief requested.
(b) Responses to motions to file pleadings, or portions of pleading, under seal shall be filed and served within 10 days of the date that the motion was served.


11.5. (Rule 11.5) Motion to Seal the Evidentiary Record.

(a) Motions to seal the evidentiary record or portions thereof may be made at hearing, unless the presiding officer directs otherwise.

(b) If the motion to seal the evidentiary record concerns prepared testimony offered in evidence by written motion pursuant to Rule 13.8(d), it shall be made by concurrent written motion.


11.6. (Rule 11.6) Motion for Extension of Time.

Motions for extension of time limits established in these rules or in a ruling of an Administrative Law Judge or Commissioner may be made orally, by e-mail, or by letter to the Administrative Law Judge. If other parties to the proceeding are affected by the extension, the party requesting the extension must first make a good-faith effort to ask such parties to agree to the extension. The party requesting the extension must report the results of this effort when it makes its request. If the extension is granted, the party requesting the extension shall notify all other parties to the proceeding of the extension, unless the grant of the extension is by oral ruling delivered on the record of the proceeding. If the extension is in regard to the time to file a document, the opening paragraph of the document shall indicate that the Administrative Law Judge has granted the extension. No extensions will be granted of time requirements established by statute, unless the statute permits extension or waiver of the requirement.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1701, Public Utilities Code.
11.7. (Rule 11.7) Referral to Law and Motion Judge.

The assigned Administrative Law Judge may refer motions for the resolution of discovery disputes to a designated Law and Motion Administrative Law Judge.

The Law and Motion Administrative Law Judge shall preside over discovery matters referred to him or her by the assigned Administrative Law Judge. The Law and Motion Administrative Law Judge may set law and motion hearings and take such other action as may be necessary and appropriate to the discharge of his or her duties. Rulings under this procedure will be deemed to be rulings in the proceeding in which the motions are filed.


ARTICLE 12. SETTLEMENTS

12.1. (Rule 12.1) Proposal of Settlements.

(a) Parties may, by written motion any time after the first prehearing conference and within 30 days after the last day of hearing, propose settlements on the resolution of any material issue of law or fact or on a mutually agreeable outcome to the proceeding. Settlements need not be joined by all parties; however, settlements in applications must be signed by the applicant and, in complaints, by the complainant and defendant.

The motion shall contain a statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged. Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.

When a settlement pertains to a proceeding under a Rate Case Plan or other proceeding in which a comparison exhibit would ordinarily be filed, the motion must be supported by a comparison exhibit indicating the impact of the settlement in relation to the utility's application and, if the participating staff supports the settlement, in relation to the issues staff contested, or would have contested, in a hearing.

(b) Prior to signing any settlement, the settling parties shall convene at least one conference with notice and opportunity to participate provided to all
parties for the purpose of discussing settlements in the proceeding. Notice of the date, time, and place shall be served on all parties at least seven (7) days in advance of the conference. Notice of any subsequent settlement conferences may be oral, may occur less than seven days in advance, and may be limited to prior conference attendees and those parties specifically requesting notice.

Attendance at any settlement conference shall be limited to the parties and their representatives.

(c) Settlements should ordinarily not include deadlines for Commission approval; however, in the rare case where delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion.

(d) The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.


12.2. (Rule 12.2) Comments.

Parties may file comments contesting all or part of the settlement within 30 days of the date that the motion for adoption of settlement was served.

Comments must specify the portions of the settlement that the party opposes, the legal basis of its opposition, and the factual issues that it contests. If the contesting party asserts that hearing is required by law, the party shall provide appropriate citation and specify the material contested facts that would require a hearing. Any failure by a party to file comments constitutes waiver by that party of all objections to the settlement, including the right to hearing.

Parties may file reply comments within 15 days after the last day for filing comments.

12.3. (Rule 12.3) Hearing Where Contested.

If there are no material contested issues of fact, or if the contested issue is one of law, the Commission may decline to set hearing.

If a hearing is set, it will be scheduled as soon after the close of the comment period as reasonably possible. Discovery will be permitted and should be well underway prior to the close of the comment period. Parties to the settlement must provide one or more witnesses to testify concerning the contested issues. Contesting parties may present evidence and testimony on the contested issues.


12.4. (Rule 12.4) Rejection of Settlement.

The Commission may reject a proposed settlement whenever it determines that the settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following:

(a) Hold hearings on the underlying issues, in which case the parties to the settlement may either withdraw it or offer it as joint testimony,

(b) Allow the parties time to renegotiate the settlement,

(c) Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms or to request other relief.


12.5. (Rule 12.5) Adoption Binding, Not Precedential.

Commission adoption of a settlement is binding on all parties to the proceeding in which the settlement is proposed. Unless the Commission expressly provides otherwise, such adoption does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

12.6. (Rule 12.6) Confidentiality and Inadmissibility.

No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.

If a settlement is not adopted by the Commission, the terms of the proposed settlement is also inadmissible unless their admission is agreed to by all parties joining in the proposal.


12.7. (Rule 12.7) Applicability.

Exhibits may be sponsored by two or more parties in a Commission hearing as joint testimony without application of these rules.


**ARTICLE 13. HEARINGS, EVIDENCE, BRIEFS AND SUBMISSION**


(a) The Commission shall give notice of evidentiary hearing not less than ten days before the date of hearing, unless it finds that public necessity requires hearing at an earlier date.

(b) Whenever any electrical, gas, heat, telephone, water, or sewer system utility files an application to increase any rate, the utility shall give notice of hearing, not less than five nor more than 30 days before the date of hearing, to entities or persons who may be affected thereby, by posting notice in public places and by publishing notice in a newspaper or newspapers of general circulation in the area or areas concerned, of the time, date, and place of hearing. Proof of publication and sample copies of the notices shall be filed within 10 days after publication.
(c) In addition to the notice required by this rule, parties shall provide such notice of hearing as the presiding officer may designate.


13.2. (Rule 13.2) Presiding Officer.

When evidence is to be taken in a hearing, the assigned Commissioner or assigned Administrative Law Judge shall preside, as follows:

(a) In an adjudicatory proceeding, the presiding officer shall be either the assigned Commissioner or the assigned Administrative Law Judge, as designated in the scoping memo.

(b) In a ratesetting proceeding, the presiding officer shall be either the assigned Commissioner or the assigned Administrative Law Judge, as designated by the assigned Commissioner prior to the first hearing.

(c) In a quasi-legislative proceeding, the assigned Commissioner shall be the presiding officer.

(d) Where the assigned Commissioner is designated as the presiding officer pursuant to this rule, and is absent, the assigned Administrative Law Judge shall preside at hearing to the extent permitted by law.


13.3. (Rule 13.3) Assigned Commissioner Presence.

(a) In any ratesetting proceeding, the assigned Commissioner shall be present at the closing argument, if any, and, if designated as presiding officer, shall be present for more than one-half of the hearing days.

(b) In any ratesetting proceeding, a party may request the presence of the assigned Commissioner at a hearing or specific portion of a hearing. The request may be made in a pleading or a prehearing conference statement. Alternatively, the request may be made by filing and serving on all parties a letter to the assigned Commissioner, with a copy to the assigned Administrative Law Judge. The request should be made as far as possible in advance of the hearing, and should specify (1) the witnesses and/or issues for which the assigned Commissioner's presence is requested, (2) the party's
best estimate of the dates when such witnesses and subject matter will be heard, and (3) the reasons why the assigned Commissioner's presence is requested. The assigned Commissioner has sole discretion to grant or deny, in whole or in part, any such request. Any request that is filed five or fewer business days before the date when the subject hearing begins may be rejected as untimely.

(c) In quasi-legislative proceedings, the assigned Commissioner shall be present for hearing on legislative facts (general facts that help the Commission decide questions of law and policy and discretion), but need not be present for hearing on adjudicative facts (facts that answer questions such as who did what, where, when, how, why, with what motive or intent).

(d) For purposes of this rule, "present" or "presence" at a hearing or argument means physical attendance in the hearing room, sufficient to familiarize the attending Commissioner with the substance of the evidence, testimony, or argument for which the Commissioner's presence is required or requested.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Sections 1701.2(d), 1701.3(a) and 1701.4(a), Public Utilities Code.

13.4. (Rule 13.4) Order of Procedure.

In hearings on complaints, applications and petitions, the complainant, applicant, or petitioner shall open and close. In hearings on investigation proceedings where filed rates or rules which do not result in an increase have been suspended, the respondent shall open and close. In other investigation proceedings, the Commission's staff shall open and close. Intervenors shall follow the parties in whose behalf the intervention is made. The presiding officer, where circumstances warrant, may vary the order of presentation.


13.5. (Rule 13.5) Limiting Number of Witnesses.

To avoid unnecessary cumulative evidence, the presiding officer may limit the number of witnesses or the time for testimony upon a particular issue.

13.6. (Rule 13.6) Evidence.

(a) Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.

(b) When objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.

(c) The Commission may review evidentiary rulings in determining the matter on its merits. In extraordinary circumstances, where prompt decision by the Commission is necessary to promote substantial justice, the assigned Commissioner or Administrative Law Judge may refer evidentiary rulings to the Commission for determination.

(d) Formal exceptions to rulings are unnecessary and need not be taken.

(e) An offer of proof for the record shall consist of a statement of the substance of the evidence to which objection has been sustained.


13.7. (Rule 13.7) Exhibits.

(a) Exhibits and copies of exhibits shall be legible and either prepared on paper not exceeding 8 ½ x 13 inches in size, or folded to that approximate size. Exhibits of two or more pages shall be bound or stapled and, wherever practicable, the pages of each exhibit shall be numbered. Exhibits that contain multiple chapters or attachments shall include a table of contents. Rate comparisons and other figures shall be set forth in tabular form. The top sheet of an exhibit must have a blank space two inches high by four inches wide to accommodate the Commission's exhibit stamp.

(b) When exhibits are offered in evidence, the original plus one copy shall be furnished to the presiding officer and one copy to the reporter and to each party, unless the presiding officer directs otherwise.

(c) Documentary exhibits shall be limited to those portions of the document that are relevant and material to the proceeding.

(d) If relevant and material matter offered in evidence is embraced in a document containing other matter, parties shall be afforded opportunity to examine the document, and to offer in evidence other portions thereof.
believed material and relevant.

(e) All documents that are prepared, directly or indirectly, by the party offering them into evidence shall be certified under penalty of perjury by the person preparing or in charge of preparing them as being true and correct, unless the person preparing them is dead or has been declared incompetent, in which case any other person having knowledge of such statements of fact may certify such documents.


(a) Prepared testimony may be offered in evidence as an exhibit in lieu of oral testimony under direct examination, provided that copies shall have been served upon all parties prior to hearing and pursuant to the schedule adopted in the proceeding. Prepared testimony shall constitute the entirety of the witness's direct testimony, and shall include any exhibits to be offered in support of the testimony and, in the case of an expert witness, a statement of the witness's qualifications.

(b) Direct testimony in addition to the prepared testimony previously served, other than the correction of minor typographical or wording errors that do not alter the substance of the prepared testimony, will not be accepted into evidence unless the sponsoring party shows good cause why the additional testimony could not have been served with the prepared testimony or should otherwise be admitted. Corrections to minor typographical or wording errors in prepared testimony may be offered in evidence as an exhibit in lieu of oral testimony under direct examination.

(c) In the absence of an evidentiary hearing, prepared testimony may be offered into evidence by written motion or by oral motion at a prehearing conference, if any. If the offer is by written motion, the prepared testimony shall not be filed with the motion, but shall be concurrently served with the motion. Two copies shall be served on the Administrative Law Judge or, if none is yet assigned, on the Chief Administrative Law Judge. The motion shall include a declaration under penalty of perjury by the person preparing or in charge of preparing the prepared testimony as being true and correct, unless the person preparing them is dead or has been declared incompetent, in which case any other person having knowledge of such statements of fact may certify such documents.

Official notice may be taken of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450 et seq.


The Administrative Law Judge or presiding officer, as applicable, may require the production of further evidence upon any issue. Upon agreement of the parties, the presiding officer may authorize the receipt of specific documentary evidence as a part of the record within a fixed time after the hearing is adjourned, reserving exhibit numbers therefor.


The Administrative Law Judge or presiding officer, as applicable, may fix the time for the filing of briefs. Concurrent briefs are preferable. Factual statements must be supported by identified evidence of record. Citations to the transcript must indicate the transcript page number(s) and identify the party and witness sponsoring the cited testimony. Citations to exhibits must indicate the exhibit number and exhibit page number. A brief of more than 20 pages shall contain a subject index, a table of authorities, and a summary of the briefing party's recommendations following the table of authorities.


In any adjudicatory proceeding, if an application for rehearing is granted, the parties shall have an opportunity for final oral argument before the
presiding officer, if a party so requests within the time and in the manner specified.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1701.2(d), Public Utilities Code.


(a) The Commission may, on its own motion or upon recommendation of the assigned Commissioner or Administrative Law Judge, direct the presentation of oral argument before it.

(b) In ratesetting and quasi-legislative proceedings in which hearings were held, a party has the right to make a final oral argument before the Commission, provided that the party makes such request in its closing brief or, if closing briefs are not permitted by the scoping memo, within the time and in the manner specified in the scoping memo or later ruling in the proceeding. A quorum of the Commission shall be present; however, a Commissioner may be present by teleconference to the extent permitted by the Bagley-Keene Open Meeting Act.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Sections 1701.3(d) and 1701.4(c), Public Utilities Code.


(a) A proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed.

(b) A motion to set aside submission and reopen the record for the taking of additional evidence, or for consideration of a settlement under Article 12 shall specify the facts claimed to constitute grounds in justification thereof, including material changes of fact or of law alleged to have occurred since the conclusion of the hearing. It shall contain a brief statement of proposed additional evidence, and explain why such evidence was not previously adduced.

ARTICLE 14. RECOMMENDED DECISIONS


For purposes of this article, the following definitions shall apply:

(a) "Presiding officer's decision" is a recommended decision that is proposed by the presiding officer in an adjudicatory proceeding in which evidentiary hearings have been conducted.

(b) "Proposed decision" is a recommended decision, other than a presiding officer's decision as defined in subsection (a), that is proposed by (1) the presiding officer or (2) where there is not a presiding officer, the assigned Administrative Law Judge or the assigned Commissioner.

(c) "Draft resolution" is a recommended resolution that is proposed by a Commission director.

(d) "Alternate proposed decision" or “alternate draft resolution” means a substantive revision by a Commissioner to a proposed decision or draft resolution not proposed by that Commissioner which either:

(1) materially changes the resolution of a contested issue, or

(2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

"Alternate proposed decision" also means a recommended decision prepared by the assigned Administrative Law Judge in ratesetting proceeding where the assigned Commissioner is the presiding officer.

A substantive revision to a proposed decision or draft resolution is not an "alternate proposed decision" or “alternate draft resolution” if the revision does no more than make changes suggested in prior comments on the proposed decision or draft resolution, or in a prior alternate to the proposed decision or draft resolution.

14.2. (Rule 14.2) Issuance of Recommended Decision.

(a) A proposed decision shall be filed no later than 90 days after submission. In a ratesetting case that requires a hearing, an alternate proposed decision by the assigned commissioner or assigned administrative law judge shall be filed concurrently with the proposed decision.

(b) A presiding officer's decision shall be filed no later than 60 days after submission.

(c) An alternate proposed decision shall be filed without undue delay.

(d) A draft resolution shall not be filed with the Commission, but shall be served as follows, and on other persons as the Commission deems appropriate:

(1) A draft resolution disposing of an advice letter shall be served on the utility that proposed the advice letter, on any person who served a protest or response to the advice letter, and any person whose name and interest in the relief sought appears on the face of the advice letter (as where the advice letter seeks approval of a contract or deviation for the benefit of such person);

(2) A draft resolution disposing of a request for disclosure of documents in the Commission's possession shall be served on (A) the person who requested the disclosure, (B) any Commission regulate about which information protected by Public Utilities Code Section 583 would be disclosed if the request were granted, and (C) any person (whether or not a Commission regulate) who, pursuant to protective order, had submitted information to the Commission, which information would be disclosed if the request were granted;

(3) A draft resolution disposing of one or more requests for motor carrier operating authority shall be served on any person whose request would be denied, in whole or part, and any person protesting a request, regardless of whether the resolution would sustain the protest;

(4) A draft resolution establishing a rule or setting a fee schedule for a class of Commission-regulated entities shall be served on any person providing written comment solicited by Commission staff (e.g., at a workshop or by letter) for purposes of preparing the draft resolution.
An alternate draft resolution shall be served consistent with the service of the draft resolution.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 311(d), 311(f), 1701.1, 1701.3 and 1701.4, Public Utilities Code.

14.3. (Rule 14.3) Comments on Proposed or Alternate Decision.

(a) Parties may file comments on a proposed or alternate decision within 20 days of the date of its service on the parties.

(b) Except in general rate cases, major plant addition proceedings, and major generic investigations, comments shall be limited to 15 pages in length. Comments in general rate cases, major plant addition proceedings, and major generic investigations shall not exceed 25 pages. Comments shall include a subject index listing the recommended changes to the proposed or alternate decision, a table of authorities and an appendix setting forth proposed findings of fact and conclusions of law. The subject index, table of authorities, and appendix do not count against the page limit.

(c) Comments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law. Comments which fail to do so will be accorded no weight. Comments proposing specific changes to the proposed or alternate decision shall include supporting findings of fact and conclusions of law.

(d) Replies to comments may be filed within five days after the last day for filing comments and shall be limited to identifying misrepresentations of law, fact or condition of the record contained in the comments of other parties. Replies shall not exceed five pages in length.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 311(d), Public Utilities Code.

14.4. (Rule 14.4) Appeal and Review of Presiding Officer's Decision.

(a) Any party may file an appeal of the presiding officer's decision within 30 days of the date the decision is served.

(b) Any Commissioner may request review of the presiding officer's decision
by filing a request for review within 30 days of the date the decision is served.

(c) Appeals and requests for review shall set forth specifically the grounds on which the appellant or requestor believes the presiding officer's decision to be unlawful or erroneous. Vague assertions as to the record or the law, without citation, may be accorded little weight.

(d) Any party may file its response no later than 15 days after the date the appeal or request for review was filed. In cases of multiple appeals or requests for review, the response may be to all such filings and may be filed 15 days after the last such appeal or request for review was filed. Replies to responses are not permitted. The Commission is not obligated to withhold a decision on an appeal or request for review to allow time for responses to be filed.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Sections 1701.2(a) and (c), Public Utilities Code.

14.5. (Rule 14.5) Comment on Draft or Alternate Draft Resolution.

Any person may comment on a draft or alternate draft resolution by serving (but not filing) comments on the Commission by no later than ten days before the Commission meeting when the draft or alternate resolution is first scheduled for consideration (as indicated on the first page of the draft or alternate resolution) in accordance with the instructions accompanying the notice of the draft or alternate draft resolution in the Commission's Daily Calendar.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 311(e) and 311(g), Public Utilities Code.

14.6. (Rule 14.6) Reduction or Waiver of Review.

(a) In an unforeseen emergency situation, the Commission may reduce or waive the period for public review and comment on proposed decision, draft resolutions, and their alternates. "Unforeseen emergency situation" means a matter that requires action or a decision by the Commission more quickly than would be permitted if advance publication were made on the regular meeting agenda. Examples include, but are not limited to:
(1) Activities that severely impair or threaten to severely impair public health or safety.

(2) Crippling disasters that severely impair public health or safety.

(3) Administrative disciplinary matters, including, but not limited to, consideration of proposed decisions and stipulations, and pending litigation, that require immediate attention.

(4) Consideration of applications for licenses or certificates for which a decision must be made in less than ten days.

(5) Consideration of proposed legislation that requires immediate attention due to legislative action that may be taken before the next regularly scheduled Commission meeting, or due to time limitations imposed by law.

(6) Requests for relief based on extraordinary conditions in which time is of the essence.

(7) Deadlines for Commission action imposed by legislative bodies, courts, other administrative bodies or tribunals, the office of the Governor, or a legislator.

(8) Unusual matters that cannot be disposed of by normal procedures if the duties of the Commission are to be fulfilled.

A rate increase is not an unforeseen emergency situation.

(b) The Commission may reduce or waive the period for public review and comment on proposed decisions and their alternates, where all the parties so stipulate, and on draft resolutions and their alternates, where all persons identified in subsection (1), (2), (3) or (4) of Rule 14.2(c) so stipulate.

(c) In the following circumstances, the Commission may reduce or waive the period for public review and comment on draft resolutions and proposed decisions, and may reduce but not waive the period for public review and comment on alternate draft resolutions and alternate proposed decisions:

(1) in a matter where temporary injunctive relief is under consideration.

(2) in an uncontested matter where the decision grants the relief requested.

(3) for a decision on a request for review of the presiding officer's decision in an adjudicatory proceeding.
(4) for a decision extending the deadline for resolving adjudicatory proceedings (Public Utilities Code Section 1701.2(d)) or for resolving the issues raised in the scoping memo in a ratesetting or quasi-legislative proceeding (Public Utilities Code Section 1701.5).

(5) for a decision under the state arbitration provisions of the federal Telecommunications Act of 1996.

(6) for a decision on a request for compensation pursuant to Public Utilities Code Section 1801 et seq.

(7) for a decision authorizing disclosure of documents in the Commission's possession when such disclosure is pursuant to subpoena.

(8) for a decision under a federal or California statute (such as the California Environmental Quality Act or the Administrative Procedure Act) that both makes comprehensive provision for public review and comment in the decision-making process and sets a deadline from initiation of the proceeding within which the Commission must resolve the proceeding.

(9) for a decision in a proceeding in which no hearings were conducted where the Commission determines, on the motion of a party or on its own motion, that public necessity requires reduction or waiver of the 30-day period for public review and comment. For purposes of this subsection, "public necessity" refers to circumstances in which the public interest in the Commission adopting a decision before expiration of the 30-day review and comment period clearly outweighs the public interest in having the full 30-day period for review and comment. "Public necessity" includes, without limitation, circumstances where failure to adopt a decision before expiration of the 30-day review and comment period would place the Commission or a Commission regulatee in violation of applicable law, or where such failure would cause significant harm to public health or welfare. When acting pursuant to this subsection, the Commission will provide such reduced period for public review and comment as is consistent with the public necessity requiring reduction or waiver.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 306(b), 311(e), 311(g), 1701.2(d) and 1701.5, Public Utilities Code; and Section 11125.5, Government Code.

14.7. (Rule 14.7) Exemptions.

(a) No public review or comment is required for (1) a resolution on an advice
letter filing or decision on an uncontested matter where the filing or matter pertains solely to one or more water corporations as defined in Public Utilities Code Section 241, (2) an order instituting investigation or rulemaking, (3) a categorization resolution under Public Utilities Code Sections 1701.1 through 1701.4, or (4) an order, including a decision on an appeal from the presiding officer's decision in an adjudicatory proceeding, that the Commission is authorized by law to consider in executive session.

(b) Except to the extent that the Commission finds it is required by the public interest in a particular case, this article does not apply to the decision of the assigned Administrative Law Judge in a complaint under the expedited complaint procedure.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 311(f) and 1702.1, Public Utilities Code.

ARTICLE 15. COMMISSION DECISIONS

15.1. (Rule 15.1) Commission Meetings.

(a) Commission Business Meetings shall be held on a regularly scheduled basis to consider and vote on decisions and orders and to take such other action as the Commission deems appropriate. Commission Business Meetings are open to the public, but the Commission may hold closed sessions as part of a regular or special meeting, as permitted by law.

(b) In a ratesetting proceeding where a hearing was held, the Commission may hold a Ratesetting Deliberative Meeting to consider its decision in closed session.

(c) Notice of the time and place of these meetings will appear in the Commission's Daily Calendar.

(d) No unscheduled meeting to take action will be held unless: (1) the Commission determines by majority vote, at a meeting prior to the emergency meeting or at the beginning of the emergency meeting, that an unforeseen emergency situation, as defined in the Bagley-Keene Open Meeting Act, exists, or (2) wherever otherwise permitted by the Bagley-Keene Open Meeting Act.

(e) If an alternate is mailed less than 30 days before the Commission
meeting at which the proposed decision or draft resolution is scheduled to be considered, the items will continue to be listed on the Commission's agenda, but will be held to the extent necessary to comply with Public Utilities Code Section 311(e).

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 306 and 311(e), Public Utilities Code; and Sections 11123, 11125.4, 11125.5 and 11126, Government Code.

15.2. (Rule 15.2) Meeting Agenda.

(a) At least ten days in advance of the Commission meeting, the Commission will issue an agenda listing the items of business to be transacted or discussed by publishing it on the Commission's Internet website. The agenda is also available for viewing and photocopying (for a fee) at the Central Files Office.

(b) Members of the public, other than persons who have consented to e-mail service in a proceeding pursuant to Rule 1.10, may place a standing order with the Commission's Administrative Law Judge Division to subscribe to receive hard copies of the agenda.

(c) A matter not appearing on the agenda of a meeting will not be decided unless:

(1) The Commission determines by majority vote that an unforeseen emergency situation, as defined in the Bagley-Keene Open Meeting Act exists;

(2) The Commission determines by a two-thirds majority (or, if less than two-thirds of the Commissioners are present, by a unanimous vote of those Commissioners present) that a need to take immediate action exists and that the need for this action came to the Commission's attention after the agenda for the meeting was issued; or

(3) As otherwise permitted by the Bagley-Keene Open Meeting Act.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 306(b) and 311.5, Public Utilities Code; Sections 11125(b), 11125.3 and 11126.3(d), Government Code.
15.3. (Rule 15.3) Agenda Item Documents.

(a) Before each Commission meeting, the Commission will make available to the public all draft orders, proposed and draft decisions and their alternates, draft resolutions and their alternates, and written reports appearing on the agenda, except those documents relating to items the Commission considers during its closed session, by publishing them on the Commission's Internet web site.

(b) Agenda item documents are also available for viewing and photocopying (for a fee) at the Commission's Central Files in San Francisco and at the Commission's Los Angeles and San Diego offices, and may be available in certain of the Commission's field offices. If agenda item documents are not ready when the agenda is issued, they will be available at no charge at 9 a.m. on the day and at the location of the Commission meeting.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 311.5, Public Utilities Code; Section 11125.1, Government Code.

15.4. (Rule 15.4) Decision in Ratesetting or Quasi-Legislative Proceeding.

The Commission shall vote on its decision in a ratesetting or quasi-legislative proceeding not later than 60 days after issuance of a proposed or draft decision. The Commission may extend the deadline for a reasonable period under extraordinary circumstances. The 60-day deadline shall be extended for 30 days if any alternate decision is proposed. Decisions shall become effective 20 days after issuance, unless otherwise provided therein.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Section 1701.3(e), 1701.4(d), 1705 and 1731(a), Public Utilities Code.

15.5. (Rule 15.5) Decision in Adjudicatory Proceeding.

In an adjudicatory proceeding in which a hearing was held:

(a) The decision of the presiding officer shall become the decision of the Commission if no appeal or request for review is timely filed pursuant to Rule 14.4. The Commission's Daily Calendar shall notice each decision of a presiding officer that has become the decision of the Commission, the proceeding so decided, and the effective date of the decision.

(b) The Commission may meet in closed session to consider the decision of
the presiding officer that is under appeal pursuant to Rule 14.4. The vote on the appeal or a request for review shall be in a public meeting and shall be accompanied by an explanation of the Commission's decision, which shall be based on the record developed by the presiding officer. A decision different from that of the presiding officer shall include or be accompanied by a written explanation of each of the changes made to the presiding officer's decision. The decision shall become effective 20 days after issuance, unless otherwise provided therein.

Note: Authority cited: Section 1701, Public Utilities Code. Reference: Sections 311(d), 1701.2(a), 1701.2(c) and 1705, Public Utilities Code.

15.6. (Rule 15.6) Service of Decisions and Orders.

Decisions and orders shall be served on all parties by the Executive Director's office, unless doing so would be contrary to state or federal law.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 311.5 and 1701, Public Utilities Code; and Section 11104.5, Government Code.

ARTICLE 16. REHEARING, MODIFICATION AND TIME TO COMPLY


(a) Application for rehearing of a Commission order or decision shall be filed within 30 days after the date the Commission mails the order or decision, or within 10 days of mailing in the case of an order relating to (1) security transactions and the transfer or encumbrance of utility property as described in Public Utilities Code Section 1731(b), or (2) the Department of Water Resources as described in Public Utilities Code Section 1731(c).

(b) Filing of an application for rehearing shall not excuse compliance with an order or a decision. An application filed ten or more days before the effective date of an order suspends the order until the petition is granted or denied. Absent further Commission order, this suspension will lapse after 60 days. The Commission may extend the suspension period.

(c) Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission
to a legal error, so that the Commission may correct it expeditiously.

(d) A response to an application for rehearing is not necessary. Any response may be filed and served no later than fifteen days after the day the application for rehearing was filed. In instances of multiple applications for rehearing the response may be to all such applications, and may be filed 15 days after the last application for rehearing was filed. The Commission is not obligated to withhold a decision on an application for rehearing to allow time for a response to be filed.

(e) Motions related to applications for rehearing shall be directed to the Chief Administrative Law Judge for resolution.


16.2. (Rule 16.2) Parties Eligible to File Applications for Rehearing and Responses.

(a) For purposes of filing an application for rehearing in a formal proceeding, "parties" include any person who is a party pursuant to Rule 1.4.

(b) For purposes of filing an application for rehearing of a resolution, "parties" include any person described in paragraphs (1) through (4) of Rule 14.2(c) and any person who has served written comments on a draft or alternate resolution pursuant to Rule 14.5.

(c) Except as may be specifically authorized by statute, a person may not become a party by filing an application for rehearing or a response to an application for rehearing.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 1731, 1732, 1733 and 1735, Public Utilities Code.

16.3. (Rule 16.3) Oral Arguments on Application for Rehearing.

(a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision:
(1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;

(2) changes or refines existing Commission precedent;

(3) presents legal issues of exceptional controversy, complexity, or public importance; and/or

(4) raises questions of first impression that are likely to have significant precedential impact.

These criteria are not exclusive. The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. Arguments must be based only on the evidence in the record. Oral argument is not part of the evidentiary record.

(b) Any party responding to an application for rehearing may make its own request, or respond to the rehearing applicant's request, for oral argument; if it does either, the party must comment on why the issues raised meet or do not meet the criteria stated in subsection (a).

(c) The President has the discretion to grant the request for oral argument, if any. At the request of any other Commissioner, the President's determination will be placed on the Commissioner's meeting agenda for consideration by the full Commission.

(d) Oral argument will be scheduled in a manner that will not unduly delay the resolution of the application for rehearing. At least ten days prior to the oral argument, the Commission will serve all parties to the proceeding with a notice of the oral argument, which may set forth the issues to be addressed at the argument, the order of presentation, time limitations, and other appropriate procedural matters. Normally, no more than one hour will be allowed for oral argument in any particular proceeding.

(e) Participation in the oral argument will ordinarily be limited to those parties who have filed or responded to the application for rehearing. Other parties to the proceeding may participate with the permission or at the invitation of the Commission. Requests to participate should be directed to the General Counsel and should be made at least seven days before the date set for oral argument.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 1731, 1732, 1733 and 1735, Public Utilities Code.
16.4. (Rule 16.4) Petition for Modification.

(a) A petition for modification asks the Commission to make changes to an issued decision. Filing a petition for modification does not preserve the party's appellate rights; an application for rehearing (see Rule 16.1) is the vehicle to request rehearing and preserve a party's appellate rights.

(b) A petition for modification of a Commission decision must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. Any factual allegations must be supported with specific citations to the record in the proceeding or to matters that may be officially noticed. Allegations of new or changed facts must be supported by an appropriate declaration or affidavit.

(c) A petition for modification must be filed and served on all parties to the proceeding or proceedings in which the decision proposed to be modified was made. If more than one year has elapsed since the effective date of the decision, the Administrative Law Judge may direct the petitioner to serve the petition on other persons.

(d) Except as provided in this subsection, a petition for modification must be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

(e) If the petitioner was not a party to the proceeding in which the decision proposed to be modified was issued, the petition must state specifically how the petitioner is affected by the decision and why the petitioner did not participate in the proceeding earlier.

(f) Responses to petitions for modification must be filed within 30 days of the date that the petition was filed. Responses must be served on the petitioner and on all parties who were served with the petition.

(g) With the permission of the Administrative Law Judge, the petitioner may reply to responses to the petition. Replies must be filed and served within 10 days of the last day for filing responses, unless the Administrative Law Judge sets a different date. A reply must state in the opening paragraph that the Administrative Law Judge has authorized its filing and must state the date and the manner in which the authorization was given (i.e., in writing, by telephone conversation, etc.).
(h) Unless otherwise ordered by the Commission, the filing of a petition for modification does not stay or excuse compliance with the order of the decision proposed to be modified. The decision remains in effect until the effective date of any decision modifying the decision.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1708, Public Utilities Code.

16.5. (Rule 16.5) Correction of Obvious Errors.

Correction of obvious typographical errors or omissions in Commission decisions may be requested by letter to the Executive Director, with a copy sent at the same time to all parties to the proceeding.


16.6. (Rule 16.6) Extension of Time to Comply.

Requests for extension of time to comply with a Commission decision or order may be made by letter or e-mail to the Executive Director, with a copy served at the same time on all parties to the proceeding and on the Administrative Law Judge Division (by letter to the Chief Administrative Law Judge, or by e-mail to aljextensionrequests@cpuc.ca.gov). A copy of the certificate of service must be attached to the letter or e-mail. The e-mail, the letter, or a facsimile of the letter, must be received by the Executive Director at least five business days before the existing date for compliance. If the Executive Director grants the extension, the party requesting the extension must promptly inform all parties to the proceeding of the extension and must state in the opening paragraph of the document that the Executive Director has authorized the extension.

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Section 1708, Public Utilities Code.
ARTICLE 17. COMPENSATING INTERVENORS

17.1. (Rule 17.1) Notice of Intent to Claim Compensation.

(a) A notice of intent to claim compensation may be filed:

(1) in a proceeding in which a prehearing conference is held, any time after the start of the proceeding until 30 days after the prehearing conference.

(2) if it has been preliminarily determined that a hearing is not needed, any time after the start of the proceeding until 30 days after the time for filing responsive pleadings (e.g., protests, responses, answers, or comments). If a prehearing conference is later held, the notice may be filed pursuant to subsection (a)(1).

(3) in a petition for rulemaking, any time after the petition is filed until 30 days after the time for filing responses. If the petitioner intends to request compensation, the petition itself may include a notice of intent. If a prehearing conference is later held, the notice may be filed pursuant to subsection (a)(1).

(4) in a proceeding where the Commission anticipates that the proceeding will take less than 30 days, by any deadline that may be established by the Administrative Law Judge.

(b) An amended notice of intent may be filed within 15 days after the issuance of the scoping memo in the proceeding.

(c) The notice of intent shall identify all issues on which the intervenor intends to participate and seek compensation, and shall separately state the expected budget for participating on each issue. The notice of intent may include a category of general costs not attributable to a particular issue.

(d) The notice of intent shall provide either (1) verification of the intervenor's customer status pursuant to Public Utilities Code Section 1802(b)(1)(A) or (B), or (2) a copy of articles of incorporation or bylaws demonstrating the intervenor's customer status pursuant to Public Utilities Code Section 1802(b)(1)(C). If current articles or bylaws have already been filed with the Commission, the notice of intent need only make a specific reference to such filings.

(e) The notice of intent shall state the intervenor's economic interest in the proceeding, as that interest relates to the issues on which the intervenor
intends to participate.

(f) An intervenor who intends to request compensation for costs of judicial review shall file a supplemental notice of intent within 30 days after the date that the intervenor first appears or files a pleading in the judicial review proceeding. The supplemental notice of intent shall identify the issues upon which the intervenor intends to participate in judicial review, and an itemized estimate of the compensation that the intervenor expects to request by reference to those identified issues. If the intervenor intends to support the Commission’s decision on review, the supplemental notice of intent shall include a showing of why the intervenor expects that its participation in judicial review will supplement, complement or contribute to the Commission’s defense of its decision.

(g) Responses to notices of intent to claim compensation shall be filed within 15 days of service of the notice.


17.2. (Rule 17.2) Eligibility in Phased Proceedings.

A party found eligible for an award of compensation in one phase of a proceeding remains eligible in later phases, including any rehearing, in the same proceeding.


17.3. (Rule 17.3) Request for Award.

A request for an award of compensation may be filed after the issuance of a decision that resolves an issue on which the intervenor believes it made a substantial contribution, but in no event later than 60 days after the issuance of the decision closing the proceeding. If an application for rehearing challenges a decision on an issue on which the intervenor believes it made a substantial contribution, the request for an award of compensation may be filed within 60 days of the issuance of the decision denying rehearing on that issue, the order or decision that resolves that issue after rehearing, or the decision closing the proceeding.

17.4. (Rule 17.4) Request for Compensation; Reply to Responses.

(a) The request for compensation shall identify each issue resolved by the Commission for which the intervenor claims compensation, and shall specify the pages, findings, conclusions and/or ordering paragraphs in the Commission decision which resolve the issue.

(b) The request for compensation shall include time records of hours worked that identify:

(1) the name of the person performing the task;
(2) the specific task performed;
(3) the issue that the task addresses, as identified by the intervenor; and
(4) the issue that the task addresses, as identified by the scoping memo, if any.

(c) The request for compensation shall itemize each expense for which compensation is claimed.

(d) The request for compensation may include reasonable costs of participation in the proceeding that were incurred prior to the start of the proceeding.

(e) The request for compensation may include reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs incurred as a result of an application for rehearing.

(f) If the proceeding involved multiple intervenors, the request for compensation shall include a showing that the participation materially supplemented, complemented, or contributed to the presentation of any other party with similar interests, or that the participation did not overlap the presentation of other intervenors.

(g) Responses to requests for compensation must be filed within 30 days after filing of the request.

(h) Replies to responses to requests for compensation must be filed within 15 days after filing of the response.

ARTICLE 18. FORMS

18.1. (Rule 18.1) Forms.

The following skeleton forms of applications, complaint, answer, protest and certificate of service are merely illustrative. The content of a particular document will vary, depending on the subject matter and applicable rules.

1. Application
2. Complaint
3. Answer
4. Certificate of Service

Note: Authority cited: Section 1701, Public Utilities Code; and Section 2, Article XII, California Constitution. Reference: Sections 454 and 1702, Public Utilities Code.
No. 1—Application

(See Articles 1 and 2)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of JOHN JONES (Jones Rapid Transit) to operate bus service between San Francisco and South San Francisco; to establish fares; and to issue a $10,000 note.

APPLICATION

The application of (exact legal name, mailing address and telephone number of each applicant) respectfully shows:

1. That communications in regard to this application are to be addressed to (name, title, and address).

2. (Here, and in succeeding numbered paragraphs, set forth the specific facts required by the applicable rules, together with additional facts deemed material.)

WHEREFORE, applicant requests an order (here state clearly and concisely the specific authorization sought by applicant).

Dated at _____________, California, this ______ day of __________, 20____.

_____________________________________________
(Signature of applicant)

_____________________________________________
(Signature, address, telephone number, facsimile transmission number, and e-mail address (if consenting to e-mail service) of attorney, if any)

VERIFICATION*

(See Rule 1.11)

(Where applicant is an individual)

I am the applicant in the above-entitled matter; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ________________ at ________________, California.

(Date) (Name of city)

_____________________________________________
(Applicant)

* Where execution occurs outside California, verification must be made in accordance with the law of the state where execution occurs.
VERIFICATION
(See Rule 1.11)
(Where Applicant is a Corporation)

I am an officer of the applicant corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ___________________ at ________________________, California.
   (Date)                             (Name of city)
   ________________________________
   (Signature and Title of Corporate Officer)

(Where applicant is absent from County of Attorney’s Office)

I am the attorney for the applicant herein; said applicant is absent from the County of _____________, California, where I have my office, and I make this verification for said applicant for that reason; the statements in the foregoing document are true of my own knowledge, except as to matters which are therein stated on information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _________________ at ________________________, California.
   (Date)                             (Name of city)
   ________________________________
   (Attorney for Applicant)
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

(B) ___________________________
______________________________
______________________________
______________________________

(Fill in Complainant(s) name)

vs.

(C) ___________________________
______________________________
______________________________
______________________________

(Fill in Defendant(s) name)

CASE __________________________
(for Commission use only)

(A) Have you tried to resolve this matter informally with the Commission’s Consumer Affairs staff?

_________________________/_____________________

YES
NO

Has staff responded to your complaint?

_________________________/_____________________

YES
NO

Did you appeal to the Consumer Affairs Manager?

_________________________/_____________________

YES
NO

Do you have money on deposit with the Commission?

_________________________/__________/$_

YES
NO

AMOUNT

Is your service now disconnected?

_________________________/_____________________

YES
NO

COMPLAINT

(D) The complaint of _______________________________

(Insert exact legal name, mailing address and telephone number of each complainant)

______________________________

______________________________

respectfully shows that:

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4/1/2014
(E) 1. Defendant(s)__________________________________________

(Insert full name and address of each defendant)

__________________________________________

__________________________________________

__________________________________________

(F) 2. Explain fully and clearly the details of your complaint. (Attach additional pages if necessary.)

__________________________________________

__________________________________________

__________________________________________

(G) 3. Scoping Memo Information

(a) The proposed category for the Complaint is (check one):

   □ adjudicatory
   □ ratesetting (if the complaint challenges the reasonableness of a rate)

(b) Are hearings needed? YES NO

(c) The issues to be considered are:

__________________________________________

__________________________________________

__________________________________________

(d) The proposed schedule for resolving the complaint within 12 months (if categorized as adjudicatory) or 18 months (if categorized as ratesetting) is as follows:

   Prehearing Conference: 30 to 40 days from the date of filing of the Complaint.
   Hearing: 50 to 70 days from the date of filing of the Complaint.

Explain here if you propose a schedule different from the above guidelines.

__________________________________________

__________________________________________

__________________________________________

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(H) Wherefore, complainant(s) request(s) an order: State clearly the exact relief desired.
(Attach additional pages if necessary)

(I) OPTIONAL: I/we would like to receive the answer and other filings of the defendant(s) and information and notices from the Commission by electronic mail (e-mail). My/our e-mail address(es) is/are:

________________________________________________________________

(J) Dated ________, California, this ________ day of ________, 20 ________
   (city)                        (date)                 (month)     (year)

   (Signature of each complainant)

   __________________________________________
   (Signature, address, telephone number, facsimile transmission number, and, if the representative consents to e-mail service, the e-mail address, of representative, if any)
VERIFICATION
(For Individual or Partnerships)

I am (one of) the complainant(s) in the above-entitled matter; the statements in the foregoing document are true of my knowledge, except as to matters which are therein stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

(K) Executed on _________________, at ________________________, California.
     (date)                    (city)

(If more than one complainant, only one need sign) ______________________________
     (Complainant)

VERIFICATION
(For a Corporation)

I am an officer of the complaining corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

(L) Executed on _________________, at ________________________, California.
     (date)                    (city)

(Signature and Title of Corporate Officer) ______________________________
     ______________________________
     ______________________________

(M) FILE the original complaint plus 6 copies, plus 1 copy for each named defendant, with the Commission.

(N) MAIL TO: California Public Utilities Commission
       Attn: Docket Office
       505 Van Ness Avenue, Room 2001
       San Francisco, CA 94102
No. 3—Answer

(See Article 1 and Rule 4.4)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

John A. Jones,
                                      Complainant,
                                      vs.
                                      Smith Public Utility System, a corporation,
                                      Defendant.

                                      Case No. ________________________
                          (Insert number of complaint)

ANSWER

Defendant (exact legal name, mailing address and telephone number of each defendant joining in answer), for answer to the above complaint, respectfully shows:

1. (Here, and in succeeding numbered paragraphs, admit or deny material allegations of the complaint, and set forth any matters constituting a defense.)

   WHEREFORE, defendant requests that the complaint be dismissed (or other appropriate request).

   Dated at __________________, California, this _____ day of _________, 20____.

   __________________________________________

   (Signature of each defendant joining in answer)

   __________________________________________

   __________________________________________

   (Signature, address, telephone number, facsimile transmission number, and e-mail address (if consenting to e-mail service) of attorney, if any)

VERIFICATION

Use appropriate form of verification as set forth following Form 1, substituting “defendant” for “applicant.”
No. 4—Certificate of Service
(See Rule 1.9)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

John A. Jones,

Complainant,

vs.

Smith Public Utility System, a corporation,

Defendant.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of [title of document, e.g., “Applicant UtilCorp’s Motion to Strike” or “Notice of Availability of Application”] on all known parties to [proceeding number, e.g., A.93-01-010] by [here describe manner of service, e.g., mailing a properly addressed copy by first-class mail with postage prepaid, or transmitting an e-mail message with the document attached, etc.] to each person named in the official service list [or appropriate special service list or specific persons required to be served by ruling or order, etc.]. (If more than one means of service is used, identify which persons were served by which means.)

Executed on [date] at [location], California.

[signature]
John Jones
## Table of Filing Fees

*(See Rule 1.156)*

<table>
<thead>
<tr>
<th>Type of Filing</th>
<th>Type of Utility</th>
<th>Fee</th>
<th>PU Code Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application for Certificate of Public Convenience and Necessity (CPCN)</td>
<td>Passenger stage corporation UNLESS already operating in the immediate vicinity under the Commission's jurisdiction</td>
<td>$500</td>
<td>§1036(a)</td>
</tr>
<tr>
<td></td>
<td>All others, including street railroads, gas corporations, electric corporations, telegraph corporations, telephone corporations, water corporations, and common carrier vessels</td>
<td>$75</td>
<td>§§1001, 1007, 1008, 1904(a)</td>
</tr>
<tr>
<td>Application to sell, mortgage, Lease, assign, transfer, or encumber a CPCN</td>
<td>Passenger stage corporation</td>
<td>$300</td>
<td>§1036(b)</td>
</tr>
<tr>
<td></td>
<td>All others, including street railroads, gas corporations, electric corporations, telegraph corporations, telephone corporations, water corporations, and common carrier vessels</td>
<td>$75</td>
<td>§1904(a)</td>
</tr>
<tr>
<td>Application to register</td>
<td>Interstate highway carrier of household goods or passengers</td>
<td>$5 per vehicle, plus $25 for carriers exempt from ICC regulation</td>
<td>§3902(a)(3)z Res. TL-18582 Res. TL-18520</td>
</tr>
<tr>
<td></td>
<td>Private carrier of passengers</td>
<td>$35 initial registration $30 renewal</td>
<td>§4006</td>
</tr>
<tr>
<td>Application for registration license</td>
<td>Non-dominant interexchange carrier</td>
<td>$250</td>
<td>§1013 Decision 10-09-017</td>
</tr>
<tr>
<td>Application for permit</td>
<td>Household goods carrier</td>
<td>$500</td>
<td>§5136</td>
</tr>
<tr>
<td></td>
<td>Charter-party carrier of passengers</td>
<td>$500 plus $15 per tour bus to a maximum of $6,500</td>
<td>§5373.1(a), (b)</td>
</tr>
<tr>
<td>Application for issuance or renewal of Class A certificate</td>
<td>Charter-party carrier of passengers</td>
<td>$1,500 (new) $500 (renewal) plus $15 per tour bus up to a maximum of $6,500</td>
<td>§§5371.1(b), 5373.1(a)(1)-(2), (b)</td>
</tr>
<tr>
<td>Application for issuance or renewal of Class B certificate</td>
<td>Charter-party carrier of passenger</td>
<td>$500 plus $15 per tour bus up to a maximum of $6,500</td>
<td>§§5371.1(b), 5373.1(a)(3), (b)</td>
</tr>
<tr>
<td>Application for issuance or renewal of Class C certificate</td>
<td>Charter-party carrier of passengers</td>
<td>$500 plus $15 per tour bus to a maximum of $6,500</td>
<td>§§5371.1(b), 5373.1(a)(4), (b)</td>
</tr>
<tr>
<td>Type of Filing</td>
<td>Type of Utility</td>
<td>Fee</td>
<td>PU Code Reference</td>
</tr>
<tr>
<td>--------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------</td>
<td>------------------------------------------------</td>
<td>------------------</td>
</tr>
<tr>
<td>Application to sell, lease, assign, or otherwise transfer or encumber a certificate</td>
<td>Charter-party carrier of passengers</td>
<td>$300</td>
<td>§5377.1</td>
</tr>
<tr>
<td>Application to transfer permit</td>
<td>Household goods carrier</td>
<td>$150 or $25 for transfer after death of permittee and after court approval of distribution of estate, or if no probate or court distribution necessary</td>
<td>§5136</td>
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How and Why the FAA Employs Alternative Dispute Resolution

BY C. Scott Maravilla, Sarah Block, and Greg Matherne

The Federal Aviation Administration (FAA) possesses unique statutory authority exempting it from the Federal Acquisition Regulation (FAR), the Competition in Contracting Act (CICA), and the Contract Disputes Act (CDA). In its place, the FAA procures goods and services through its own Acquisition Management System (AMS). The AMS is a policy, not a regulation. The Office of Dispute Resolution for Acquisition (ODRA) adjudicates and mediates bid protests and contract disputes on behalf of the FAA administrator.

Pursuant to the AMS, the ODRA employs alternative dispute resolution (ADR) as the primary means of dispute resolution. It is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA. While the use of alternative dispute resolution is voluntary, the ODRA encourages parties to utilize the ADR process. The ODRA commences the adjudicative process when parties cannot agree on the use of ADR, ADR has not resolved all pending issues in a dispute, or where the ODRA determines that ADR is not the most efficient means of resolving a dispute. All ADR proceedings are voluntary and governed by the relevant provisions of the AMS, the ODRA procedural regulations, and the Administrative Dispute Resolution Act of 1996 (ADRA).

The ADR process begins with assignment of an administrative judge as a potential neutral. The neutral may discuss ADR options with the consent of the parties. In the case of a contract dispute, the parties have an initial 20-day informal resolution period to attempt to resolve or narrow the issues. Once the parties have agreed to attempt to resolve their case through ADR, they must execute an ADR agreement setting forth the procedures to be used.

ADR Agreements
Agreements utilizing nonbinding ADR techniques must “provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter” as well as a provision for “a termination of ADR proceedings and the commencement of adjudication under the adjudicative process, upon the election of any party.” Nonbinding ADR techniques may also be employed concurrently with adjudication.

Once the parties have reached a resolution it is memorialized in a written settlement agreement. A model form for settlement agreements is available on the ODRA’s website. The ODRA treats an agreement reached in ADR by the parties as a binding and formal resolution of the dispute. After a settlement agreement is reached either party may seek enforcement with the ODRA if there is a question of compliance. Absent extraordinary circumstances, however, the ODRA will not look behind a settlement agreement and relitigate the issues resolved by the ADR process. Thus, parties should carefully consider the ramifications of any settlement agreement prior to its execution. However, this deference to settlement agreements means that the parties can be assured that the agreement will be enforced as long as it was entered into in good faith.

Confidentiality
ADR proceedings are subject to strict rules of confidentiality. The ADRA’s confidentiality provisions, as well as the principles of Federal Rule of Evidence 408, apply to all ADR proceedings at the ODRA. ADR neutrals are prohibited from disclosing dispute resolution communications, even to other judges at the ODRA, except in the extremely limited circumstances explicitly outlined in the statute. ADR communications do not become a part of the administrative record unless an agreement among the parties has been made otherwise. The parties do have the opportunity, however, to agree to alternative confidential procedures for disclosures by the neutral that will supplement or modify the default confidentiality provisions.

Types of ADR
The most commonly used procedures are mediation, early neutral evaluation (ENE), and binding arbitration. In mediation, the ADR neutral will “ascertain[] the needs and interests of both parties and facilitate[]

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discussions between or among the parties and an amicable resolution of their differences. ENE allows the ADR neutral to provide a “candid assessment and opinion of the strengths and weaknesses and the parties’ positions as to the facts and law” and may be provided during any stage of the ADR process. Because nonbinding ADR techniques are not mutually exclusive, the majority of ADRs at the ODRA involve a combination of mediation and ENE.

Generally the ODRA uses a combination of facilitative and evaluative mediation in the ADR process. The ODRA uses ENE to focus the issues of the parties in order to increase chances of settlement during the facilitative mediation process. During the ENE process the neutral will listen to each side’s position and offer an assessment of the merits of each party’s case. As the ADR processes proceeds, the neutral will engage the parties in facilitative mediation. At this stage the parties will present their cases to one another with assistance from the ADR neutral. During facilitative mediation the purpose and goal of the neutral is to help the parties reach rational business determinations that may lead to settlement. The neutral does not provide legal advice to either party nor does the neutral recommend a resolution. The goal of this process is for the parties to reach a mutually agreeable resolution that may include novel solutions that would not be available through normal legal proceedings.

Binding Arbitration
As an alternative to facilitative and evaluative mediation, the FAA is one of a small number of agencies that offers truly binding arbitration if the parties wish to resolve the issue through that avenue. Most federal agencies require that any “binding” arbitration agreement contain a provision allowing the head of the agency to “opt out” of the agreement. However, pursuant to the ADR, the FAA has issued guidelines allowing for the use of true binding arbitration without any opt-out provisions.

Generally binding arbitration is used by the ODRA to settle construction disputes. In these cases, binding arbitration is not used in isolation and is combined with mediation in what is known as “med- arb.” A relative newcomer to the field of ADR, med-arb arrangements combine the flexibility of the mediation process with the finality of arbitration. In the cases where med-arb arrangements have been used at the ODRA, all of the disputes have been settled at the mediation stage.

Bid Protests
The ODRA has been very successful in the use of ADR in bid protests. Through the ADR process the ODRA resolves two-thirds of protests filed. The ADR neutrals typically use a combination of facilitative mediation and ENE to assist the parties in evaluating their positions. The parties will also be encouraged to think outside the box and widen the possible remedies to resolve the controversy. These may include voluntary corrective action on the part of the agency, withdrawal by the protester after receiving additional information, or other consideration.

Contract Disputes
In addition to using the ADR process to resolve bid protests and contract disputes, the ODRA may, through ADR, address problems that are not within the adjudicative jurisdiction of the ODRA but nevertheless might impact the FAA. With the consent of both parties, the ODRA has acted as a neutral for the resolution of sub-contracting agreements and settlements between state airport authorities and contractors. In cases such as these, the ODRA will provide nonbinding ADR services to the parties in an attempt to resolve the issue to the benefit of all parties.

When the parties involved in a protest or contract dispute agree to participate in ADR, the ODRA will generally engage the parties in facilitative mediation and neutral evaluation. The use of either facilitative mediation or neutral evaluation ADR is strongly preferred by the ODRA. However, in limited cases, with the consent of the parties, the ODRA may use binding arbitration to resolve the issues presented.

Pre-Disputes
The ODRA engages parties in ADR to resolve disputes as early as possible. This early intervention allows ADR efforts to be undertaken before an issue is fully developed and a formal bid protest or contract dispute has even been filed with the ODRA. The ODRA has engaged in pre-dispute ADR in an attempt to resolve 112 potential protests or disputes. Of these potential disputes and protests, 109 have been resolved or withdrawn through the ADR process and only two have required that a formal protest or dispute be adjudicated.

Using the ODRA process in pre-dispute, ADR does not toll the time limitations for filing protests or contract disputes. In addition, as with all ADR at the ODRA, the party responding to the pre-dispute has the option of declining to engage the filing party in ADR. If the responding party chooses to decline ADR, the ODRA will not take any action on the potential issue unless a formal protest or dispute is subsequently filed.

Conclusion
One of the primary benefits of the ADR process is that the parties are not bound to the zero-sum game results of an adjudicatory proceeding. A party engaged in ADR with the ODRA may propose any “fair” resolution. Through the ADR process the parties can actually develop stronger relationships to the benefit of both the contractor and the agency in future interactions.

Endnotes
1. GAO has also held that it lacks jurisdiction over bid protests and disputes arising under the AMS. See Resource Consultants,
News from the COMMITTEES

REPORTED BY HERMAN D. LEVY

Intellectual Property Committee March 27, 2014
Ben Richards, Intellectual Property Section, Civil Division, US Department of Justice, and Scott Felder, partner, Wiley Rein, led a discussion on patent infringement litigation under 28 U.S.C. § 1498 at the Court of Federal Claims. They also discussed 28 U.S.C. § 1500, which removes section 1498 jurisdiction in the CoFC if a similar action is pending in district court. Ben noted that in the CoFC the statute of limitations is seven years, as against two in district court. In answer to Herman Levy’s question, Jayna Rust stated that section 1500 is a Civil War statute intended to consolidate cotton claims in one court; Jayna is writing an article on the subject.

Ben and Scott proceeded to discuss third-party defendants under CoFC rules 14 and 24, which are generally similar to the corresponding Federal Rules of Civil Procedure (applicable to actions in district court). Discussion among attendees ensued. Scott then discussed 28 U.S.C. § 271 and infringement. Scott then had to leave and Ben continued on the subject of remedies. Savrab Anard discussed discovery and third-party claims.

Co-chair Nicole Owren-Wiest then noted DFARS Interim rule, Disclosure to Litigation Support Contractors; comments are due April 29. She asked anyone wishing to comment and willing to draft comments to see one of the three co-chairs.

For information on Section committees, see the Section website at www.americanbar.org/groups/public_contract_law.html. \*\*

43. Id.
45. Id.
47. Id.
48. Id. at § 17.57(c).
49. Id. at § 17.59(c).
50. Id.
51. See Anthony N. Palladino, supra note 25, at 15.
52. Id. at 12–13.
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Electronic Case Files and Administrative Hearings: A View from the Bench

By John G. Farrell*

The increasing use of electronic case files impacts all aspects of administrative agencies and their functions. In this article, I intend to address the use of such systems by administrative judges during hearings. An assessment of the impact of such systems on the general policies, procedures, and missions of administrative agencies is beyond the scope of this article, though I would imagine that such an assessment would have to be done agency-by-agency.

Despite the relentless trend toward computerization of files previously retained as paper documents, very little has been written on the impact of this technology on the hearing process itself. It is my hope that this article will initiate a dialogue among professionals on the issue, which will assist administrative agencies and judges in developing a realistic assessment of both the positive and negative impacts of such systems on real-world administrative hearings. Although my familiarity is with a specific electronic system and software, it is not my intention to critique any particular name brands. It is my belief that all electronic files and document imaging systems share certain basic properties that make them inherently different from paper filing systems. I will limit my comments to observations that I believe to be of universal interest and relevance to all judges who use electronic filing and imaging systems.

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I have been an Administrative Law Judge since 1992, first with the New York State ("NYS") Unemployment Insurance Appeal Board and since 1996, with the NYS Workers' Compensation Board. In 1998, the Workers' Compensation Board adopted in-hearing use of electronic case files, using document imaging. I base my comments on my own observations and experience, as well as feedback from other judges at my agency.

I. OVERVIEW OF ELECTRONIC CASE FILES AND THE ELECTRONIC INTERFACE

A. The Electronic File

I begin with a brief summary of the system I use. The NYS Workers' Compensation Board began using electronic case files during hearings in 1998. There were certainly a number of immediate benefits, the most obvious being the elimination of the need to transport paper files to the individual hearing sites on a daily basis. There was no longer any risk that a file would be delayed, lost, or incorrectly routed. Nearly overnight, all files in the state became immediately accessible to any judge or party of interest at any hearing site in the state. The implications of this were quite dramatic, as the only interruptions occur when the computer system experiences a slowdown or failure. Fortunately, this is a rare event which is usually corrected within hours.

I use a computer with a large (twenty+ inch) flat-screen monitor, which can either sit on top of a desk or be recessed under glass in the desktop, depending on a judge's preference. The computer itself is out of sight inside the desk and is accessed via the keyboard and mouse, both recessed below desk level. Once the appropriate software application is activated, the electronic case file for a particular case can be accessed via the case number, case name, or a host of other identifying features. This electronic case file consists of a screen display showing "folder tabs" that can be clicked on to select various other screens that list data regarding basic claim information, the parties of interest, case history, case notes, associated files, the case folder, or a record of prior awards and other findings. From the perspective of the judge conducting hearings, the "case folder" itself is the heart of the file, most analogous to the paper file folder, and contains the literal scanned images of documents submitted by
parties, medical providers, or issued by the Board, including correspondence, hearing notices, and decisions.

As previously stated, it is not my intention to critique any particular name brand electronic hardware or software. I believe that, while all such systems vary in detail, they all share some common features. With this in mind, I believe it safe to assume that all electronic case file systems require a method of locating, and viewing images of documents or other file data. These documents and other file data are located by the operation of a mouse or keyboard (input devices), in conjunction with the display screens. They are then viewed using a monitor (output device). For the sake of consistency and clarity, I will use the term “monitor” to refer to the physical hardware and the term “screen” to refer to a particular image displayed on the monitor, such as the menu screen or the case folder screen. I note that the documents and file data can also be viewed by printing a hardcopy or can be transmitted electronically to another computer, via e-mail, fax or another internal agency communication system. I will also assume that, to avoid the necessity of electronically rifling though every single document page in the file, all electronic case file systems must display some form of a document list, index, or table of contents, identifying each document by name, type, form number, date received, date scanned, or other identifying feature. As a practical matter, although the documents are “images,” a list consisting of thumbnail views of documents would generally not be very useful, since crucial text is not legible in a thumbnail view.

I will assume that most, if not all, electronic case file systems are similar in these basic requirements. Accordingly, they all require the use of an electronic interface.

B. The Electronic Interface

The electronic interface is a term that I will use to refer to all the physical hardware, including the computer, monitor, mouse, keyboard, and printer, as well as to all the physical interactions required by the judge to control these devices. In my estimation, it is this electronic interface that distinguishes electronic files from paper files, while conducting hearings. Hearings are to some extent rituals with both ceremonial and substantive elements. I hope to explain
how manipulating an electronic file is significantly different from manipulating a paper file in both form and substance.

To understand why the concept of the electronic interface is important to my analysis, it is first necessary to explain the process of how documents are located and viewed in paper files, followed by a brief summary of how documents are located and viewed in electronic files. Both of my summaries will assume that the documents being sought were accurately filed in the proper paper folder or, for an electronic file, were properly identified and scanned into the correct file with all identifying data accurately input. All things being equal, I will assume that the rate of accuracy or error in filing should be roughly the same for both paper and electronic files. To the extent this is not true at a particular agency, the problem is a personnel training issue and, thus, outside the scope of this article. Nevertheless, with electronic files, this issue can be of particular concern if the “scanning” duties have been privatized or “farmed out” to a private vendor. However, that is another issue that is outside the scope of this article.

C. Locating and Viewing Documents in a Paper File

When a paper file is used during an administrative hearing, a paper folder containing the relevant documents sits on the judge’s desk. In fact, an entire pile of folders reflecting the day’s hearing calendar can sit on the desk or a nearby table. The judge can then review file documents before, during, and after the hearing. This is done by opening up and leafing through the folder by hand. Obviously, a very large folder can become cumbersome. Nevertheless, you can place the folder on the left, on the right, or in the center of the desk. Perhaps the folder is divided into sections by subject tabs, has separate pockets or other dividers, or contains color-coded documents. You can open the folder, place post-it notes on important documents, remove papers from the file, or spread multiple papers out on your desk. Thus, an individual page of each individual document in the paper folder can be “located” by sifting through the folder, that is, by manipulating the papers and subfolder sections by hand and by movement of one’s eyes to locate an identifying folder, subject tab, title, heading, date, or color of paper. A document is then “viewed” simply by placing the page, or multiple documents, within range of the judge’s eyesight. Important documents can be placed
anywhere on the desk and "accessed" simply by eye movement. A judge can physically hand a particular document to the parties for their review.

If I haven't put you to sleep yet, I imagine you would agree that the above portrayal is so intuitively obvious as to not require description. Indeed, it is done by judges, and by lots of other people, without a second thought nearly every minute of the workday. Certainly, few people would differentiate between locating and viewing a document, so seamlessly does the human hand and mind perform this task. Nevertheless, it is necessary for me to state the obvious and risk boring everyone to distraction before I can clarify what I believe is a profound difference between the use of a paper file and an electronic file during the course of an administrative hearing. I turn now to a brief summary of how documents in electronic files are located and viewed.

D. Locating and Viewing Documents in an Electronic File

In an electronic file system, the first obvious difference is the physical presence of the computer and its input and output devices in the hearing room. The computer itself is presumably placed out of sight, under or inside the desk. The monitor is presumably placed on top of the judge’s desk or recessed in the desktop, and the keyboard and mouse may be visible on the desktop or recessed below it. The final item is the printer, which can be on or near the desktop or elsewhere in the hearing room.

To locate a document during a hearing, a judge must interact with a keyboard or mouse. As described earlier, most electronic files, by their very nature, must contain some form of a list, or index, of the documents contained therein, identified by name, type, form number, date, or some other feature. Using these input devices, the judge summons this list to his monitor, reads it, identifies the documents he desires to view, and chooses by "clicking" on the desired document. At this point, if all is well electronically, the document should appear. For the purpose of this analysis, we will assume it does. It could be argued that the actual manipulation of these devices in order to locate a document is perhaps analogous to leafing through a file by hand, with which I would conditionally agree. In terms of hearing room decorum, there is probably little difference. In terms of ergonomic health, there could be considerable difference, which will be
discussed in more detail below. In any event, once the document is located, it is time to view it. This is where things get interesting.

In contrast to the paper file, one can look to only one specific location to view any document, and that is, of course, in the direction where the monitor is placed. This is so because, under current technology, monitors are fixed and immovable, or at least not conveniently moveable. I will call this phenomenon the "inflexible viewing position." Even more importantly, only a limited number of pages of a document may be viewed at once. In the system I use, only one page of each scanned document may be viewed at a time. It's certainly possible that other systems are more flexible but, as a practical matter, since monitor size and monitor resolution are finite, I believe that I can safely speculate that two pages at a time is the maximum number that can be simultaneously displayed and coherently read on a monitor. I will refer to this phenomenon as "tunnel vision." Finally, it is important to acknowledge the fact that, unlike paper folders, in an electronic file you are never looking at original documents. By definition, you are viewing facsimiles of scanned documents, and monitor resolution is finite. As a result, even a perfectly scanned document is never 100% as clear as an original, or even a hardcopy, of a document. Moreover, since the people scanning the document are only human, there are inevitable variations in the clarity of document image. Perfection can be approached but is rarely achieved. I will call this phenomenon "image distortion."

I realize that technological improvements will probably someday solve these problems with the creation of desk-sized screens with images that can be manipulated by hand (for example, see certain science fiction movies). However, administrative law judges are adjudicating cases in the present and it seems likely that the keyboard, mouse, and monitor tools will remain with us for at least another decade. But we can certainly work around these electronic interface problems. That is precisely the topic of this article - how working around these problems affects the hearing process. To someone who does not have to view and analyze documents in real time, all day long, these image-viewing phenomena may seem like pesky annoyances or, at most, trivial differences between paper folders and electronic folders. However, far from being minor, in practice they constitute a major and profound difference. A run-through of a typical hearing may help better illustrate these issues.
E. Using Electronic Files during Real-Time Hearings

I conduct two kinds of hearings. The first type is a preliminary hearing, which is generally ten minutes in length, where issues are narrowed, motions are ruled upon, and trial dates are scheduled. The second type is a trial, which are generally anywhere from 15 to 120 minutes in length, where testimony is taken, and formal exhibits are submitted. For either type of hearing, the parties are called into the hearing room where they are identified and their appearance recorded by the judge. Next, claims are stated, defenses are specified, motions or applications are made and, if it is a trial, testimony is taken under oath. A court reporter records the proceedings.

It is generally necessary for the judge to review the file in advance in order to ascertain the issue in dispute, determine what the prior rulings or directions were, review the recent medical evidence submitted by either claimant or the insurance carrier, and ascertain if the proper parties of interest are on notice and if all parties of interest were sent a hearing notice at the correct address. This requires the ability to look at a lot of documents quickly. The aforementioned "inflexible viewing position" phenomenon can interfere with this during a real time hearing.

I quickly learned that some inconvenience and delay could be avoided by printing out hard copies of at least three or four of the most important documents prior to each hearing so I can access them quickly during the hearing. This may seem redundant, however, I find it invaluable, especially due to the aforementioned time constraints. I find it nearly impossible to conduct a hearing with any sort of efficiency without having hardcopies of some documents in front of me. The reason I do this is not because I crave the tactile comfort of paper in my hands. It is a necessary task because I need to have the basic information literally at my fingertips. With this basic information at hand, I can focus my energy on listening to oral arguments and concentrate my computer skills on locating and viewing other documents that the parties may bring to my attention.

Moreover, I may wish to direct one or both parties’ attention to a document in the Board file. How would I show it to them? Even if my monitor was on a swivel arm, swinging a large monitor on a swivel can be problematic and doesn’t allow all parties to view it simultaneously without standing up and approaching the screen. If I
have printed some crucial documents in advance, I have given myself the flexibility of being able to hand a hardcopy of a document to party who hasn’t seen it. As an alternative, I could print the document on a desktop laser printer during the hearing and hand it to them in seconds. It works, but it is not without a time penalty. When you are conducting hearings where minutes matter, as most of us do, anything that consumes time is a concern.

As the hearing proceeds, a claimant may reference a medical document that they wish me to examine. In response, I must locate it on the file index by its identifying features and click on it to view it. Moreover, the carrier may direct my attention to a contrary medical document, located elsewhere in the file. I must likewise locate it on the file index by its identifying features and click on it to view it. Note that when paper copies of documents are in-hand, it’s intuitively easy to reference them, manipulate them, compare multiple documents, and read from them quickly. There is still no equivalent way to do so on a monitor. This brings us to the aforementioned “tunnel vision” phenomenon, which refers to the fact that on a monitor, you are limited to looking at only one, or possibly two, pages at a time.

To understand what I mean by “tunnel vision,” imagine that you can look anywhere in a room through a narrow cardboard tube. You can only see a few feet of the room at any one time. While you can eventually look at the whole room, it’s hard to get a big picture, or even an overview, and it is difficult to move quickly from one site to another. Now imagine that you can’t actually move the tube freely with your hands, but that the room is divided into sectors and you must either input the sector on a keyboard to get a peek at the “right upper quadrant” of the room or click a mouse on this designation to get the view. This describes the “tunnel vision” viewing phenomenon.

At this point, I have located the document, summoned it to the monitor, and I am viewing page three of the medical report. Since I am looking at a facsimile of an original, the image is not as clear as the original or it may be less than perfectly scanned. Thus, “image distortion” makes reading it difficult. Luckily, computer programmers are aware of this shortcoming and permit images to be enlarged with the click of a mouse. However, this is akin to pulling out a magnifying glass to read a document. It works, but it is not
without a time penalty. Moreover, it multiplies the "tunnel vision" phenomenon that I described above.

The bottom line is that there is an inherent and profound difference between viewing documents on a monitor and viewing documents in a paper folder. These differences can be "worked around," but not without a price in terms of time expended.

II. PRACTICAL IMPACTS OF THE ELECTRONIC INTERFACE ON THE CONDUCT OF HEARINGS

A. The Effect of the Electronic Interface on Courtroom Decorum

The physical hardware present in the hearing room consists of a computer, presumably placed out of sight, a monitor, presumably placed on top of the judge's desk or recessed in the desktop; and a keyboard and mouse, which may or may not be visible to the parties. A final item is the printer, which can be on or near the desktop or elsewhere in the hearing room. Of these, the monitor is probably the most noticeable. Frankly, to alleviate eye strain, you will want the viewing area of your monitor be as large as possible. Unless recessed in the desktop, this in itself can affect courtroom decorum. Unfortunately, recessed monitors are not the best ergonomic solution for every judge. For instance, although I periodically have it moved, my monitor is sometimes located on the right side of my desk. As an unfortunate side effect, my view of a party, a witness or a representative can sometimes be temporarily obscured. Likewise, their view of me can be obscured. This has an intangible impact on decorum. I try to be aware of this when parties are being seated and either relocate them or move my own chair. Nevertheless, as judges we know that appearance can be as important as substance while conducting hearings. Proper adjudication requires that every party's position be heard and considered. It is equally important that every party believe that their position has been heard and considered. To the extent that the judge's view of them is obscured by courtroom hardware, it is difficult to suppose that this phenomenon does not adversely impact this goal.

To an extent, manipulation of the mouse is somewhat analogous to leafing through a file. It is not very noisy and can be accomplished somewhat inconspicuously. However, I believe that typing on a keyboard is another matter. The keyboard must often be
used to access software applications or case files, or to enter notes into the file regarding arguments or testimony. The electronic file has an advantage over paper in that I can enter "confidential notes" to the file, which (unlike in a paper file) cannot be accessed by anyone except the judge. Although I am a decent typist, I have observed that typing is sometimes more distracting to the parties than taking handwritten notes. Beyond a certain point, there is a risk that a typing judge begins to look like a data-entry clerk, an image quite far removed from that of an independent impartial decision maker. It begins to look as though the judge is paying less attention to the parties and the merits of the case and more attention to the data-entry details and duties. Is he or she serving the parties or the computer software? I do not believe that it is elitist to suggest that our profession demands a certain amount of symbolic ritual and that appearance is important. This is especially true with administrative judges, who generally have few trappings of authority. Parties need to feel as though the judge is a decision maker devoting his or her full attention to their evidence and arguments. Such an image is projected non-verbally by the judge's actions. I do not think that anyone would seriously contend that "typing" projects an appropriate image.

Regrettably, current technology (i.e., the keyboard) demands that a certain amount of typing is necessary. I do not believe that it can be eliminated, though I would suggest limiting it during hearings to tasks absolutely crucial to the hearing function. To this end, agency policy choices which result in the addition of tasks requiring more typing or data entry during hearings, should be very carefully considered.

No candid discussion of electronic files would be complete without addressing the dreaded "hourglass" which appears on the screen while the computer does its thing, such as initiating a software application, or retrieving a document. Admittedly, a similar delay might occur while riffling through a paper file for a document. However, when this occurs with a paper file, the delay is self-explanatory; that is, everyone can see you riffling through the file. However, no one can see your computer screen, so it looks for all the world as though you are sitting up there staring blankly into space, or twiddling your thumbs. Courtesy demands a verbal explanation while one waits for the hourglass to disappear. Although I am forced to address the issue several times a day, I have still not discovered a
refined way to explain it without feeling somewhat ineffective, as it is almost an acknowledgment that we all must serve the computer. I note that with a paper file, the act of locating a document is nearly always concurrent with the act of viewing the document. With an electronic file, in contrast, you can sometimes locate a document, and then have to wait several seconds to retrieve and view it. It sounds inconsequential, but it can be an extremely frustrating interruption in the flow or rhythm of an administrative hearing.

As mentioned earlier, trying to show a document to a party can be problematic. This is partly solved by printing a hardcopy on my high-speed desktop laser printer and handing it to them in seconds. It works, but it can also create new problems. Occasionally an attorney will show signs of becoming dependent on my generosity, despite the fact that they have the ability to print documents for themselves off the hearing site computers, either before or after a hearing. Such habits, of course, must be monitored and firmly discouraged.

B. The Effect of the Electronic Interface on Procedural and Substantive Due Process

As mentioned above, it is not unheard of for me to print documents during hearings. Why do I do this? There are at least four reasons: (1) it is easier to read a hardcopy, (2) it allows me to have it in front of me while the hearing continues on and other documents are called to my attention, (3) a hard copy will then be available to physically show to other parties, and (4) the fast and quiet desktop laser printer makes it very convenient. The risk inherent in this arrangement is that some attorney may come to rely on this and forgo providing the other party with copies of important documents. A judge should, of course, admonish parties who appear to be taking advantage of this. Nevertheless, I confess that if it will expedite a resolution of a disputed issue, I will not hesitate to take the five seconds needed to print a copy and move on to address the merits of the issue.

No doubt, it is only a matter of time before attorneys arrive with their own electronic case files on their laptops. Indeed, some insurance carriers already keep file summaries on their laptops, which are referenced by their attorneys during hearings. Administrative courtrooms will evolve to accommodate this with multiple power outlets, internet access and the sharing of documents.
by wireless transfers between computers. This may resolve some of the document sharing and printing issues discussed above.

The electronic case file can become problematic when it comes to handling formal exhibits. In many ways the exhibit is handled at the hearing in a manner similar to a paper file hearing, with some important caveats. Unlike a paper file, the document itself does not normally become part of the file, only a scanned image does. How then to handle sensitive “original” documents, such as a birth or marriage certificate? With a paper file, you could simply accept the document into evidence and place it in the paper file. With an electronic file, the issue can sometimes be finessed by having all parties stipulate on the record that the document has been inspected, that there is no dispute about the authenticity of the document and that a facsimile will be accepted into evidence. However, when there are disputes about the authenticity of a document or forgery is alleged, technical and practical problems arise. Plainly, establishing a chain of custody of the evidence will quickly become problematic if all documents are sent to a private vendor responsible for “scanning” documents. One solution, utilized in my agency, is to accept the original document into the record as physical evidence, which will be stored in hard copy in an agency file cabinet after being marked, identified, and accepted as an exhibit. As a practical matter, in my experience, I have found such situations to be exceedingly rare and not a substantial problem.

Until now I have intentionally focused solely on the electronic file itself. However, a discussion cannot be complete without acknowledging that the presence of a computer in the hearing room also provides the judge with a wealth of supplemental information. The following is an incomplete list of some examples. An internal hearing calendar database can be accessed to permit accurate scheduling of hearings and trials. A medical database can permit nearly instant access to deciphering medical codes often used by doctors on medical forms. An internal agency database listing availability of medical witnesses can facilitate accurate scheduling of a doctor for testimony. Access to legal research databases can open up a Pandora’s Box of issues, if a judge wishes to check on case law cited by a party during a hearing. An internal agency database can be accessed to record statistics on cases, issues or hearing outcomes.

Certainly, access to more information can often impact the quality of the decision that is ultimately rendered. Interestingly, I
very much doubt that anyone would suggest that accessing all such supplemental information during a hearing was appropriate if the information was contained in paper-bound volumes sitting on a bookshelf. However, the near-instant availability and speed of access to these and other information databases can entice judges and parties to attempt to access this information during hearings. The ease of accessibility of this information is certainly of value to the parties. Nevertheless, it is not a time-free exercise and it is important for judges and agencies to seriously consider the impact of this issue on hearing time allowances.

Any activity that occurs during a hearing takes time. Hearing time allotments are usually finite. Both the judge and the agency must carefully consider whether certain activities are reducing the time available for the primary purpose of an administrative hearing, which is to consider and resolved disputed issues. Is the information to be accessed or recorded so important that it should take time away from this primary adjudicatory function? If not, can the agency afford to allot additional hearing time to permit performance of these non-adjudicatory tasks during a hearing?

C. The Effect of the Electronic Interface on the Ergonomic Health of the Judge

The nearly constant use of computer monitors by judges each day can obviously strain vision. Proper alignment of the computer screen is crucial. It is recommended that the screen be placed at least sixteen to twenty-two inches away from the eyes, though some experts recommend twenty-eight inches. I find the greater distance works better for me. Arm’s length distance is a good guideline. It is recommended that computer users avoid placing the screen to the left or right which requires twisting your neck to view it. Ideally, the top of the screen should be even with the top of your forehead. Chair position can affect this as well. Plainly, this advice is problematic if one is trying to conduct a hearing. Placing the monitor directly in front of you on the desktop is simply not practical, especially if you are interested in seeing the parties. Regular eye exams are very important. It is recommended that you rest your eyes regularly by focusing on distant objects or performing eye exercises.

Regular use of a computer keyboard and mouse can also affect the wrists and elbows. Repetitive stress injuries such as carpal tunnel
syndrome are an increasingly common problem for all computer users and, I presume, will soon affect many judges as well. I already know of at least one judge who has acquired work-related carpal tunnel syndrome. Back and neck injuries are likewise possible as a result of poor ergonomic setups. The chair should be adjustable, with lower back support. Your knees should be even with your hips or a little lower.

When operating a keyboard or a mouse, the elbows should be bent at 90 degrees, with the wrists straight or slightly bent up. Placing the keyboard or a mouse on top of a standard desk is too high and can cause discomfort and impairment of circulation, or cause stress to the neck, shoulders and arms.

The above ergonomic advice is helpful up to a point. The workstation recommendations may be feasible and effective for a typical data-entry clerk or typist sitting alone at their own workstation, not interacting with anyone. Indeed, all the ergonomic advice that I have seen seems designed with data-entry in mind. Unfortunately, a judge does not have the luxury of operating alone. Besides the desire to exhibit a little judicial dignity and decorum, a judge must interact with the parties. That is our job. Whether or not one can do so while remaining conscious of these ergonomic recommendations is questionable. A standard ergonomic workstation is not practical or appropriate for a hearing room. I do not know the solution to this problem, but it does need to be urgently studied and addressed. I recommend that judges try different setups until they find one with which they are comfortable.

D. The Effect of the Electronic Interface on Management Prerogatives

Although administrative law judges generally have decision-making independence, it is a rare agency where a judge is not required to follow agency-specific uniform procedures with respect to the manner in which a hearing is conducted and how rulings and decisions are recorded. Although organizational charts vary, at most agencies, management makes the choices regarding these procedures. For this reason, I will refer to these choices as management prerogatives.

Computer processing speed, which improves every year, can create the illusory impression that individual hearings are now
“faster.” This impression, combined with the speed and flexibility of computer systems, combined with the ease of access to greater amounts of information, can tempt management to add tasks to the hearing process, such as statistical recording of hearing outcomes, electronically scheduling hearings and trials, reporting faulty images and faulty document filing, or even entering, composing, or recording final versions of decisions and rulings. Such tasks can be added formally or informally. All of these tasks consume time. Seconds begin to add up to minutes. Some tasks are not necessarily appropriate during hearings. At a minimum, if assigned, they require a consideration and acknowledgment that they consume hearing time.

If traditional manual methods were required to perform these tasks, I very much doubt that any agency’s management would consider adding some of them to the hearing process. Nevertheless, the speed of access to other databases offered by a computer can create a false impression that such tasks are time-free; they are not. Any activity that occurs during a hearing consumes time. For non-judicial tasks, it is important that management carefully consider not if, but how much, these tasks reduce the time available for the primary purpose of an administrative hearing, which is to consider and resolve disputed issues. Is the task so important that it should take time away from this primary adjudicatory function? If not, can the agency afford to allot additional hearing time to permit performance of these non-adjudicatory tasks during a hearing? These questions must be considered and discussed frankly by all participating professionals.

III. SUMMARY

A. Impact on Judge

With electronic files, there are no more cumbersome paper folders to lift. Judges can easily record confidential notes to the file, which can be invaluable at future hearings; companion and related files can be located and viewed in seconds from anywhere in the state during the hearing, when in the past, an adjournment would have been necessary. These changes can result in faster issue resolution for certain cases. Case files are continuously being updated as documents are received and scanned into the file, as there is no
longer any need for the filer to wait for manual access to the physical file.

On the other hand, electronic files require interaction with an electronic interface which frequently demands considerably more time to locate and view an individual document, especially a multi-page document, or to compare two documents. Paradoxically, although hard-to-find documents can be located faster in an electronic file, more common documents usually take longer to locate in an electronic file than in a paper file. However, viewing the document always takes longer due to the viewing phenomenon known as “inflexible viewing position,” “tunnel vision,” and “image distortion.” This adversely impacts on the time available for a judge to dispense justice. It can also adversely affect judicial decorum. Our roles are symbolic as well as substantive. Therefore, appearance is important.

In addition, the electronic interface seems to foster or encourage an increase in clerical tasks, which takes time away from hearing, reviewing and deciding disputed issues, which is the primary purpose of an administrative hearing. Such tangential tasks should be kept to a minimum. It is important to avoid the impression that the judge is more concerned with form than function, or that he or she is more concerned with editing computer records than in delivering justice. To the greatest extent possible, such “editing” should be done “off-stage,” not during the course of a hearing.

B. Impact on Management

To the extent that an agency’s management is responsible for developing and improving procedures by which hearings are scheduled, conducted and concluded, electronic files certainly facilitate assignment of cases and setting up hearing calendars. They have resulted in the complete elimination of any need to coordinate the physical transportation of paper files to and from hearing sites. They hold the potential of generating rapid and accurate statistics regarding hearings, and hearing outcomes, which can be used to improve policies. Files themselves can be kept more up-to-date with more ease.

It is important for management to be aware that, though electronic files speed up many aspects of agency file processing, they actually slow down many of the tasks performed during an actual
real-time hearing. This is a difficult concept to grasp for someone unaccustomed to conducting real-time hearings on a daily basis, but it must be understood before meaningful improvements can be made to the hearing process itself. Another important consideration is the ever-increasing temptation to add tasks and functions to the hearing process and the resultant danger of dilution of the hearing process, as judges assume more clerical tasks during hearings. This creates appearance problems, as well as an actual reduction in the time available to address substantive issues during a hearing, which can eventually result in erosion of respect for the administrative hearing system.

C. Impact on Parties

Plainly, electronic files have drastically reduced the possibility that a file will not be available on the day of hearing. Parties also benefit from the judge’s instant accessibility to all files. Both of these benefits reduce the possibility of an unnecessary adjournment. Parties can also access the Board files on the hearing site computers at any time that the office is open. Indeed, multiple parties can access the same file simultaneously. More information is now more easily available to more parties sooner.

On the downside, during the hearing itself, parties are affected by the judge’s access problems described above, which can result in “downtime” while the judge tries to review electronic documents which could be more easily reviewed in hardcopy. Likewise the aforementioned addition of tasks, added by the judge or by management can result in less actual time available during the hearing for the judge to consider and resolved disputed issues.

IV. CONCLUSION

It is important to realize and acknowledge that, while electronic case files have many virtues, they slow down individual hearings due to the electronic interface involved and, ironically, due to the fact that they provide greater access to information.

I believe that most judges who use electronic files are well aware of the impact of the electronic interface, but may require a reminder regarding the risks of ease of information access. When even seemingly minimal tasks are added to a hearing, these tasks consume
time and, as a consequence, reduce the amount of time available at each hearing to address substantive issues. Therefore, judges must resist the temptation to add tasks without considering the impact on the hearing time allotment. Likewise, management must resist the temptation to add tasks, formally or informally, without considering the necessity of increasing time allowances for each hearing, and without considering whether such tasks are a cost-effective use of a judge’s time.

Suggestions from judges for improvements or resistance to added tasks should not be automatically attributed to resistance to new technology. Unlike any other employee, judges use this system in “real time,” on the record, while parties are sitting there waiting. The effect of a delay due to a single viewing issue for one page of one document is miniscule, but they all add up. The electronic case file is a marvelous invention. However, it is important to recognize both its strengths and its limitations.
AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action updates, simplifies, and streamlines the current regulations governing the procedures for bid protests brought against the FAA and contract disputes brought against or by the FAA. It also adds a voluntary dispute avoidance and early resolution process. This action ensures the regulations reflect the changes that have evolved since they were first implemented in 1999. The intended effect of this action is to further improve the protest and dispute process.

DATES: Effective October 7, 2011.

ADDRESSES: For information on where to obtain copies of rulemaking documents and other information related to this final rule, see the How To Obtain Additional Information section of this document.

FOR FURTHER INFORMATION CONTACT: Marie A. Collins, Senior Attorney and Dispute Resolution Officer, FAA Office of Dispute Resolution for Acquisition, AGC-70, Room 8332, Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590, telephone (202) 366-6400.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking and Background

In 1995 Congress, through the Department of Transportation Appropriations Act,\1\ directed the FAA `to develop and implement, not later than April 1, 1996, an acquisition management system that addressed the unique needs of the agency and, at a minimum, provided for more timely and cost effective acquisitions of equipment and materials.' The Act instructed the FAA to design the system, notwithstanding provisions of Federal acquisition law, and to not use certain provisions of Federal acquisition law. In response, the FAA developed the Acquisition Management System (AMS) for the management of FAA procurement. The AMS included a system of policy guidance that maximized the use of agency discretion in the interest of best business practices. As a part of the AMS, the FAA created the Office of Dispute Resolution for Acquisition (ODRA) to facilitate the Administrator's review of procurement protests and contract disputes. In a 1996 notice \2\ published in the Federal Register, the FAA announced the creation of the ODRA and stated the agency would promulgate rules of procedure governing the dispute resolution process.

\1\ Public Law 104-50, 109 Stat. 436 (November 15, 1995).
\2\ 61 FR 24348; May 14, 1996.
In August 1998, the FAA issued a Notice of Proposed Rulemaking (NPRM) that proposed regulations under 14 CFR part 17 for the conduct of protests and contract disputes under the FAA AMS. The comment period for the NPRM closed on October 26, 1998. On June 18, 1999, the FAA published the final rule entitled, Procedures for Protests and Contract Disputes; Amendment of Equal Access to Justice Act Regulations, which codified (effective June 28, 1999) the procedures governing the dispute resolution process. On August 31, 1999, the FAA published a document that made certain corrections to the June 1999 final rule.

In addition to the rules of procedures, ODRA operates pursuant to delegations of authority from the Administrator. In a memorandum signed by the Administrator on July 29, 1998 (1998 Delegation), the Administrator generally authorized the ODRA through its Director to provide dispute resolution services including administrative adjudication of all bid protests and contract disputes under the AMS. The 1998 Delegation further provided that all final decisions must be executed by the Administrator. The 1998 Delegation was expanded by a Delegation dated March 27, 2000 (2000 Delegation), which provided additional authority to the ODRA Director to execute and issue, on behalf of the Administrator, Orders and Final Decisions for the Administrator in all matters within the ODRA's jurisdiction valued at not more than $1 Million. The 2000 Delegation was superseded by a Delegation of Authority from the Administrator, dated March 10, 2004 (2004 Delegation), which increased the dollar limit of the final decisional authority of the ODRA Director from $1 Million to $5 Million. The 2004 Delegation was superseded by another Delegation of Authority dated March 31, 2010 (2010 Delegation), which increased the dollar limit of the final decisional authority of the ODRA Director from $5 Million to $10 Million.

Congress provided further confirmation about the FAA's dispute resolution authority in the Vision 100-Century of Aviation Reauthorization Act of 2003 (2003 Reauthorization Act), see Public Law 108-176, Sec. 224(b), 117 Stat. 2490, 2528 (codified as amended at 49 U.S.C. 40110(d)(4)), which confirmed the ODRA's exclusive jurisdiction. Specifically, the 2003 Reauthorization Act expressly provided at Subsection (b)(2)(4) under the title "Adjudication of Certain Bid Protests and Contract Disputes," that "[a] bid protest or contract dispute that is not addressed or resolved through alternative dispute resolution shall be adjudicated by the Administrator, through Dispute
Resolution Officers or Special Masters of the Federal Aviation Administration Office of Dispute Resolution for Acquisition, acting pursuant to Sections 46102, 46104, 46105, 46106 and 46107 and shall be subject to judicial review under Section 46110 and Section 504 of Title 5.'

The ODRA dispute resolution procedures encourage the parties to

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protests and contract disputes to use Alternative Dispute Resolution (ADR) as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996 ("ADRA"), Public Law 104-320, 5 U.S.C. 570-579, and in consonance with Department of Transportation and FAA policies to maximize the use of ADR to the extent possible. Under these procedures, the ODRA actively encourages the parties to consider ADR techniques such as case evaluation, mediation, arbitration, or other types of ADR. In this regard, on October 15, 2001, the FAA published in the Federal Register Final Guidance (66 FR 52475) for the use of binding arbitration for purposes of resolving bid protests and contract disputes relating to procurements and contracts under the FAA AMS after receiving the concurrence of the Attorney General in accordance with Section 575 of the ADRA. Additionally, the ODRA developed an informal pre-dispute process, which provides voluntary dispute avoidance services that are available to parties upon request.

On January 12, 2011, the FAA published the Procedures for Protests and Contracts Dispute NPRM, which proposed to update, simplify and streamline the procedures for bid protests against the FAA and contract disputes brought against or by the FAA. The NPRM had a 60-day comment period, which ended March 14, 2011.

Statement of the Problem

Since the issuance of the FAA's rules of procedure more than 10 years ago, the ODRA's statutory and regulatory authorities for conducting a dispute resolution process evolved, along with the body of case law interpreting those rules. The ODRA's implementation of these rules of procedure also resulted in the identification of procedural issues in need of clarification to provide uniform guidance. The ODRA further identified certain aspects of the rules that need revision to reflect evolving practices at the ODRA, as well as evolving dispute resolution practices in general. An example of such practices is the increased emphasis on early intervention and dispute avoidance efforts.

Overview of Final Rule

In order to address the changing environment with respect to the FAA's dispute resolution process, the agency adopts the rules proposed in the Procedures for Protests and Contracts Dispute NPRM it published on January 12, 2011. Today's final rule revises part 17 to incorporate the ODRA's evolving practices; reflect the availability of a pre-dispute process; reorganize and streamline the rules for ease of use; and harmonize the existing part 17 rules with current statutory and other authority.

The final rule reorganizes and consolidates for ease of use the current part 17 procedures for adjudicating protests and contract disputes. The procedures related to the adjudicative process for protests and for contract disputes that are currently in subpart E are now included in subpart B and subpart C, respectively. The finality and
review provisions have been moved from subpart F to subpart E. Also, today's final rule includes streamlined procedures, as well as expanded coverage in areas where guidance was lacking or a process has evolved over time. Examples of expanded coverage include the addition of a section on the confidentiality of ADR (Sec. 17.39) and a section for filing requests for reconsideration (Sec. 17.47). In addition, new sections have been added to subpart F to address "other matters" like sanctions and professional conduct. Further, new subpart G has been added to address procedures for filing pre-disputes.

Summary of the NPRM

The NPRM proposed to update, simplify, and streamline the FAA's regulations governing the procedures for bid protests brought against the FAA and contract disputes brought against or by the FAA. It also proposed to add a voluntary dispute avoidance and early resolution process. The FAA published the NPRM in the Federal Register on January 12, 2011 with a 60-day comment period. The comment period ended on March 14, 2011. No comments were received to the rulemaking docket. You may refer to the NPRM for further details.

Discussion of Final Rule

A discussion, organized by subpart, and excluding minor editorial revisions and clarifications, of the adopted changes to 14 CFR part 17, follows. Additionally, even though we received no comments, the FAA has made non-substantive editorial and clarifying changes to the NPRM which are explicitly identified below.

Subpart A--General

Subpart A is revised as noted below.

Definitions (Sec. 17.3)

The following new definitions are added to this section: Adjudicative Process, Default Adjudicative Process, Counsel, Contractor, Legal Representative, and Pre-disputes. An additional editorial change was made to correct the sentence structure of paragraph (s) by relocating the phrase "of the parties."

Filing and Computation of Time (Sec. 17.7)

Paragraph (c) is revised to clarify that "other days on which Federal Government offices in Washington, DC are not open" is an excluded timeframe in calculating time limits for filings. In addition, paragraph (d) is added to allow the use of electronic filing where permitted by the ODRA.

Protective Orders (Sec. 17.9)

Paragraph (d) is revised to explain the type of sanctions that could be imposed if a protective order is violated.

Subpart B--Protests

In subpart B, current Sec. 17.21 (Protest remedies) is renumbered as Sec. 17.23, and the Adjudicative process for protests section that is currently in subpart E is moved to Sec. 17.21.

Filing a Protest (Sec. 17.15)

Paragraph (d)(2) is revised to make clear the standard of review
for a request for a suspension or delay of the procurement. Also, paragraph (d)(3) is added to explain the possible consequences of protesters' failure to provide appropriate supporting documentation in their requests to suspend a procurement or contract performance. An additional editorial change was made to correct the sentence structure of paragraph (a)(1) by relocating the phrase "SIR or solicitation," and to paragraph (d)(4) by substituting the word "That" for "Whether."

Initial Protest Procedures (Sec. 17.17)

    In Sec. 17.17(a), the timeframes for responding to a request for a suspension or delay of the procurement are revised according to the established ODRA practice of granting an extension until the date of the initial status conference. In Sec. 17.17(b), the purpose of the initial status conference is clarified. In Sec. 17.17(c), the requirement that parties file a joint statement about whether they are pursuing ADR, and the adjudication timeframes that automatically begin when no ADR is contemplated are removed. An additional editorial change was made to correct the sentence structure by substituting the word "If" for "Should" in paragraphs (d) and (e).

Motions Practice and Dismissal or Summary Decision of Protests (Sec. 17.19)

    Paragraph (a) is revised to clarify the use of appropriate motions for dismissal or summary decision of protests and the ODRA's standard of review for such motions. Paragraph (d) is revised to clarify when such a decision is construed as a final agency order. An additional editorial change was made to provide consistency with Sec. 17.31(a) which states the same standard in a more concise manner.

Adjudicative Process for Protests (Sec. 17.21)

    In addition to moving the procedures for the Adjudicative Process for protests from current Sec. 17.37 of subpart E to proposed Sec. 17.21 of subpart B, this section is revised to more fully address the management of the discovery process and the type of discovery that is authorized. This section further is revised to delineate the ODRA's standard of review for protests, the development of the administrative record, and under what circumstances ex parte communications are permitted in protests. In addition, the revisions to this section address the procedures for preparing and issuing the ODRA's findings and recommendations and final FAA order. An additional editorial change was made for clarification by replacing the words "to pursue" with "for.""

Protest Remedies (Sec. 17.23)

    Paragraph (b) of this section is revised to identify the factors the ODRA considers in determining an appropriate remedy.

Subpart C--Contract Disputes

    In subpart C, current Sec. Sec. 17.23, 17.25, 17.27, and 17.29 are renumbered as Sec. Sec. 17.25, 17.27, 17.29 and 17.31, respectively. Section 17.33 (Adjudicative process for contract disputes), which has been moved from current Sec. 17.39 of subpart E, is added to proposed subpart C. Also, the requirement in current Sec. 17.27 (Submission of joint or separate statements) is deleted. An additional editorial change was made to correct the sentence structure in Sec. 17.21 (p) by
substituting the words "if" for "should" and "be" for "was." An additional editorial change was made to delete the redundant phrase "or more."

Filing a Contract Dispute (Sec. 17.25)

Paragraph (a) is revised to provide additional guidance on the information to be included in the contract dispute. Paragraph (e) is added to state the OGRA retains the discretion to modify any timeframe established by the regulations in connection to contract disputes.

Informal Resolution Period (Sec. 17.29)

This section is revised to conform to current practice regarding the informal resolution process. This includes clarifications related to scheduling and assigning a potential neutral for ADR.

Dismissal or Summary Decision of Contract Disputes (Sec. 17.31)

Section 17.31 is revised to clarify the standard for requesting a dismissal or summary decision, and the process for responding to and issuing a decision on a request for dismissal or summary decision. This section also is revised to clarify when such a decision is to be construed as a final agency order.

Adjudicative Process for Contract Disputes (Sec. 17.33)

In addition to moving this section from current Sec. 17.39 of subpart E, Sec. 17.33 is revised to clarify that the process for submitting the Dispute File applies to cases initiated by the contractor or alternatively by the FAA. Also, it is revised to more fully explain what documents will be admitted into the administrative record and the timeframes for responding to written discovery. Further, the section is revised to streamline the requirements for final submissions. Additionally, the revisions state that the ODRA must conduct a de novo review using the preponderance of the evidence standard, unless a different standard is required. The revisions also identify the circumstances under which ex parte communications are permitted in contract disputes. An additional editorial change was made to Sec. 17.33 (g)(1) to delete the unnecessary phrase "to resolve the dispute."

Subpart D--Alternative Dispute Resolution

The current sections under subpart D are renumbered from Sec. Sec. 17.31 and 17.33 to Sec. Sec. 17.35 and 17.37, respectively. Also, a new Sec. 17.39 (Confidentiality of ADR) is added to provide for the applicability of the Administrative Dispute Resolution Act of 1996, 5 U.S.C. 571 et seq., and to clarify how ADR communications are treated. Further, current Sec. 17.35 (Selection of neutrals for the alternative dispute resolution process) is deleted. An additional editorial correction was made to Sec. 17.37 (e) to delete the word "informal." An additional revision was made to Sec. 17.39 (c) to reflect current practice permitting the parties to agree to include ADR communications in the administrative record.

Subpart E--Finality and Review

As noted previously, Sec. Sec. 17.37 and 17.39 of current subpart E (Default Adjudicative Process) is moved to subparts B (Sec. 17.21) and C (Sec. 17.33), respectively. In today's final rule, the requirements in current subpart F (Finality and Review--Sec. Sec. 17.41, 17.43, and 17.45) are moved to subpart E. Also, Sec. 17.47
(Reconsideration) is added to subpart E to provide the timeframe for filing requests for reconsideration and to state the standard for reconsideration according to ODRA precedent.

Subpart F--Other Matters

Subpart F is revised to add sections covering sanctions, decorum and professional conduct, the use of orders and subpoenas for testimony and document production, and Standing Orders of the ODRA Director.

Subpart G--Pre-Disputes

A new subpart (subpart G) is added. This subpart makes clear that the pre-dispute process applies to all potential disputes arising under contracts or solicitations with the FAA. Also, it sets forth the process for filing a pre-dispute. Further, it clarifies the non-binding voluntary nature of the pre-dispute process and that it is subject to the confidentiality requirements of Sec. 17.39.

Appendix A to Part 17--Alternative Dispute Resolution (ADR)

Appendix A is revised to eliminate the description of "Minitrial" and to add a provision that addresses and clarifies the use of binding arbitration.

Regulatory Notices and Analyses

Changes to Federal regulations must undergo several economic analyses. First, Executive Orders 12866 and 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96-39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis of U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million or more annually (adjusted for inflation with base year of 1995). This portion of the preamble summarizes the FAA's analysis of the economic impact of the final rule.

Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the costs and benefits is not prepared. Such a determination has been made for this final rule.

The reasoning for this determination follows: Under the FAA's Acquisition Management System, the Office of Dispute Resolution for Acquisition (ODRA) manages the dispute resolution process, including administrative adjudication of all procurement protests and contract disputes. This final rule simplifies and clarifies the current part 17 regulations under which ODRA operates, including clarifying language
and definitions, reorganization and consolidation of certain sections, and simplification and clarification of certain procedures such as filing requirements. These changes will make it easier (less costly) to use the dispute resolution process.

In addition, the final rule is updated to incorporate changes in statutory authority and additional authority delegated by the Administrator to ODRA (these changes will have no effect on expected costs). The rulemaking also will codify a voluntary dispute avoidance and early resolution process that ODRA is already using. The voluntary process is inherently less costly than the more formal dispute resolution process. The FAA expects that codification of the voluntary process will increase its use, thereby lowering the overall cost of dispute resolutions.

Since no comments were received regarding our determination in the NPRM that the benefits exceed the costs, the FAA expects the final rule to have benefits that exceed the costs. The FAA therefore has determined that this final rule does not warrant a full regulatory evaluation.

The FAA has also determined that this final rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not "significant" as defined in DOT's Regulatory Policies and Procedures.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (Pub. L. 96-354) (RFA) establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.' The RFA covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a rule will have a significant economic impact on a substantial number of small entities. If the agency determines that it will, the agency must prepare a regulatory flexibility analysis as described in the RFA. However, if an agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. The certification must include a statement providing the factual basis for this determination, and the reasoning should be clear.

As noted above, the changes to part 17 are either cost beneficial or have no effect on costs. We received no comments regarding the initial regulatory flexibility analysis determination of no significant economic impact. Accordingly, the final rule will not have a significant impact on a substantial number of small entities. Therefore, as the FAA Administrator, I certify that this final rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96-39), as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the
United States, so long as the standard has a legitimate domestic objective, such the protection of safety, and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. The FAA has assessed the potential effect of this final rule and determined it will have little or no effect on international trade as it applies to both foreign and domestic contractors with the FAA.

Unfunded Mandates Assessment

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a "significant regulatory action." The FAA currently uses an inflation-adjusted value of $140.8 million.

This final rule does not contain such a mandate. The requirements of Title II do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. We have determined that this action will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, will not have federalism implications.

Environmental Analysis

FAA Order 1050.1E identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under the National Environmental Policy Act in the absence of extraordinary circumstances. The FAA has determined this final rule qualifies for the categorical exclusion identified in paragraph 312d and involves no extraordinary circumstances.

Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA has analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). We have determined that it is not a "significant energy action" under the executive order, it is not a "significant regulatory action" under Executive Order 12866 and DOT's Regulatory Policies and Procedures, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the FAA consider the impact of paperwork and other information collection burdens imposed on the public. The FAA has determined that there is no new requirement for information collection associated with
this final rule.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to International Civil Aviation Organization (ICAO) Standards and Recommended Practices to the maximum extent practicable. The FAA has determined that there are no ICAO Standards and Recommended Practices that correspond to these regulations.

Executive Order Determinations

Executive Order 12866

See the "Regulatory Evaluation" discussion in the "Regulatory Notices and Analyses" section elsewhere in this preamble.

Executive Order 13132, Federalism

The FAA has analyzed this final rule under the principles and criteria of Executive Order 13132, Federalism. The agency determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, does not have Federalism implications.

Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under Executive Order 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). The agency has determined that it is not a "significant energy action" under the executive order and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

How To Obtain Additional Information

Rulemaking Documents

An electronic copy of a rulemaking document may be obtained by using the Internet--
1. Search the Federal eRulemaking Portal (http://www.regulations.gov/);
2. Visit the FAA's Regulations and Policies Web page at http://www.faa.gov/regulations_policies; or

Copies may also be obtained by sending a request (identified by notice, amendment, or docket number of this rulemaking) to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue, SW., Washington, DC 0591, or by calling (202) 267-9680.

The Rulemaking Docket

The rulemaking docket includes a copy of the rulemaking and related documents, as well as any public comments. You may access the docket for this rulemaking at http://www.regulations.gov. Follow the online instructions to search the docket number for this action.

While no comments were filed to this rulemaking docket, anyone is able to search the electronic form of comments received into any of the
FAA's dockets by using the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996 requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document, may contact its local FAA official, or the person listed under the FOR FURTHER INFORMATION CONTACT heading at the beginning of the preamble. To find out more about SBREFA on the Internet, visit http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.

List of Subjects in 14 CFR Part 17

Administrative practice and procedure, Authority delegations (Government agencies), Government contracts.

The Amendment

In consideration of the foregoing, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations by revising part 17 to read as follows:

PART 17--PROCEDURES FOR PROTESTS AND CONTRACT DISPUTES

Subpart A--General

Sec.
17.1 Applicability.
17.3 Definitions.
17.5 Delegation of authority.
17.7 Filing and computation of time.
17.9 Protective orders.

Subpart B--Protests
17.11 Matters not subject to protest.
17.13 Dispute resolution process for protests.
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17.19 Motions practice and dismissal or summary decision of protests.
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Subpart C--Contract Disputes
17.25 Dispute resolution process for contract disputes.
17.27 Filing a contract dispute.
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Subpart D--Alternative Dispute Resolution
17.35 Use of alternative dispute resolution.
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Subpart E--Finality and Review
17.41 Final orders.
17.43 Judicial review.
17.45 Conforming amendments.
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Subpart F--Other Matters
17.49 Sanctions.
17.51 Decorum and professional conduct.
17.53 Orders and subpoenas for testimony and document production.
17.55 Standing orders of the ODRA director.
Subpart G--Pre-Disputes
17.57 Dispute resolution process for pre-disputes.
17.59 Filing a pre-dispute.
17.61 Use of alternative dispute resolution.
Appendix A to Part 17--Alternative Dispute Resolution (ADR)


Subpart A--General

Sec. 17.1 Applicability.

This part applies to all Acquisition Management System (AMS) bid protests and contract disputes involving the FAA that are filed at the Office of Dispute Resolution for Acquisition (ODRA) on or after October 7, 2011, with the exception of those contract disputes arising under or related to FAA contracts entered into prior to April 1, 1996, where such contracts have not been modified to be made subject to the FAA AMS. This part also applies to pre-disputes as described in subpart G of this part.

Sec. 17.3 Definitions.

(a) Accrual means to come into existence as a legally enforceable claim.

(b) Accrual of a contract claim means that all events relating to a claim have occurred, which fix liability of either the government or the contractor and permit assertion of the claim, regardless of when the claimant actually discovered those events. For liability to be fixed, some injury must have occurred. Monetary damages need not have been incurred, but if the claim is for money, such damages must be capable of reasonable estimation. The accrual of a claim or the running of the limitations period may be tolled on equitable grounds, including but not limited to active concealment, fraud, or if the facts were inherently unknowable.

(c) Acquisition Management System (AMS) establishes the policies, guiding principles, and internal procedures for the FAA's acquisition system.

(d) Adjudicative Process is an administrative adjudicatory process used to decide protests and contract disputes where the parties have not achieved resolution through informal communication or the use of ADR. The Adjudicative Process is conducted by a Dispute Resolution Officer (DRO) or Special Master selected by the ODRA Director to preside over the case in accordance with Public Law 108-176, Section 224, Codified at 49 U.S.C. 40110(d)(4).

(e) Administrator means the Administrator of the Federal Aviation Administration.

(f) Alternative Dispute Resolution (ADR) is the primary means of voluntary dispute resolution that is employed by the ODRA. See Appendix A of this part.

(g) Compensated Neutral refers to an impartial third party chosen by the parties to act as a facilitator, mediator, or arbitrator functioning to resolve the protest or contract dispute under the auspices of the ODRA. The parties pay equally for the services of a compensated neutral, unless otherwise agreed to by the parties. An ODRA DRO or neutral cannot be a compensated neutral.
(h) Contract Dispute, as used in this part, means a written request to the ODRA seeking, as a matter of right under an FAA contract subject to the AMS, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or for other relief arising under, relating to, or involving an alleged breach of that contract. A contract dispute does not require, as a prerequisite, the issuance of a Contracting Officer final decision. Contract disputes, for purposes of ADR only, may also involve contracts not subject to the AMS.

(i) Counsel refers to a Legal Representative who is an attorney licensed by a State, the District of Columbia, or a territory of the United States to practice law or appear before the courts of that State or territory.

(j) Contractor is a party in contractual privity with the FAA and responsible for performance of a contract’s requirements.

(k) Discovery is the procedure whereby opposing parties in a protest or contract dispute may, either voluntarily or to the extent ordered by the ODRA, obtain testimony from, or documents and information held by, other parties or non-parties.

(l) Dispute Resolution Officer (DRO) is an attorney and member of the ODRA staff. The term DRO can include the Director of the ODRA.

(m) Interested party, in the context of a bid protest, is one whose direct economic interest has been or would be affected by the award or failure to award an FAA contract. Proposed subcontractors are not "interested parties" within this definition and are not eligible to submit protests to the ODRA. Subcontractors not in privity with the FAA are not interested parties in the context of a contract dispute.

(n) Intervenor is an interested party other than the protester whose participation in a protest is allowed by the ODRA. For a post-award protest, the awardee of the contract that is the subject of the protest will be allowed, upon timely request, to participate as an intervenor in the protest. In such a protest, no other interested parties will be allowed to participate as intervenors.

(o) Legal Representative is an individual(s) designated to act on behalf of a party in matters before the ODRA. Unless otherwise provided under Sec. Sec. 17.15(c)(2), 17.27(a)(1), or 17.59(a)(6), a Notice of Appearance must be filed with the ODRA containing the name, address, telephone and facsimile (Fax) numbers of a party's legal representative.

(p) Neutral refers to an impartial third party in the ADR process chosen by the parties to act as a facilitator, mediator, arbitrator, or otherwise to aid the parties in resolving a protest or contract dispute. A neutral can be a DRO or a person not an employee of the ODRA.

(q) ODRA is the FAA’s exclusive forum acting on behalf of the Administrator, pursuant to the statutory authority granted by Public Law 108-176, Section 224, to provide dispute resolution services and to adjudicate matters within its jurisdiction. The ODRA may also provide non-binding dispute resolution services in matters outside of its jurisdiction where mutually requested to do so by the parties involved.

(r) Parties include the protester(s) or the contractor, the FAA, and any intervenor(s).

(s) Pre-Disputes mean an issue(s) in controversy concerning an FAA contract or solicitation that, by mutual agreement of the parties, is filed with the ODRA. See subpart G of this part.

(t) Product Team, as used in these rules, refers to the FAA organization(s) responsible for the procurement or contracting activity, without regard to funding source, and includes the Contracting Officer (CO). The Product Team, acting through assigned FAA counsel, is responsible for all communications with and submissions to the ODRA in pending matters.

(u) Screening Information Request (SIR or Solicitation) means a request by the FAA for documentation, information, presentations, proposals, or binding offers concerning an approach to meeting
potential acquisition requirements established by the FAA.

(v) A Special Master is a non-FAA attorney or judge who has been assigned by the ODRA to act as its finder of fact, and to make findings and recommendations based upon AMS policy and applicable law and authorities in the Adjudicative Process.

Sec. 17.5 Delegation of authority.

(a) The authority of the Administrator to conduct dispute resolution and adjudicative proceedings concerning acquisition matters is delegated to the Director of the ODRA.

(b) The Director of the ODRA may redelegate to Special Masters and DROs such delegated authority in paragraph (a) of this section as deemed necessary by the Director for efficient resolution of an assigned protest or contract dispute, including the imposition of sanctions for the filing of frivolous pleadings, making false statements, or other disciplinary actions. See subpart F of this part.

Sec. 17.7 Filing and computation of time.

(a) Filing of a protest or contract dispute may be accomplished by overnight delivery, by hand delivery, by Fax, or, if permitted by Order of the ODRA, by electronic filing. A protest or contract dispute is considered to be filed on the date it is received by the ODRA during normal business hours. The ODRA's normal business hours are from 8:30 a.m. to 5 p.m. Eastern Time. A protest or contract dispute received after the time period prescribed for filing shall not be considered timely filed. Service shall also be made on the Contracting Officer (CO) pursuant to Sec. Sec. 17.15(e) and 17.27(d).

(b) Submissions to the ODRA after the initial filing of a protest or contract dispute may be accomplished by any means available in paragraph (a) of this section. Copies of all such submissions shall be served on the opposing party or parties.

(c) The time limits stated in this part are calculated in business days, which exclude weekends, Federal holidays and other days on which Federal Government offices in Washington, DC are not open. In computing time, the day of the event beginning a period of time shall not be included. If the last day of a period falls on a weekend or a Federal holiday, the first business day following the weekend or holiday shall be considered the last day of the period.

(d) Electronic Filing--Procedures for electronic filing may be utilized where permitted by Order of the ODRA on a case-by-case basis or pursuant to a Standing Order of the ODRA permitting electronic filing.

Sec. 17.9 Protective orders.

(a) The ODRA may issue protective orders addressing the treatment of protected information, including protected information in electronic form, either at the request of a party or upon its own initiative. Such information may include proprietary, confidential, or source-selection-sensitive material, or other information the release of which could result in a competitive advantage to one or more firms.

(b) The terms of the ODRA's standard protective order may be altered to suit particular circumstances, by negotiation of the parties, subject to the approval of the ODRA. The protective order establishes procedures for application for access to protected
information, identification and safeguarding of that information, and submission of redacted copies of documents omitting protected information.

(c) After a protective order has been issued, counsel or consultants retained by counsel appearing on behalf of a party may apply for access to the material under the order by submitting an application to the ODRA, with copies furnished simultaneously to all parties. The application shall establish that the applicant is not involved in competitive decision-making for any firm that could gain a competitive advantage from access to the protected information and that the applicant will diligently protect any protected information received from inadvertent disclosure. Objections to an applicant's admission shall be raised within two (2) days of the application, although the ODRA may consider objections raised after that time for good cause.

(d) Any violation of the terms of a protective order may result in the imposition of sanctions, including but not limited to removal of the violator from the protective order and reporting of the violator to his or her bar association(s), and the taking of other actions as the ODRA deems appropriate. Additional civil or criminal penalties may apply.

Subpart B--Protests

Sec. 17.11 Matters not subject to protest.

The following matters may not be protested before the ODRA, except for review of compliance with the AMS:
(a) FAA purchases from or through, State, local, and tribal governments and public authorities;
(b) FAA purchases from or through other Federal agencies;
(c) Grants;
(d) Cooperative agreements;
(e) Other transactions.

Sec. 17.13 Dispute resolution process for protests.

(a) Protests concerning FAA SIRs, solicitations, or contract awards shall be resolved pursuant to this part.
(b) Potential protestors should, where possible, attempt to resolve any issues concerning potential protests with the CO. Such attempts are not a prerequisite to filing a protest with the ODRA.
(c) Offerors or prospective offerors shall file a protest with the ODRA in accordance with Sec. 17.15. The protest time limitations set forth in Sec. 17.15 will not be extended by attempts to resolve a potential protest with the CO. Other than the time limitations specified in Sec. 17.15 for the filing of protests, the ODRA retains the discretion to modify any timeframes established herein in connection with protests.
(d) In accordance with Sec. 17.17(b), the ODRA shall convene an initial status conference for the purpose of scheduling proceedings in the protest and to encourage the parties to consider using the ODRA's ADR process to attempt to resolve the protest, pursuant to subpart D of this part. It is the Agency's policy to use voluntary ADR to the maximum extent practicable. If the parties elect not to attempt ADR, or if ADR efforts do not completely resolve the protest, the protest will proceed under the ODRA Adjudicative Process set forth in subpart E of this part. Informal ADR techniques may be utilized simultaneously with ongoing adjudication.
(e) The ODRA Director shall designate DROs, outside neutrals or Special Masters as potential neutrals for the resolution of protests
through ADR. The ultimate choice of an ADR neutral is made by the parties participating in the ADR. The ODRA Director also shall, at his or her sole discretion, designate an adjudicating DRO or Special Master for each matter. A person serving as a neutral in an ADR effort in a matter, shall not serve as an adjudicating DRO or Special Master for that matter.

(f) Multiple protests concerning the same SIR, solicitation, or contract award may be consolidated at the discretion of the ODRA Director, and assigned to a single DRO or Special Master for adjudication.

(g) Procurement activities, and, where applicable, contractor performance pending resolution of a protest, shall continue during the pendency of a protest, unless there is a compelling reason to suspend all or part of the procurement activities or contractor performance. Pursuant to Sec. Sec. 17.15(d) and 17.17(a), the ODRA may impose a temporary suspension and recommend suspension of award or contract performance, in whole or in part, for a compelling reason. A decision to suspend procurement activities or contractor performance is made in writing by the Administrator or the Administrator's delegee upon recommendation of the ODRA.

Sec. 17.15 Filing a protest.

(a) An interested party may initiate a protest by filing with the ODRA in accordance with Sec. 17.7(a) within the timeframes set forth in this Section. Protests that are not timely filed shall be dismissed. The timeframes applicable to the filing of protests are as follows:

(1) Protests based upon alleged SIR or solicitation improprieties that are apparent prior to bid opening or the time set for receipt of initial proposals shall be filed prior to bid opening or the time set for the receipt of initial proposals.

(2) In procurements where proposals are requested, alleged improprieties that do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation, must be protested not later than the next closing time for receipt of proposals following the incorporation.

(3) For protests other than those related to alleged solicitation improprieties, the protest must be filed on the later of the following two dates:

(i) Not later than seven (7) business days after the date the protester knew or should have known of the grounds for the protest; or

(ii) If the protester has requested a post-award debriefing from the FAA Product Team, not later than five (5) business days after the date on which the Product Team holds that debriefing.

(b) Protests shall be filed at:

(1) ODRA, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591; Telephone: (202) 267-3290, Fax: (202) 267-3720; or

(2) Other address as shall be published from time to time in the Federal Register.

(c) A protest shall be in writing, and set forth:

(1) The protestor's name, address, telephone number, and FAX number;

(2) The name, address, telephone number, and FAX number of the protestor's legal representative, and who shall be duly authorized to represent the protestor, to be the point of contact;

(3) The SIR number or, if available, the contract number and the name of the CO;

(4) The basis for the protestor's status as an interested party;
(5) The facts supporting the timeliness of the protest;
(6) Whether the protester requests a protective order, the material to be protected, and attach a redacted copy of that material;
(7) A detailed statement of both the legal and factual grounds of the protest, and one (1) copy of each relevant document;
(8) The remedy or remedies sought by the protester, as set forth in Sec. 17.23;
(9) The signature of the legal representative, or another person duly authorized to represent the protester.
(d) If the protester wishes to request a suspension of the procurement or contract performance, in whole or in part, and believes that a compelling reason(s) exists to suspend the procurement or contract performance because of the protested action, the protester shall, in its initial filing:
(1) Set forth such compelling reason(s), supply all facts and documents supporting the protester's position; and
(2) Demonstrate--
   (i) The protester has alleged a substantial case;
   (ii) The lack of a suspension would be likely to cause irreparable injury;
   (iii) The relative hardships on the parties favor a suspension; and
   (iv) That a suspension is in the public interest.
(3) Failure of a protester to provide information or documents in support of a requested suspension or failure to address the elements of paragraph (d)(2) of this section may result in the summary rejection of the request for suspension, or a requirement that the protester supplement its request prior to the scheduling of a Product Team response to the request under Sec. 17.17(a).
(e) Concurrent with the filing of a protest with the ODRA, the protester shall serve a copy of the protest on the CO and any other official designated in the SIR for receipt of protests, by means reasonably calculated to be received by the CO on the same day as it is to be received by the ODRA. The protest shall include a signed statement from the protester, certifying to the ODRA the manner of service, date, and time when a copy of the protest was served on the CO and other designated official(s).
(f) Upon receipt of the protest, the CO shall notify the awardee of a challenged contract award in writing of the existence of the protest. The awardee and/or interested parties shall notify the ODRA in writing, of their interest in participating in the protest as intervenors within two (2) business days of receipt of the CO's notification, and shall, in such notice, designate a person as the point of contact for the ODRA.
(g) The ODRA has discretion to designate the parties who shall participate in the protest as intervenors. In protests of awarded contracts, only the awardee may participate as an intervenor as a matter of right.

Sec. 17.17 Initial protest procedures.

(a) If, as part of its initial protest filing, the protester requests a suspension of procurement activities or contractor performance in whole or in part, in accordance with Sec. 17.15(d), the Product Team shall submit a response to the request to the ODRA by no later than the close of business on the date of the initial scheduling conference or on such other date as is established by the ODRA. Copies of the response shall be furnished to the protester and any intervenor(s) so as to be received within the same timeframe. The protester and any intervenor(s) shall have the opportunity of providing additional comments on the response within two (2) business days of receiving it. Based on its review of such submissions, the ODRA, in its discretion, may--
(1) Decline the suspension request; or
(2) Recommend such suspension to the Administrator or the Administrator's designee. The ODRA also may impose a temporary suspension of no more than ten (10) business days, where it is recommending that the Administrator impose a suspension.

(b) Within five (5) business days of the filing of a protest, or as soon thereafter as practicable, the ODRA shall convene an initial status conference for purposes of:
(1) Reviewing the ODRA's ADR and adjudication procedures and establishing a preliminary schedule;
(2) Identifying legal or other preliminary or potentially dispositive issues and answering the parties' questions regarding the ODRA process;
(3) Dealing with issues related to protected information and the issuance of any needed protective order;
(4) Encouraging the parties to consider using ADR;
(5) Appointing a DRO as a potential ADR neutral to assist the parties in considering ADR options and developing an ADR agreement; and
(6) For any other reason deemed appropriate by the DRO or by the ODRA.

(c) The Product Team and protester will have five (5) business days from the date of the initial status conference to decide whether they will attempt to use an ADR process in the case. With the agreement of the ODRA, ADR may be used concurrently with the adjudication of a protest. See Sec. 17.37(e).

(d) If the Product Team and protester elect to use ADR proceedings to resolve the protest, they will agree upon the neutral to conduct the ADR proceedings (either an ODRA DRO or a compensated neutral of their own choosing) pursuant to Sec. 17.37, and shall execute and file with the ODRA a written ADR agreement. Agreement of any intervenor(s) to the use of ADR or the resolution of a dispute through ADR shall not be required.

(e) If the Product Team or protester indicate that ADR proceedings will not be used, or if ADR is not successful in resolving the entire protest, the ODRA Director upon being informed of the situation, will schedule an adjudication of the protest.

Sec. 17.19 Motions practice and dismissal or summary decision of protests.

(a) Separate motions generally are discouraged in ODRA bid protests. Counsel and parties are encouraged to incorporate any such motions in their respective agency responses or comments. Parties and counsel are encouraged to attempt to resolve typical motions issues through the ODRA ADR process. The ODRA may rule on any non-dispositive motion, where appropriate and necessary, after providing an opportunity for briefing on the motion by all affected parties. Unjustifiable, inappropriate use of motions may result in the imposition of sanctions. Where appropriate, a party may request by dispositive motion to the ODRA, or the ODRA may recommend or order, that:
(1) The protest, or any count or portion of a protest, be dismissed for lack of jurisdiction, timeliness, or standing to pursue the protest;
(2) The protest, or any count or portion of a protest, be dismissed, if frivolous or without basis in fact or law, or for failure to state a claim upon which relief may be had;
(3) A summary decision be issued with respect to the protest, or any count or portion of a protest, if there are no material facts in
dispute and a party is entitled to summary decision as a matter of law. 

(b) In connection with consideration of possible dismissal or summary decision, the ODRA shall consider any material facts in dispute, in a light most favorable to the party against whom the dismissal or summary decision would operate and draw all factual inferences in favor of the non-moving party.

(c) Either upon motion by a party or on its own initiative, the ODRA may, at any time, exercise its discretion to:
   (1) Recommend to the Administrator dismissal or the issuance of a summary decision with respect to the entire protest;
   (2) Dismiss the entire protest or issue a summary decision with respect to the entire protest, if delegated that authority by the Administrator; or
   (3) Dismiss or issue a summary decision with respect to any count or portion of a protest.

(d) A dismissal or summary decision regarding the entire protest by either the Administrator, or the ODRA by delegation, shall be construed as a final agency order. A dismissal or summary decision that does not resolve all counts or portions of a protest shall not constitute a final agency order, unless and until such dismissal or decision is incorporated or otherwise adopted in a decision by the Administrator (or the ODRA, by delegation) regarding the entire protest.

(e) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision is to be entered the opportunity to respond to the proposed dismissal or summary decision.

Sec. 17.21 Adjudicative Process for protests.

(a) Other than for the resolution of preliminary or dispositive matters, the Adjudicative Process for protests will be commenced by the ODRA Director pursuant to Sec. 17.17(e).

(b) The Director of the ODRA shall appoint a DRO or a Special Master to conduct the adjudication proceedings, develop the administrative record, and prepare findings and recommendations for review of the ODRA Director.

(c) The DRO or Special Master may conduct such proceedings and prepare procedural orders for the proceedings as deemed appropriate; and may require additional submissions from the parties.

(d) The Product Team response to the protest will be due to be filed and served ten (10) business days from the commencement of the ODRA Adjudication process. The Product Team response shall consist of a written chronological, supported statement of proposed facts, and a written presentation of applicable legal or other defenses. The Product Team response shall cite to and be accompanied by all relevant documents, which shall be chronologically indexed, individually tabbed, and certified as authentic and complete. A copy of the response shall be furnished so as to be received by the protester and any intervenor(s) on the same date it is filed with the ODRA. In all cases, the Product Team shall indicate the method of service used.

(e) Comments of the protester and the intervenor on the Product Team response will be due to be filed and served five (5) business days after their receipt of the response. Copies of such comments shall be provided to the other participating parties by the same means and on the same date as they are furnished to the ODRA. Comments may include any supplemental relevant documents.

(f) The ODRA may alter the schedule for filing of the Product Team response and the comments for good cause or to accommodate the circumstances of a particular protest.

(g) The DRO or Special Master may convene the parties and/or their representatives, as needed for the Adjudicative Process.
(h) If, in the sole judgment of the DRO or Special Master, the parties have presented written material sufficient to allow the protest to be decided on the record presented, the DRO or Special Master shall have the discretion to decide the protest on that basis.

(i) The parties may engage in limited, focused discovery with one another and, if justified, with non-parties, so as to obtain information relevant to the allegations of the protest.

(1) The DRO or Special Master shall manage the discovery process, including limiting its length and availability, and shall establish schedules and deadlines for discovery, which are consistent with timeframes established in this part and with the FAA policy of providing fair and expeditious dispute resolution.

(2) The DRO or Special Master may also direct the parties to exchange, in an expedited manner, relevant, non-privileged documents.

(3) Where justified, the DRO or Special Master may direct the taking of deposition testimony, however, the FAA dispute resolution process does not contemplate extensive discovery.

(4) The use of interrogatories and requests for admission is not permitted in ODRA bid protests.

(5) Where parties cannot voluntarily reach agreement on a discovery-related issue, they may timely seek assistance from an ODRA ADR neutral or may file an appropriate motion with the ODRA. Parties may request a subpoena.

(6) Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing.

(7) Unless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record.

(j) Hearings are not typically held in bid protests. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Hearings will be conducted:

(1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or

(2) Upon request of any party to the protest, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(k) The Director of the ODRA may review the status of any protest in the Adjudicative Process with the DRO or Special Master.

(1) After the closing of the administrative record, the DRO or Special Master will prepare and submit findings and recommendations to the ODRA that shall contain the following:

(1) Findings of fact;

(2) Application of the principles of the AMS, and any applicable law or authority to the findings of fact;

(3) A recommendation for a final FAA order; and

(4) If appropriate, suggestions for future FAA action.

(m) In preparing findings and recommendations in protests, the DRO or Special Master, using the preponderance of the evidence standard, shall consider whether the Product Team actions in question were
consistent with the requirements of the AMS, had a rational basis, and whether the Product Team decision was arbitrary, capricious or an abuse of discretion. Notwithstanding the above, allegations that government officials acted with bias or in bad faith must be established by clear and convincing evidence.

(n) The DRO or Special Master has broad discretion to recommend a remedy that is consistent with Sec. 17.23.

(o) A DRO or Special Master shall submit findings and recommendations only to the Director of the ODRA or the Director's designee. The findings and recommendations will be released to the parties and to the public upon issuance of the final FAA order in the case. If an ODRA protective order was issued in connection with the protest, or if a protest involves proprietary or competition-sensitive information, a redacted version of the findings and recommendations, omitting any protected information, shall be prepared wherever possible and released to the public, as soon as is practicable, along with a copy of the final FAA order. Only persons admitted by the ODRA under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations that contain proprietary or competition-sensitive information.

(p) Other than communications regarding purely procedural matters or ADR, there shall be no substantive ex parte communication between ODRA personnel and any principal or representative of a party concerning a pending or potentially pending matter. A potential or serving ADR neutral may communicate on an ex parte basis to establish or conduct the ADR.

Sec. 17.23 Protest remedies.

(a) The ODRA has broad discretion to recommend and impose protest remedies that are consistent with the AMS and applicable law. Such remedies may include, but are not limited to one or a combination of, the following:

1. Amend the SIR;
2. Refrain from exercising options under the contract;
3. Issue a new SIR;
4. Require a recompetition or revaluation;
5. Terminate an existing contract for the FAA's convenience;
6. Direct an award to the protestor;
7. Award bid and proposal costs; or
8. Any other remedy consistent with the AMS that is appropriate under the circumstances.

(b) In determining the appropriate recommendation, the ODRA may consider the circumstances surrounding the procurement or proposed procurement including, but not limited to: the nature of the procurement deficiency; the degree of prejudice to other parties or to the integrity of the acquisition system; the good faith of the parties; the extent of performance completed; the feasibility of any proposed remedy; the urgency of the procurement; the cost and impact of the recommended remedy; and the impact on the Agency's mission.

(c) Attorney's fees of a prevailing protestor are allowable to the extent permitted by the Equal Access to Justice Act, 5 U.S.C. 504(a)(1) (EAJA) and 14 CFR part 14.

Subpart C--Contract Disputes

Sec. 17.25 Dispute resolution process for contract disputes.

(a) All contract disputes arising under contracts subject to the AMS shall be resolved under this subpart.

(b) Contract disputes shall be filed with the ODRA pursuant to
Sec. 17.27.

(c) The ODRA has broad discretion to recommend remedies for a contract dispute that are consistent with the AMS and applicable law, including such equitable remedies or other remedies as it deems appropriate.

Sec. 17.27 Filing a contract dispute.

(a) Contract disputes must be in writing and should contain:
   (1) The contractor's name, address, telephone and Fax numbers and the name, address, telephone and Fax numbers of the contractor's legal representative(s) (if any) for the contract dispute;
   (2) The contract number and the name of the Contracting Officer;
   (3) A detailed chronological statement of the facts and of the legal grounds underlying the contract dispute, broken down by individual claim item, citing to relevant contract provisions and attaching copies of the contract and other relevant documents;
   (4) Information establishing the ODRA's jurisdiction and the timeliness of the contract dispute;
   (5) A request for a specific remedy, and the amount, if known, of any monetary remedy requested, together with pertinent cost information and documentation (e.g., invoices and cancelled checks). Supporting documentation should be broken down by individual claim item and summarized; and
   (6) The signature of a duly authorized representative of the initiating party.

(b) Contract disputes shall be filed at the following address:
ODRA, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591; Telephone: (202) 267-3290, Fax: (202) 267-3720.

(c) A contract dispute against the FAA shall be filed with the ODRA within two (2) years of the accrual of the contract claim involved. A contract dispute by the FAA against a contractor (excluding contract disputes alleging warranty issues, fraud or latent defects) likewise shall be filed within two (2) years of the accrual of the contract claim. If an underlying contract entered into prior to the effective date of this part provides for time limitations for filing of contract disputes with the ODRA, which differ from the aforesaid two (2) year period, the limitation periods in the contract shall control over the limitation period of this section. In no event will either party be permitted to file with the ODRA a contract dispute seeking an equitable adjustment or other damages after the contractor has accepted final contract payment, with the exception of FAA contract disputes related to warranty issues, gross mistakes amounting to fraud or latent defects. FAA contract disputes against the contractor based on warranty issues must be filed within the time specified under applicable contract warranty provisions. Any FAA contract disputes against the contractor based on gross mistakes amounting to fraud or latent defects shall be filed with the ODRA within two (2) years of the date on which the FAA knew or should have known of the presence of the fraud or latent defect.

(d) A party shall serve a copy of the contract dispute upon the other party, by means reasonably calculated to be received on the same day as the filing is received by the ODRA.

(e) With the exception of the time limitations established herein for the filing of contract disputes, the ODRA retains the discretion to modify any timeframe established herein in connection with contract disputes.
Sec. 17.29 Informal resolution period.

(a) The ODRA process for contract disputes includes an informal resolution period of twenty (20) business days from the date of filing in order for the parties to attempt to informally resolve the contract dispute either through direct negotiation or with the assistance of the ODRA. The CO, with the advice of FAA legal counsel, has full discretion to settle contract disputes, except where the matter involves fraud.

(b) During the informal resolution period, if the parties request it, the ODRA will appoint a DRO for ADR who will discuss ADR options with the parties, offer his or her services as a potential neutral, and assist the parties to enter into an agreement for a formal ADR process. A person serving as a neutral in an ADR effort in a matter shall not serve as an adjudicating DRO or Special Master for that matter.

(c) The informal resolution period may be extended at the request of the parties for good cause.

(d) If the matter has not been resolved informally, the parties shall file joint or separate statements with the ODRA no later than twenty (20) business days after the filing of the contract dispute. The ODRA may extend this time, pursuant to Sec. 17.27(e). The statement(s) shall include either:

   (1) A joint request for ADR, or an executed ADR agreement, pursuant to Sec. 17.37(d), specifying which ADR techniques will be employed; or
   (2) Written explanation(s) as to why ADR proceedings will not be used and why the Adjudicative Process will be needed.

(e) If the contract dispute is not completely resolved during the informal resolution period, the ODRA's Adjudicative Process will commence unless the parties have reached an agreement to attempt a formal ADR effort. As part of such an ADR agreement the parties, with the concurrence of the ODRA, may agree to defer commencement of the adjudication process pending completion of the ADR or that the ADR and adjudication process will run concurrently. If a formal ADR is attempted but does not completely resolve the contract dispute, the Adjudicative Process will commence.

(f) The ODRA shall hold a status conference with the parties within ten (10) business days, or as soon thereafter as is practicable, of the ODRA's receipt of a written notification that ADR proceedings will not be used, or have not fully resolved the Contract Dispute. The purpose of the status conference will be to commence the Adjudicative Process and establish the schedule for adjudication.

(g) The submission of a statement which indicates that ADR will not be utilized will not in any way preclude the parties from engaging in non-binding ADR techniques during the Adjudicative Process, pursuant to subpart D of this part.

Sec. 17.31 Dismissal or summary decision of contract disputes.

(a) Any party may request by motion, or the ODRA on its own initiative may recommend or direct, that a contract dispute be dismissed, or that a count or portion thereof be stricken, if:

   (1) It was not timely filed;
   (2) It was filed by a subcontractor or other person or entity lacking standing;
   (3) It fails to state a matter upon which relief may be had; or
   (4) It involves a matter not subject to the jurisdiction of the ODRA.

(b) Any party may request by motion, or the ODRA on its own initiative may recommend or direct, that a summary decision be issued with respect to a contract dispute, or any count or portion thereof if there are no material facts in dispute and a party is entitled to a summary decision as a matter of law.
(c) In connection with any potential dismissal of a contract dispute, or summary decision, the ODRA will consider any material facts in dispute in a light most favorable to the party against whom the dismissal or summary decision would be entered, and draw all factual inferences in favor of that party.

(d) At any time, whether pursuant to a motion or on its own initiative and at its discretion, the ODRA may:

(1) Dismiss or strike a count or portion of a contract dispute or enter a partial summary decision;

(2) Recommend to the Administrator that the entire contract dispute be dismissed or that a summary decision be entered; or

(3) With a delegation from the Administrator, dismiss the entire contract dispute or enter a summary decision with respect to the entire contract dispute.

(e) An order of dismissal of the entire contract dispute or summary decision with respect to the entire contract dispute, issued either by the Administrator or by the ODRA, on the grounds set forth in this section, shall constitute a final agency order. An ODRA order dismissing or striking a count or portion of a contract dispute or entering a partial summary judgment shall not constitute a final agency order, unless and until such ODRA order is incorporated or otherwise adopted in a final agency decision of the Administrator or the Administrator's delegatee regarding the remainder of the dispute.

(f) Prior to recommending or entering either a dismissal or a summary decision, either in whole or in part, the ODRA shall afford all parties against whom the dismissal or summary decision would be entered the opportunity to respond to a proposed dismissal or summary decision.

Sec. 17.33 Adjudicative Process for contract disputes.

(a) The Adjudicative Process for contract disputes will be commenced by the ODRA Director upon being notified by the ADR neutral or by any party that either--

(1) The parties will not be attempting ADR; or

(2) The parties have not settled all of the dispute issues via ADR, and it is unlikely that they can do so within the time period allotted and/or any reasonable extension.

(b) In cases initiated by a contractor against the FAA, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the Product Team shall prepare and submit to the ODRA, with a copy to the contractor, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The contractor will be entitled, at a specified time, to supplement the record with additional documents.

(c) In cases initiated by the FAA against a contractor, within twenty (20) business days of the commencement of the Adjudicative Process or as scheduled by the ODRA, the contractor shall prepare and submit to the ODRA, with a copy to the Product Team counsel, a chronologically arranged and indexed substantive response, containing a legal and factual position regarding the dispute and all documents relevant to the facts and issues in dispute. The Product Team will be entitled, at a specified time, to supplement the record with additional documents.

(d) Unless timely objection is made, documents properly filed with the ODRA will be deemed admitted into the administrative record. Discovery requests and responses are not part of the record and will not be filed with the ODRA, except in connection with a motion or other permissible filing.
Designated, relevant portions of such documents may be filed, with the permission of the ODRA.

(e) The Director of the ODRA shall assign a DRO or a Special Master to conduct adjudicatory proceedings, develop the administrative adjudication record and prepare findings and recommendations for the review of the ODRA Director or the Director's designee.

(f) The DRO or Special Master may conduct a status conference(s) as necessary and issue such orders or decisions as are necessary to promote the efficient resolution of the contract dispute.

(g) At any such status conference, or as necessary during the Adjudicative Process, the DRO or Special Master will:
   (1) Determine the appropriate amount of discovery required;
   (2) Review the need for a protective order, and if one is needed, prepare a protective order pursuant to Sec. 17.9;
   (3) Determine whether any issue can be stricken; and
   (4) Prepare necessary procedural orders for the proceedings.

(h) Unless otherwise provided by the DRO or Special Master, or by agreement of the parties with the concurrence of the DRO or Special Master, responses to written discovery shall be due within thirty (30) business days from the date received.

(i) At a time or at times determined by the DRO or Special Master, and in advance of the decision of the case, the parties shall make individual final submissions to the ODRA and to the DRO or Special Master, which submissions shall include the following:
   (1) A statement of the issues;
   (2) A proposed statement of undisputed facts related to each issue together with citations to the administrative record or other supporting materials;
   (3) Separate statements of disputed facts related to each issue, with appropriate citations to documents in the Dispute File, to pages of transcripts of any hearing or deposition, or to any affidavit or exhibit which a party may wish to submit with its statement;
   (4) Separate legal analyses in support of the parties' respective positions on disputed issues.

(j) Each party shall serve a copy of its final submission on the other party by means reasonably calculated so that the other party receives such submissions on the same day it is received by the ODRA.

(k) The DRO or Special Master may decide the contract dispute on the basis of the administrative record and the submissions referenced in this section, or may, in the DRO or Special Master's discretion, direct the parties to make additional presentations in writing. The DRO or Special Master may conduct hearings, and may limit the hearings to the testimony of specific witnesses and/or presentations regarding specific issues. The DRO or Special Master shall control the nature and conduct of all hearings, including the sequence and extent of any testimony. Evidentiary hearings on the record shall be conducted by the ODRA:
   (1) Where the DRO or Special Master determines that there are complex factual issues in dispute that cannot adequately or efficiently be developed solely by means of written presentations and/or that resolution of the controversy will be dependent on his/her assessment of the credibility of statements provided by individuals with first-hand knowledge of the facts; or
   (2) Upon request of any party to the contract dispute, unless the DRO or Special Master finds specifically that a hearing is unnecessary and that no party will be prejudiced by limiting the record in the adjudication to the parties' written submissions. All witnesses at any such hearing shall be subject to cross-examination by the opposing party and to questioning by the DRO or Special Master.

(l) The DRO or Special Master shall prepare findings and recommendations, which will contain findings of fact, application of the principles of the AMS and other law or authority applicable to the findings of fact, and a recommendation for a final FAA order.
(m) The DRO or Special Master shall conduct a de novo review using the preponderance of the evidence standard, unless a different standard is prescribed for a particular issue. Notwithstanding the above, allegations that government officials acted with bias or in bad faith must be established by clear and convincing evidence.

(n) The Director of the ODRA may review the status of any contract dispute in the Adjudicative Process with the DRO or Special Master.

(o) A DRO or Special Master shall submit findings and recommendations to the Director of the ODRA or the Director's designee. The findings and recommendations will be released to the parties and to the public, upon issuance of the final FAA order in the case. Should an ODRA protective order be issued in connection with the contract dispute, or should the matter involve proprietary or competition-sensitive information, a redacted version of the findings and recommendations omitting any protected information, shall be prepared wherever possible and released to the public, as soon as is practicable, along with a copy of the final FAA order. Only persons admitted by the ODRA under the protective order and Government personnel shall be provided copies of the unredacted findings and recommendations.

(p) Attorneys' fees of a qualified prevailing contractor are allowable to the extent permitted by the EAJA, 5 U.S.C. 504(a)(1). See 14 CFR part 14.

(q) Other than communications regarding purely procedural matters or ADR, there shall be no substantive ex parte communication between ODRA personnel and any principal or representative of a party concerning a pending or potentially pending matter. A potential or serving ADR neutral may communicate on an ex parte basis to establish or conduct the ADR.

Subpart D--Alternative Dispute Resolution

Sec. 17.35 Use of alternative dispute resolution.

(a) By statutory mandate, it is the policy of the FAA to use voluntary ADR to the maximum extent practicable to resolve matters pending at the ODRA. The ODRA therefore uses voluntary ADR as its primary means of resolving all factual, legal, and procedural controversies.

(b) The parties are encouraged to make a good faith effort to explore ADR possibilities in all cases and to employ ADR in every appropriate case. The ODRA uses ADR techniques such as mediation, neutral evaluation, binding arbitration or variations of these techniques as agreed by the parties and approved by the ODRA. At the beginning of each case, the ODRA assigns a DRO as a potential neutral to explore ADR options with the parties and to convene an ADR process. See Sec. 17.35(b).

(c) The ODRA Adjudicative Process will be used where the parties cannot achieve agreement on the use of ADR; where ADR has been employed but has not resolved all pending issues in dispute; or where the ODRA concludes that ADR will not provide an expeditious means of resolving a particular dispute. Even where the Adjudicative Process is to be used, the ODRA, with the parties' consent, may employ informal ADR techniques concurrently with the adjudication.

Sec. 17.37 Election of alternative dispute resolution process.

(a) The ODRA will make its personnel available to serve as Neutrals in ADR proceedings and, upon request by the parties, will attempt to make qualified
non-FAA personnel available to serve as Neutrals through neutral-sharing programs and other similar arrangements. The parties may elect to employ a mutually acceptable compensated neutral at their expense.

(b) The parties using an ADR process to resolve a protest shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the ODRA pursuant to Sec. 17.17(c). The ODRA may extend this time for good cause.

(c) The parties using an ADR process to resolve a contract dispute shall submit an executed ADR agreement containing the information outlined in paragraph (d) of this section to the ODRA pursuant to Sec. 17.29.

(d) The parties to a protest or contract dispute who elect to use ADR must submit to the ODRA an ADR agreement setting forth:

(1) The agreed ADR procedures to be used; and

(2) The name of the neutral. If a compensated neutral is to be used, the agreement must address how the cost of the neutral's services will be reimbursed.

(e) Non-binding ADR techniques are not mutually exclusive, and may be used in combination if the parties agree that a combination is most appropriate to the dispute. The techniques to be employed must be determined in advance by the parties and shall be expressly described in their ADR agreement. The agreement may provide for the use of any fair and reasonable ADR technique that is designed to achieve a prompt resolution of the matter. An ADR agreement for non-binding ADR shall provide for a termination of ADR proceedings and the commencement of adjudication under the Adjudicative Process, upon the election of any party. Notwithstanding such termination, the parties may still engage with the ODRA in ADR techniques (neutral evaluation and/or informal mediation) concurrently with adjudication.

(f) Binding arbitration is available through the ODRA, subject to the provisions of applicable law and the ODRA Binding Arbitration Guidance dated October 2001 as developed in consultation with the Department of Justice.

(g) The parties may, where appropriate in a given case, submit to the ODRA a negotiated protective order for use in ADR in accordance with the requirements of Sec. 17.9.

Sec. 17.39 Confidentiality of ADR.


(b) The ODRA looks to the principles of Rule 408 of the Federal Rules of Evidence in deciding admissibility issues related to ADR communications.

(c) ADR communications are not part of the administrative record unless otherwise agreed by the parties.

Subpart E--Finality and Review

Sec. 17.41 Final orders.

All final FAA orders regarding protests or contract disputes under this part are to be issued by the FAA Administrator or by a delegee of the Administrator.

Sec. 17.43 Judicial review.

(a) A protester or contractor may seek review of a final FAA order,
pursuant to 49 U.S.C. 46110, only after the administrative remedies of this part have been exhausted.

(b) A copy of the petition for review shall be filed with the ODRA and the FAA Chief Counsel on the date that the petition for review is filed with the appropriate circuit court of appeals.

Sec. 17.45 Conforming amendments.

The FAA shall amend pertinent provisions of the AMS, standard contract forms and clauses, and any guidance to contracting officials, so as to conform to the provisions of this part.

Sec. 17.47 Reconsideration.

The ODRA will not entertain requests for reconsideration as a routine matter, or where such requests evidence mere disagreement with a decision or restatements of previous arguments. A party seeking reconsideration must demonstrate either clear errors of fact or law in the underlying decision or previously unavailable evidence that warrants reversal or modification of the decision. In order to be considered, requests for reconsideration must be filed within ten (10) business days of the date of issuance of the public version of the subject decision or order.

Subpart F--Other Matters

Sec. 17.49 Sanctions.

If any party or its representative fails to comply with an Order or Directive of the ODRA, the ODRA may enter such orders and take such other actions as it deems necessary and in the interest of justice.

Sec. 17.51 Decorum and professional conduct.

Legal representatives are expected to conduct themselves at all times in a civil and respectful manner appropriate to an administrative forum. Additionally, counsel are expected to conduct themselves at all times in a professional manner and in accordance with all applicable rules of professional conduct.

Sec. 17.53 Orders and subpoenas for testimony and document production.

(a) Parties are encouraged to seek cooperative and voluntary production of documents and witnesses prior to requesting a subpoena or an order under this section.

(b) Upon request by a party, or on his or her own initiative, a DRO or Special Master may, for good cause shown, order a person to give testimony by deposition and to produce records. Section 46104(c) of Title 49 of the United States Code governs the conduct of depositions or document production.

(c) Upon request by a party, or on his or her own initiative, a DRO or Special Master may, for good cause shown, subpoena witnesses or records related to a hearing from any place in the United States to the designated place of a hearing.

(d) A subpoena or order under this section may be served by a United States marshal or deputy marshal, or by any other person who is not a party and not less than 18 years of age. Service upon a person
named therein shall be made by personally delivering a copy to that person and tendering the fees for one day's attendance and the mileage provided by 28 U.S.C. 1821 or other applicable law; however, where the subpoena is issued on behalf of the Product Team, money payments need not be tendered in advance of attendance. The person serving the subpoena or order shall file a declaration of service with the ODRA, executed in the form required by 28 U.S.C. 1746. The declaration of service shall be filed promptly with the ODRA, and before the date on which the person served must respond to the subpoena or order.

(e) Upon written motion by the person subpoenaed or ordered under this section, or by a party, made within ten (10) business days after service, but in any event not later than the time specified in the subpoena or order for compliance, the DRO may--
   (1) Rescind or modify the subpoena or order if it is unreasonable and oppressive or for other good cause shown, or
   (2) Require the party on whose behalf the subpoena or order was issued to advance the reasonable cost of producing documentary evidence. Where circumstances require, the DRO may act upon such a motion at any time after a copy has been served upon all parties.

(f) The party that requests the DRO to issue a subpoena or order under this section shall be responsible for the payment of fees and mileage, as required by 49 U.S.C. 46104(d), for witnesses, officers who serve the order, and the officer before whom a deposition is taken.

(g) Subpoenas and orders issued under this section may be enforced in a judicial proceeding under 49 U.S.C. 46104(b).

Sec. 17.55 Standing orders of the ODRA Director.

The Director may issue such Standing Orders as necessary for the orderly conduct of business before the ODRA.

Subpart G--Pre-Disputes

Sec. 17.57 Dispute resolution process for Pre-Disputes.

(a) All potential disputes arising under contracts or solicitations with the FAA may be resolved with the consent of the parties to the dispute under this subpart.

(b) Pre-disputes shall be filed with the ODRA pursuant to Sec. 17.59.

(c) The time limitations for the filing of Protests and Contract Disputes established in Sec. Sec. 17.15(a) and 17.27(c) will not be extended by efforts to resolve the dispute under this subpart.

Sec. 17.59 Filing a Pre-Dispute.

(a) A Pre-dispute must be in writing, affirmatively state that it is a Pre-dispute pursuant to this subpart, and shall contain:
   (1) The party's name, address, telephone and Fax numbers and the name, address, telephone and Fax numbers of the contractor's legal representative(s) (if any);
   (2) The contract or solicitation number and the name of the Contracting Officer;
   (3) A chronological statement of the facts and of the legal grounds for the party's positions regarding the dispute citing to relevant contract or solicitation provisions and documents and attaching copies
of those provisions and documents; and

(4) The signature of a duly authorized legal representative of the initiating party.

(b) Pre-disputes shall be filed at the following address: ODRA, AGC-70, Federal Aviation Administration, 800 Independence Avenue, SW., Room 323, Washington, DC 20591; Telephone: (202) 267-3290, Fax: (202) 267-3720.

(c) Upon the filing of a Pre-dispute with the ODRA, the ODRA will contact the opposing party to offer its services pursuant to Sec. 17.57. If the opposing party agrees, the ODRA will provide Pre-dispute services. If the opposing party does not agree, the ODRA Pre-dispute file will be closed and no service will be provided.

Sec.  17.61 Use of alternative dispute resolution.

(a) Only non-binding, voluntary ADR will be used to attempt to resolve a Pre-dispute pursuant to Sec. 17.37.

(b) ADR conducted under this subpart is subject to the confidentiality requirements of Sec. 17.39.

Appendix A to Part 17--Alternative Dispute Resolution (ADR)

A. The FAA dispute resolution procedures encourage the parties to protests and contract disputes to use ADR as the primary means to resolve protests and contract disputes, pursuant to the Administrative Dispute Resolution Act of 1996, Public Law 104-320, 5 U.S.C. 570-579, and Department of Transportation and FAA policies to utilize ADR to the maximum extent practicable. Under the procedures presented in this part, the ODRA encourages parties to consider ADR techniques such as case evaluation, mediation, or arbitration.

B. ADR encompasses a number of processes and techniques for resolving protests or contract disputes. The most commonly used types include:

(1) Mediation. The neutral or compensated neutral ascertains the needs and interests of both parties and facilitates discussions between or among the parties and an amicable resolution of their differences, seeking approaches to bridge the gaps between the parties'' respective positions. The neutral or compensated neutral can meet with the parties separately, conduct joint meetings with the parties'' representatives, or employ both methods in appropriate cases.

(2) Neutral Evaluation. At any stage during the ADR process, as the parties may agree, the neutral or compensated neutral will provide a candid assessment and opinion of the strengths and weaknesses of the parties'' positions as to the facts and law, so as to facilitate further discussion and resolution.

(3) Binding Arbitration. The ODRA, after consultation with the United States Department of Justice in accordance with the provisions of the Administrative Disputes Resolution Act offers true binding arbitration in cases within its jurisdiction. The ODRA's Guidance for the Use of Binding Arbitration may be found on its website at: http://www.faa.gov/go/odra.

Issued in Washington, DC, on July 25, 2011.
J. Randolph Babbitt,
Administrator.
Working Surfaces standard (29 CFR part 1910, subpart D) is designed to protect workers by making them aware of load limits of the floors of buildings, defective portable metal ladders, and the specifications of outrigger scaffolds used. For additional information, see the related 60-day preclearance notice published in the Federal Register at Vol. 74 FR 55858 on October 29, 2009. PRA documentation prepared in association with the preclearance notice is available on http://www.regulations.gov under docket number OSHA—2009–0033.

Darrin A. King, Departmental Clearance Officer.

[FR Doc. 2010–1268 Filed 1–22–10; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR
Office of the Secretary

Delegation of Authority and Assignment of Responsibility to the Administrative Review Board


Secretary’s Order 1–2010

1. Purpose. To delegate authority and assign responsibility to the Administrative Review Board, define its composition, and describe its functions.

2. Authorities. This Order is issued under the authority of 5 U.S.C. 301 (Departmental Regulations); 29 U.S.C. 551 et seq. (Establishment of Department; Secretary; Seal); Reorganization Plan No. 6 1950 (5 U.S.C. App. 1 Reorg. Plan 6 1950); and the authorities cited in Section 5 of this Order.

3. Background. The Secretary of Labor (“Secretary”) has the authority and responsibility to decide certain appeals from administrative decisions. The Secretary created the Administrative Review Board (“Board” or “ARB”) in Secretary’s Order 02–96, which delegated authority and assigned responsibilities to the Board. Secretary’s Order 01–2002 delegated this authority and assigned responsibility to the ARB, defined and expanded its composition, clarified ARB procedural authorities, and codified the location of the ARB in the Department’s organizational structure. This Order creates and designates a Vice-Chair to maintain and operate the Board during a Chair’s absence or vacancy. Additionally, this Order delegates the responsibility for the operational management of the Board and its affairs to the newly created Vice-Chair.

4. Directives Affected. Secretary’s Orders 01–2002 and 02–96 are hereby canceled.

5. Delegation of Authority and Assignment of Responsibilities. The Board is hereby delegated authority and assigned responsibility to act for the Secretary of Labor in review or on appeal of the matters listed below, including, but not limited to, the issuance of final agency decisions. The Board shall report to the Secretary of Labor through the Deputy Secretary of Labor.

a. Final decisions of the Administrator of the Wage and Hour Division or an authorized representative of the Administrator, and final decisions of Administrative Law Judges (“ALJs”), under the following:

(1) The Davis-Bacon Act, as amended (40 U.S.C. 276a et seq.); any laws now existing or which may be subsequently enacted, providing for prevailing wages determined by the Secretary of Labor in accordance with or pursuant to the Davis-Bacon Act; the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq.) (except matters pertaining to safety); the Copeland Act (40 U.S.C. 276c); Reorganization Plan No. 14 of 1950; and 29 CFR Parts 1, 3, 5, 6, Subpart C and D.

b. Final decisions of the Administrator of the Wage and Hour Division or an authorized representative of the Administrator, and from decisions of ALJ, arising under the McNamara-O’Hara Service Contract Act, as amended (41 U.S.C. 351); the Contract Work Hours and Safety Standards Act (40 U.S.C. 327 et seq.) (except matters pertaining to safety) where the contract is also subject to the McNamara-O’Hara Service Contract Act; and 29 CFR Parts 4, 5, 6, Subparts B, D, E.

c. Decisions and recommended decisions by ALJs as provided for or pursuant to the following laws and implementing regulations:

(1) Age Discrimination Act of 1975, 29 U.S.C. 6103;
(3) Clean Air Act, 42 U.S.C. 7622; 29 CFR Part 24;
(11) Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 203(m); 29 CFR Part 531, sections 531.4, 531.5;
(16) Federal Unemployment Tax Act, 26 U.S.C. 3303(b)(3), 3304(c);
(17) Federal Unemployment Tax Act (addressing agreements under the Trade Act of 1974, as amended), 26 U.S.C. 3302(c)(3); 20 CFR Part 617;
(19) Immigration and Nationality Act, as amended, 8 U.S.C. 1188(g)(2); 29 CFR Part 501, Subpart C;
(20) Immigration and Nationality Act, as amended, 8 U.S.C. 1182(n); 20 CFR Part 655, Subpart I;
(21) Immigration and Nationality Act as amended, 8 U.S.C. 1182(m)(1989); 20 CFR Part 655, Subpart E;
(22) Immigration and Nationality Act as amended, 8 U.S.C. 1182(m); 20 CFR Part 655, Subpart M;
(23) Immigration and Nationality Act as amended, 8 U.S.C. 1184(c)(14), 20 CFR Part 655, Subpart A;
(24) Immigration and Nationality Act, as amended, 8 U.S.C. 1288(c) and (d); 20 CFR Part 655, Subpart G;
(26) Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1813, 1853; 29 CFR Part 500, Subpart F;
(29) Older Americans Senior Community Service Employment Program, 42 U.S.C. 3056, 20 CFR 641.415(c)(5);
(31) Reports of alleged unlawful discharge or discrimination under Section 428 of the Black Lung Benefits Act, 30 U.S.C. 938;
41 CFR Part 60–741, Subpart B;
29 CFR Part 32;
(34) Safe Drinking Water Act, 42 U.S.C. 300j–9(i); 29 CFR Part 24;
(43) Welfare to Work Act, 20 CFR 645.8(d);
(45) Workforce Investment Act, 29 U.S.C. 2936(b); 20 CFR 667.830; 29 CFR Part 37 (see 37.110–112);
(47) Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A; and
(48) Any laws or regulations subsequently enacted or promulgated that provide for final decisions by the Secretary of Labor upon appeal or review of decisions, or recommended decisions, issued by ALJs.

The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions. The Board also shall not have jurisdiction to review decisions to deny or grant exemptions, variations, and tolerances and does not have the authority independently to take such actions. In issuing its decisions, the Board shall adhere to the rules of decision and precedent applicable under each of the laws enumerated in Sections 5(a), 5(b), and 5(c) of this Order, until and unless the Board or other authority expressly reverses such rules of decision or precedent. The Board’s authority includes the discretionary authority to review interlocutory rulings in exceptional circumstances, provided such review is not prohibited by statute.

6. Composition and Panel Configuration.

a. The Board shall consist of a maximum of five Members, one of whom the Secretary shall designate as Chair, and a second of whom the Secretary shall designate as Vice-Chair. The Members of the Board shall be appointed by the Secretary of Labor, and shall be selected upon the basis of their qualifications and competence in matters within the authority of the Board.

b. Except as provided in Section 6(c), the Board shall sit, hear cases, render decisions, and perform all related functions in panels of two or three Members, as may be assigned by the Chair, unless the Chair specifically directs that an appeal or review will be decided by the full Board.

c. Except as otherwise provided by law or duly promulgated regulation (see, e.g., 29 CFR Parts 7 and 8), if the petitioner(s) and the respondent(s) or the appellant(s) and the appellee(s) consent to disposition by a single Member, the Chair may determine that the decision shall be by a single Member. Upon an affirmative determination, the Chair of the Board shall, in his or her discretion, designate himself, herself, or any other Member of the Board to decide such an appeal under Section 8.

d. The Chair shall preside at meetings in the absence of the Chair. In the event of the vacancy of the Chair’s position, the Vice-Chair shall assume all of the Chair’s authority and shall act as Chair.

e. The Vice-Chair shall be responsible for the operational management of the Board and its affairs.

7. Terms of the Members.

a. Members of the Board shall be appointed for a term of two years or less.

b. Appointment of a Member of the Board to a term not to exceed a specified time period shall not affect the authority of the Secretary to remove, in his or her sole discretion, any Member at any time.

c. Vacancies in the membership of the Board shall not impair the authority of the remaining Member(s) to exercise all the powers and duties of the Board.

8. Voting. A petition for review may be granted upon the affirmative vote of one Member, except where otherwise provided by law or regulation. A decision in any matter, including the issuance of any procedural rules, shall be by a majority vote, except as provided in Section 6(c).

9. Location of Board Proceedings. The Board shall hold its proceedings in Washington, DC, unless for good cause the Board orders that proceedings in a particular matter be held in another location.

10. Rules of Practice and Procedure. The Board shall prescribe such rules of practice and procedure, as it deems necessary or appropriate, for the conduct of its proceedings. The rules (1) which are prescribed as of the date of this Order in 29 CFR Part 7 and Part 8 with respect to Sections 5(a) and 5(b), respectively, of this Order and (2) which apply as of the date of this Order to appeals and review described in Section 5(c) of this Order shall, until changed, govern the respective proceedings of the Board when it is deciding appeals described in Section 5 of this Order.

11. Departmental Counsel. The Solicitor of Labor shall have the responsibility for representing the Secretary, the Deputy Secretary, and other officials of the Department and the Board in any administrative or judicial proceedings involving agency decisions issued pursuant to this Order, including representing officials of the Department before the Board. In addition, the Solicitor of Labor shall have the responsibility for providing legal advice to the Secretary, the Deputy Secretary, and other officials of the Department with respect to decisions covered by this Order, as well as the implementation and administration of this Order. The Solicitor of Labor may also provide legal advice and assistance to the Chair and/or Vice-Chair of the Board, as appropriate.

12. Effective Date. This delegation of authority and assignment of responsibility is effective immediately.


Hilda L. Solis,
Secretary of Labor.

BILLING CODE 4510–23–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request for Administrative Procedures—20 CFR 601 Including Form MA–8–7; Comment Request on Extension Without Change

AGENCY: Employment and Training Administration, Labor.
The Peer Review Process in Administrative Adjudication

Robert Robinson Gales

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THE PEER REVIEW PROCESS IN ADMINISTRATIVE ADJUDICATION

Robert Robinson Gales*

I. INTRODUCTION

A topic that is becoming increasingly popular these days is the Peer Review Process. This process, according to David Kronick in his article entitled Peer Review in 18th Century Scientific Journalism,¹ can be traced to the publication of Philosophical Transactions by the Royal Society of London in 1752.² Some agencies view the process as a panacea for avoiding potentially troublesome agency decisions. However, it can be a mechanism for enhancing the quality and consistency of those decisions, of discouraging judicial innovation, or even influencing or prescribing the outcome or the bottom line of pending cases. Individual administrative adjudicators, whether they are characterized as administrative judges, administrative law judges, hearing examiners, hearing officers, magistrates, or judges, view the process with considerable suspicion. To them, the foremost purpose of this process – another pair of eyes armed with a sharp red pencil, reviewing their work – is decisional interference de-

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signed to deprive them of the degree of decisional independence essential for continued true due process.

Some administrative adjudicators contend that judicial independence can only exist when the individual adjudicator’s decision-making process and the crafting of a decision is constrained solely by their own reason, logic, knowledge of the law, literacy, and professional ethics and responsibility.

*Ex parte* input by the agency, also known as subsequent review or approval, of the decision by the agency prior to issuance is considered inappropriate control of the decision-making process presenting a false pretense of due process. The administrative adjudicator whose name or signature is affixed to the bottom of the decision, should, in the words of Justice Vincent Brogna of Massachusetts, “have the courage of your own error.”3 The zealously independent administrative adjudicator believes he or she should be free to be wrong, biased, inconsistent, illogical, inarticulate, and incomplete. Furthermore, these types of adjudicators believe that they should be free to ignore facts, law, and policy.

To these adjudicators, errors or disagreements should be resolved during an open agency appellate review process, much as it is with “real judges,” and not through, what they see as, pre-issuance, “quality control,” decisional interference. After all, “[t]here can be little doubt that the role of the modern... hearing examiner or administrative law judge... is ‘functionally comparable’ to that of a judge.”4 Chief Administrative Law Judge Edwin Felter, Jr.5 suggested that the process be taken beyond the appellate process and argued that there are other appropriate ways for agencies to deal with undesired adjudication outcomes.6 He identified the undesired outcomes as statutory or rule changes, and increased training of litigation and investigatory staff.7

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5. Director and Chief Administrative Law Judge, Colorado Division of Administrative Hearings, Denver, Colo.
7. Id.
Chief Administrative Law Judge John Hardwicke,\(^8\) in his exceptional exchange with Administrative Law Judge Ronnie H. Yoder,\(^9\) of the U.S. Department of Transportation addressed these issues, adding that:

There's no question that [issues regarding the correctness or bias of a judge] are for the reviewing appellate court. But it is awfully good to try to get it right the first time, because the appellate reviewing court gets into action only at considerable expense and delay to the system . . . . So it is entirely proper for a judge, a reviewer charged with the duty of due process, to take a look at the work of other judges . . . . My experience has been that the judges who do not like to be reviewed are the very judges who must be reviewed.\(^10\)

The agency generally perceives such a degree of judicial independence "exercising the 'freedoms' and practicing self-constraint" as encouraging a lack of adjudicator accountability or responsibility, thereby creating "renegade" adjudicators who tend to "run amok," to the potential detriment to the agency as well as the system.\(^11\)

**SHOULD THE ADMINISTRATIVE ADJUDICATOR BE FREE TO BE WRONG, BIASED, INCONSISTENT, ILLOGICAL, AND INARTICULATE? SHOULD THE ADMINISTRATIVE ADJUDICATOR BE FREE TO IGNORE FACTS, LAW, AND POLICY?**

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8. Chief Administrative Law Judge, Maryland Office of Administrative Hearings.
11. *Id.* at 86.
While both sides offer some reasonable rationales for embracing or rejecting the process, in reality, the peer review process is not entirely deleterious, depending on the specifics of the system selected by the agency. Before the positions of the "combatants" become too hardened, it appears appropriate to examine the process from a variety of perspectives, unburdened by parochial bias.

II. THE GENERIC PEER REVIEW PROCESS

Traditionally, a peer review process in some areas known, as "refereeing" has been a method of:

1. Evaluating physicians' qualifications for staff privileges at a hospital to ensure quality care of patients.
2. Monitoring the quality of medical and nursing services that patients receive.
3. Determining the merits of complaints concerning the quality of medical or nursing services furnished.
4. Evaluating teaching qualifications for university faculty appointments and retention.
5. Assessing the quality, validity, and accuracy of scientific arguments, procedures, and findings, as well as the correctness and plausibility of results for the allocation of resources, including publication in scientific journals, research funds, and recognition.

The internal monitoring and evaluation of other professional activities and performance by members of individual professional firms such as architects, engineers, and attorneys, has also commenced. Until relatively recently, however, the formal process did not extend to the decision-making of administrative adjudicators. It is now rapidly achieving agency approbation.

A. The "Peer"

1. Is the Reviewer Actually a Peer?

Before the peer review process can be meaningfully discussed, it is crucial to explore the individuals who might reasonably constitute an appropriate "peer" matrix. A common definition of the word "peer" is "a person ... of the same rank, value, quality, ability, etc.; equal; specifically, an equal before the law." Another resource defines "peer" as an "equal, match, fellow, like, equivalent, equipollent, coequal, parallel, ditto [coll.]; peer, compeer, rival." Finally, a third adds "one that is very similar to another in rank or position: doctors' competency reviewed by their peers. She is the peer of any tennis player on the professional circuit," as well as the synonyms: "coequal, colleague, compeer, equal, equivalent, fellow" to the definitions of the word "peer."

Thus, it appears that the "peer" selected to "peer review" decisions of administrative adjudicators should be of the same or equal background, grade, position, or responsibility as the deciding administrative adjudicator; in other words, a colleague. This raises several fundamental questions as to the propriety of appointing individuals serving in the following positions as a peer reviewer: a supervising, presiding, or chief judge; an agency director of policy; an agency staff attorney; any agency supervisor; any member in an agency Subject Matter Specialist division; a clerical, administrative, or staff person within the agency judiciary division; a judicial colleague in an agency Subject Matter Specialist division; or a judicial colleague in the agency judiciary division.

2. Goals of Peer Relationships.

"The goal of peer relationships is cooperation among equals." The person selected to perform "peer review" responsibilities must be free of any agenda or bias. Furthermore, for the process...
to achieve maximum effectiveness, and to improve the overall quality of the decision, the peer reviewer must provide fair, balanced, and constructive criticism and comment. To do otherwise may prove to be counterproductive.

III. THE PEER REVIEW PROCESS

For the purposes of this discussion, I have chosen to divide the peer review process into segments identified as Pre-Issuance Review and Post-Issuance Review, terms which will be further explained below.

The Pre-Issuance Review possesses the potential of interfering with decisional independence, especially if it focuses on the "bottom line." Decisional consistency within the agency essentially serves as a quality critique and refinement of those components of the decision which precede the "bottom line." It is a quality enhancer. Unfortunately, it is also an impediment to timeliness. Pre-Issuance Review is the focus of this article.

The Post-Issuance Review takes place after the decision has been issued. It suffers from few of the negative characteristics of the Pre-Issuance Review, and serves primarily as an educational tool for future improvement of fact-finding, legal research, interpretation, legal drafting, and analysis. It can also be used as a method of gauging professional performance. Post-Issuance Review will not be discussed any further in this article.

GALES' COMPONENTS OF PRE-ISSUANCE REVIEW:

Clerical Review
Quality Review
Agency Compliance Review
Agency Acceptability Review
A. Pre-Issuance Review - The Clerical Review

The initial step in the process, and the one which creates the least angst or opposition among administrative adjudicators, is what I have styled the Clerical Review. If decision drafters will concede that the self-proofreading review is difficult because the eye sees what it believes is written on the page rather than what is actually on the page, opposition to having a second pair of eyes generally diminishes. Someone other than a true "peer" may perform this form of review, the typist, clerk, or administrative assistant who reports to the decision-making administrative adjudicator. Alternatively, the function may be performed by a colleague, the true peer.

The Clerical Review consists of the rudimentary form of review, and is usually limited to the most noticeable imperfections without the peer possessing cognizance of the facts or issues of the particular case. In other words, only the decision is examined, and review of the case file is unnecessary. The use by the administrative adjudicator of generally accepted standards of grammar, syntax, punctuation, and spelling is significant, and a peer's knowledge and ability in these areas, as well as in proofreading, are beneficial.

Among the most widely read and respected writers, teachers, and commentators in this area are William Strunk, Jr. and E.B. White, Joseph M. Williams, and Richard C. Wydick. Other sig-

significant contributors are Paul A. Bateman and Michael H. Frost,\textsuperscript{20} Elizabeth A. Francis,\textsuperscript{21} and Timothy P. Terrell.\textsuperscript{22} Their individual views and presentations, whether in person or in writing, while not identical, do offer a degree of similarity, and are highly valued and recommended to anyone who is unfamiliar with them. A brief comment regarding the basics of grammar, syntax, punctuation, and spelling, is inevitable if this concept is to be sufficiently analyzed.

"The [judge] confronted with the task of writing a legal document would do well to remember what may be called the ABC of legal writing. These letters represent three indispensable requirements of brief writing in particular and legal writing in general "Accuracy, Brevity, and Clarity."\textsuperscript{23}

Joseph Williams, in his \textit{Style: Ten Lessons in Clarity and Grace}, stressed the significance of six areas of focus in writing: (1) Clarity; (2) Concision; (3) Cohesion (a sense of flow from old to new); (4) Coherence (a sense of focus); (5) Punctuation; and (6) Spelling.\textsuperscript{24} He observed the three (or was it four) rules of correct grammar. Referring to what he called "Real Rules" – the first group of his rules - he stated: "When we violate these rules, (the Rules of Standard Usage) our educated readers notice and condemn."\textsuperscript{25} He theorized that, "the most important rules include those whose violation unequivocally brand you as a writer of nonstandard English."\textsuperscript{26}

\begin{itemize}
\item[20.] Professors of Law, Southwestern University School of Law; visiting faculty member at The National Judicial College.
\item[21.] Professor, University of Nevada at Reno; visiting faculty member with The National Judicial College.
\item[22.] Professor of Law, Emory University School of Law, co-authored \textsc{Stephen V. Armstrong \& Timothy P. Terrell, Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing} (1992).
\item[23.] \textsc{Aldisert, Opinion Writing 187} (1990) (citing \textsc{Edward Domenic Re, Brief Writing and Oral Argument} (6th ed., West Publishing Co. 1983)).
\item[24.] \textsc{Williams, supra} note 18, at 19.
\item[25.] \textit{Id.} at 18.
\item[26.] \textit{Id.} at 19.
\end{itemize}
**JOSEPH WILLIAMS' REAL RULES:**

Double negatives: The car had *hardly no* systematic care.

Nonstandard verbs: They *knowed* what would happen.

Double comparatives: This way is *more quicker*.

Some ADJECTIVES for ADVERBS: They worked *real good*.

Some incorrect pronouns: *Him and me* will study it.

Some subject-verb disagreements: *We was* ready to begin.²⁷

Referring to what he called "**Folklore**" – the second group of his rules – Joseph Williams maintained that when we violate these "rules," few, if any, educated readers notice, much less condemn. So these are not rules at all, but folklore, enforced by many editors and schoolteachers, but ignored by most educated and careful writers; "that we can ignore, unless those we are writing for have the power to exact from us whatever kind of writing they like."²⁸

**JOSEPH WILLIAMS' FOLKLORE:**

Never begin a sentence with *and, but, or because*.

Use the RELATIVE PRONOUN *that*, not *which*, for restrictive clauses: use *which* for NON-RESTRICTIVE CLAUSES.

Use *fewer* with nouns that you can count, *less* with quantities you cannot.

Use of *since* and *while*.

*Disinterested* versus *uninterested.*²⁹

Referring to what he called "**Optional Rules**" – the third group of his rules – Joseph Williams stated: "These rules complement the Real Rules: Few readers notice when you violate these Optional Rules, but most readers will notice when you observe them and assume that you are signaling special formality."

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²⁷. *Id.*
²⁸. *Id.* at 18-19.
²⁹. *Id.*
³⁰. *Id.* at 24.
JOSEPH WILLIAMS' OPTIONAL RULES:

Do not split infinitives.
Use **shall** as the first person simple future, **will** for second and third person future; use **will** to mean strong intention in the first person, **shall** for second and third person.
Use **whom** as the object of a verb or preposition.
Do not end a sentence with a preposition.\(^{31}\)

Referring to what he called "**The Bêtes Noires**" – the fourth group of his rules – Joseph Williams asserted: "These are the items the columnists and commentators endlessly cite as evidence that cultivated English is an endangered species.... [T]hey have become the symbolic flags around which those most concerned with linguistic purity have apparently agreed to rally. None of these 'errors' interferes with clarity and concision...."\(^{32}\)

JOSEPH WILLIAMS' BÊTES NOIRES:

Never use **like** for **as** or **as if**.
After **different** use **from**, never **to** or **than**.
Never use **irregardless** for **regardless**.
Do not modify an absolute word such as **perfect**, **unique**, **final**, or **complete** with **very**, **more**, **quite**, and so on.\(^{33}\)

Joseph Williams also described the art of concision, or succinctness, by referring to his "**Five Principles of Economy**" in pruning wordiness.\(^{34}\) Those principles are: (1) Delete words that mean little or nothing: very and all; (2) Delete words that repeat other words: every in each and every; (3) Delete words whose meaning your reader can infer from other words: that someone offers us is from suggestion; (4) Replace a phrase with a word: listen to and think over to consider; (5) Change unnecessary negatives to affirmatives.\(^{35}\)

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31. *Id.*
32. *Id.* at 27.
33. *Id.*
34. *Id.* at 89.
35. *Id.*
JOSEPH WILLIAMS' 1ST PRINCIPLE OF ECONOMY:
Delete Meaningless Words

kind of
actually
particular
individual

JOSEPH WILLIAMS' 2ND PRINCIPLE OF ECONOMY:
Delete Doubled Words

full and complete
any and all
each and every
first and foremost
various and sundry

36. Id.
37. Id.
JOSEPH WILLIAMS’ 3RD PRINCIPLE OF ECONOMY:
Delete What Readers Infer:

**Redundant Modifiers**
- basic fundamentals
- future plans
- personal beliefs
- final outcome
- end result
- true facts
- important essentials
- past history
- eventual outcome

**Delete What Readers Infer:**

**Redundant Categories**
- period of time
- membrane area
- pink in color
- shiny in appearance
- large in size
- unusual in nature
- in a confused state

38. Id.
JOSEPH WILLIAMS' 4TH PRINCIPLE OF ECONOMY: Replace a Phrase With a Word

the reason for
for the reason that
due to the fact that
owing to the fact that
in light of the fact that
considering the fact that
on the grounds that

(use because, since, why)
despite the fact that
regardless of the fact that
notwithstanding the fact that

(use although, even though)

it is possible that
there is a chance that
it could happen that
the possibility exists for

(use may, might, can, could)39
Richard Wydick, in his *Plain English for Lawyers*, stressed the significance of word selection and arrangement, as well as punctuation, as his focus in writing. He also observed:

The moral is this: do not be too impressed by the Latin and archaic English words [lawyerisms such as *aforementioned*, *whereas*, *res gestae*, and *hereinafter*] you read in law books. Their antiquity does not make them superior. When your pen is poised to write a lawyerism, stop to see if your meaning can be expressed as well or better in a word or two of ordinary English.

He emphasized the importance of being precise and consistent in using words of authority such as *must, shall, will, may, should*, and their negative forms, such as *must not*, and *will not*. The term *shall* causes the most difficulties, with United States drafting authorities slowly coming around from the previous interpretation that it imposes a duty to do something, to the United Kingdom view that the term is simply too unreliable to use for any purpose.

40. Id.
41. WYDICK, *supra* note 19, at 63.
42. Id.
43. Id. at 66-67.
44. Id. at 67.
RICHARD WYDICK’S CAUTION TO USE WORDS OF AUTHORITY WITH CARE:

- **must** = is required to
- **must not** = is required not to; is disallowed
- **may** = has discretion to; is permitted to
- **may not** = is not permitted to; is disallowed from
- **is entitled to** = has a right to
- **should** = ought to
- **will** = an expression of obligations
- **shall** = ?

RICHARD WYDICK’S CAUTION TO AVOID SEXIST LANGUAGE:

Don’t use expressions that imply value judgments based on sex:

- a manly effort, or a member of the gentle sex

Use sex-neutral terms if you can do so without artificiality:

- workers versus workmen, reasonable person versus reasonable man. But don’t concoct artificial terms like waitpersons.

Use parallel construction when you are referring to both sexes:

- husbands and wives, not men and their wives

Don’t use a sex-based pronoun when the referent may not be of that sex: he every time you refer to a party or witness

Richard Wydick also discussed the significance of punctuation, and attorneys’ traditional distrust of it. The distrust arose from a variety of sources such as:

- [A] secretary having a monetary lapse of concentration;
- [A] fly leaving a deposit that could pass as a comma;
- [S]ome writers’ punctuation for rhythmic and elocutionary effect, and;
- [S]ome writers’ syntactical punctuation

He cautioned writers to punctuate carefully, and related the stories of cases in which the decisions had turned on punctuation:

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45. Id.
46. Id.
47. Id. at 86.
48. Id.
In United States v. Ron Pair Enterprises, the United States Supreme Court split 5-4 over the significance of a comma in a bankruptcy statute. One lower federal court had called it a "capricious" comma, and another had called it an awfully "small hook on which to hang a [substantial] change in the law." The majority of five Supreme Court Justices, with no apology, relied partly on the comma to conclude that the statute was clear on its face. The four dissenting Justices, on the other hand, tried to obliterate the comma with a blast of slogans from old cases: punctuation is minor and not controlling, punctuation is not decisive, punctuation is the most fallible standard by which to interpret a writing, and punctuation can be changed or ignored to effectuate congressional intent.49

Workshops routinely offer punctuation as a pivotal agenda theme, that is:

- [T]he six most frequently missed rules for using commas
- [H]ow to use semicolons to improve the "flow" of your sentences
- [H]ow and when to use colons
- [W]hen you should use quotation marks, and when you shouldn't (By the way, does the period go inside or outside the quotation marks?)
- [W]here to place apostrophes in words ending in "s"
- [D]ashes and parentheses (Did you know they are opposites?)

Proofreading is another crucial topic which demands attention to detail. The significance of the process is that the proofreader cannot merely "survey" writings by section or area, but must instead have an ability to check each individual keystroke along with the overall sentence. Another workshop provides basics of proofreading that includes in it's agenda: (1) How to increase your proofreading

49. Id. at 87 (citations omitted).
speed, without sacrificing accuracy; (2) Are you an editor or a proof-reader? How to determine which skill your job really requires; (3) Spotting common typographical errors; (4) How to correct writing without changing the meaning; (5) Tricks for finding duplicate words and omitted letters; (6) Overcoming monotony and staying alert when proofreading; (7) Creating distance from your work so you can catch your own errors; (8) Proofreading with a partner to increase your accuracy; and (9) An ingenious way to proofread numbers.

"The key to good writing is rewriting."^50

Judge Ruggero Aldisert, formerly Chief Judge of the United States Court of Appeals for the Third Circuit, in his book *Opinion Writing*, stressed the significance of rewriting:

If you will reread your early drafts for style, you will find intensifying adverbs that you put there to add force but which you now see merely sound like bluffing or exaggeration. You will find nouns qualified by one or more adjectives; if you think, or consult a thesaurus, you will be able to find a single noun that will do the job by itself, and do it more pungently. You will find loose, unharnessed sentences that you can rearrange and tighten.

When you think you have a passable draft, read it aloud. Or have a friend, perhaps your spouse, read it to you. As you listen, you will hear passages that sound flat or awkward. If the reader's voice falters, if he stresses the wrong word, if the rhythm breaks, the passage needs reworking. Perhaps it needs to be thrown away, in favor of a fresh start.

Finally, with much labor and perhaps a little luck, you succeed in wiping out all evidence of the sweat and toil that went into it. You have a paragraph that sounds easy and natural. For that is the aim of all the labor, to make it sound unlabored. "A picture is finished," said

50. ALDISERT, supra note 23, at 262.
the painter Whistler, "when all trace of the means used to bring about the end has disappeared."

If you succeed, you will have the gratifying feeling as you reread your work that the words you have used and your arrangement of them hit just the right note to produce the effect you want. Phrases, sentences, whole paragraphs, ring pleasingly in your mind and your ear. "This is good!" you will say, a little surprised and more than a little pleased. That is your reward, the sense of satisfaction with a job well done that is the ultimate reward of any craftsman.51

51. Id.
28 MATTERS THAT WRITERS OUGHT TO BE APPRAISED OF:

(1) Subjects and verb always has to agree.
(2) Make each pronoun agree with their antecedent.
(3) Just between you and I, case is important too.
(4) Being bad grammar, the writer will not use dangling participles.
   (a) “Finding no error, the judgment below is affirmed.”
(5) Parallel construction with coordinate conjunctions is not only an aid to clarity but also the mark of a good writer.
(6) Join clauses good, like a conjunction should
(7) Don’t write run-on sentences they are hard to read, you should punctuate.
(8) Don’t use no double negatives. Not never.
(9) Mixed metaphors are a pain in the neck and ought to be thrown out the window.
(10) A truly good writer is always especially careful to practically eliminate the too-frequent use of adverbs.
(11) In my opinion, I think that an author when he is writing somthing should not get accustomed to the habit of making use of too many redundant unnecessary words that he does not actually really need in order to put his message across to the reader of what he has written.
(12) About them sentence fragments. Sometimes all right.
(13) Try to not ever split infinitives.
(14) Its important to use your apostrophe’s correctly.
(15) Do not use a foreign term when there is an adequate English quid pro quo.
(16) If you must use a foreign term, it is de rigor to use it correctly.
(17) It behooves the writer to avoid archaic expressions.
(18) Do not use hyperbole; not one writer in a million can use it effectively.
(19) But, don’t use commas, which are not necessary.
(20) Placing a comma between subject and predicate, is not correct.
(21) Parenthetical words however should be enclosed in commas.
(22) Use a comma before nonrestrictive clauses which are a common source of difficulty.
(23) About repetition, the repetition of a word is not usually an effective kind of repetition.
(24) Consult the dictionary frequently to avoid mispelling. Correct speling is essential.
(25) In scholarly writing, don’t use contractions.
(26) Don’t abbrev. unless nec.
(27) Proofread your writing to see if you any words out.
(28) Last but not least, knock off the clichés. Avoid clichés like the plague.52

52. *Id.* at 187 (citing ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINION 195-96 (1974)).
On a personal note, I might have avoided embarrassment caused by one of my own decisions if I had exercised the opportunity to have a second pair of eyes peer review it prior to issuance. In explaining the milieu in which a party had descended during a lengthy period of illegal substance abuse, I stated, rather succinctly: "He succumbed to peer [sic] pressure." A good peer reviewer would catch such an error.

The administrative adjudicator is generally aware of the significance of the appearance of the written decision and the positive impact resulting from an effective Clerical Review. Errors in grammar, syntax, punctuation, and spelling can be routinely discovered and corrected before the decision is issued to the public, thereby avoiding potential embarrassment to the administrative adjudicator. Nevertheless, despite the positive features of the Clerical Review, there remains an intractable minority, perhaps between two and five percent of those polled in a largely unscientific survey of adjudicators who strongly oppose any form of peer review, including this rudimentary form of review. The issue is not quality or practicality, but rather the highly charged "judicial independence."

**B. Pre-Issuance Review - The Quality Review**

The second step in the process, and one which generates a moderate degree of angst or opposition among administrative adjudicators, is what I have styled the Quality Review. This form of review should be performed by a true "peer," a colleague, because it requires a magnitude of expertise and experience greater than that ordinarily possessed by the clerical reviewer.

Quality Review scrutinizes the legal accuracy and thoroughness as well as the logic of the document. To accomplish this, total immersion in the case file is needed to enable the peer reviewer to become intimately familiar with the facts, the issues presented, the applicable law and policy, the motions, the evidentiary rulings, and the conclusions. In other words, a de novo review occurs with the peer stepping into the thought processes of the administrative adjudicator and, at least on some points, substituting the peer's judgment for that of the administrative adjudicator. Regrettably, it is the same type of undertaking that adjudicators loathe when appellate bodies

endavor to substitute their judgment for that of the trial judge. At this level of review, grammar, syntax, punctuation, and spelling become secondary to legal analysis, accuracy, thoroughness, logic, and a "peer's" knowledge and ability in these areas.

"We hold these truths to be self-evident that all trial judges are created equal, that they are endowed by their office with certain unalienable rights, that among these rights are the right and the duty to make and issue decisions without mandatory preissuance review by anyone."\(^{54}\) "Judges may find that a good way to ensure clarity and sound reasoning is to have an able colleague review, edit, and criticize the decision."\(^{55}\)

The above remarks provide the discordant positions regarding the appreciation of the Peer Review Process in administrative adjudication. While the former sentiment stresses the "rights" of the adjudicator, to the apparent exclusion of other considerations, the latter emphasizes the benefits to the adjudicator and the system. Due process, while presumably a cornerstone to the entire system, is not even specifically mentioned in the controversy. An examination of the components of the Quality Review should afford greater insight into the issue.

Dean Patrick Hugg\(^ {56}\) stressed the significance of editing and critiquing in his article entitled *Professional Writing Methodology*.\(^ {57}\) He opined that the "editing and critiquing of the legal writing and analysis of others are two of the most powerful teaching tools available to supervisors."\(^ {58}\) He also wrote that because editing and critiquing are difficult supervisory functions, they should be approached

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54. Yoder & Hardwicke, *supra* note 10, at 75 (Justice Yoder was responding to the issue of mandatory quality assurance oversight and its potential conflicts with an Administrative Law Judge.).
55. *MORRELL MULLENS, MANUAL FOR ADMINISTRATIVE LAW JUDGES* 123 (3d ed. 1993).
56. Dean of Loyola Law School, New Orleans, La.
58. *Id.* at 238.
with care. He observed that constructively critiquing and editing the work of others is challenging and should not be rushed.

DEAN HUGG’S EDITING AND CRITIQUING ANALYTICAL FEATURES:

- Clarity
- Coherence
- Correct Law
- Full Facts
- Sound and Explicit Reasoning
- Conclusion

He suggested reading the entire decision twice, first looking for “thoughtful analysis and expression,” and not the easier-to-correct errors of style and form, and then looking for overall organization. He recommended that reactions be noted, clearly and readable, without cryptic remarks or vague symbols in the margins, to facilitate acceptance and minimize resentment. Additionally, he cautioned against focusing on minutiae or form errors, and exhorted concentration on thoroughness and sound reasoning.

Another important step in the editing and critiquing process was identified as the identification, characterization (which he called “statement”), and analysis of the issue.

59. Id.
60. Id. at 239.
61. Id.
62. Id.
63. Id.
64. Id. at 240.
65. Id. at 241.
DEAN HUGG'S EDITING AND CRITIQUING "ISSUE"

IDENTIFICATION CHECKLIST:

Issue clearly identified
Issue not clearly identified
Issue missed\(^{66}\)

DEAN HUGG'S EDITING AND CRITIQUING "ISSUE"

CHARACTERIZATION CHECKLIST:

Incorporates (fails to incorporate) relevant facts and law
(Not) Concise
Too broad\(^{67}\).

\(^{66}\) Id.
\(^{67}\) Id.
Judge Ruggero Aldisert, in his book *Opinion Writing*, also underscored the magnitude of issue analysis, and stressed five different areas of inquiry for appellate consideration, areas which are also applicable at the trial level. ⁶⁹

⁶⁸ *Id.*
⁶⁹ *See ALDISERT, supra note 23, at 270.*
JUDGE ALDISERT'S ANALYSIS OF ISSUES THE RATIO DECIDENDICA SYSTEMATIC DISCUSSION OF THE ISSUESPOSED:

1. Identify the flash point of the controversy and discuss only what is essential for a resolution.
   a. If the law and its application alike are plain, your opinion should be short and to the point.
   b. If the law is certain and the application alone is doubtful, be sure you have explained how the law applies to the facts. Be just as sure you did not waste the reader’s time justifying your choice of law.
   c. If neither the rule nor, a fortiori, its application is clear, discuss:
      i. (1)Choice, interpretation, and application of the legal precept, or
      ii. (2)Interpretation and application of the legal precept.

2. Is the discussion of the issue overwritten? Have you belabored the point or stated the obvious?

3. Have you discussed the critical issues presented? Have important contents been discussed or swept under the rug?

4. Is the logical development sound?
   a. Is the choice of a major premise supported by the applicable law and facts of the case?
   b. Have you followed the rules of inductive and deductive logic?
   c. Is the opinion free of formal or material fallacies?

5. What is the "gobbledygook" or "Jabberwocky" factor?

After lamenting that the "promiscuous uttering of citations has replaced the crisply stated, clean lines of legal reasoning," Judge Aldisert emphasized the proper use of citations and authorities.
JUDGE ALDISERT'S RECOMMENDED USE OF CITATIONS
AND AUTHORITIES:

(1) If it is at all possible to do so, you should confine citations to your jurisdiction. It makes no sense to refer to another court’s decision if your own court has decided the point.

(2) You should require your law clerks to check meticulously:

   1. To be certain that the law cited in the opinion is current and in the appropriate citation format.
   2. Every quotation, word for word, punctuation mark for punctuation mark.
   3. Each word and symbol for consistency in style. You should not use “percent” on one page and “%” on the next.
   4. Typographical errors and misspellings. Those who cannot spell should consult those who can. If there are none such in your court, it might be well to invest in spell-checking software.

(3) You should avoid string citations. A single citation, one that demonstrates similar or identical facts, may give you your most effective argument. String citations may be justified, however, in limited circumstances. Some judges use them effectively when a challenge has been lodged against a legal precept that in fact is settled law in the jurisdiction. Sometimes, you may make your point succinctly by citing a leading case and adding “(collecting cases).”

(4) You should never exaggerate the holding of a citation, never. . . .

(5) You should avoid stating the citation in terms of a broad principle. A tight, fact-specific rule of law will serve you better.

(6) Where there is primary reliance upon only one precedent, you should summarize the holding, the reasoning and the facts.\textsuperscript{73}

Dean Hugg underscored the proper use of authorities in a slightly different manner.\textsuperscript{74}

\textsuperscript{73} Id.
\textsuperscript{74} Hugg, supra note 57, at 241.
DEAN HUGG'S EDITING AND CRITIQUING

USE OF AUTHORITY CHECKLIST:
Precedent rules & holdings (not) adequately defined/explained
Relationship of precedent case to analysis (not) supported with
facts/holding/reasoning of cited case
Authority does not support analysis
Extraneous facts from case obscure analysis
Quotations used appropriately
Quotations: too many, too long, not integrated into analysis

1. May Judges Ethically and Professionally Confer With Other Judges Regarding Pending Matters, and if so, Should Such Conferring Take Place?

Throughout the discussion of the Pre-Issuance Review, "The Quality Review" component, I have stressed matters of quality, without any reference to the outcome or the "bottom line" of pending cases. Administrative Law Judge Edward Schoenbaum urged in his article, Managing Your Docket Effectively and Efficiently, that before arriving at the "bottom line," especially in complex cases, it would profit the administrative adjudicator to confer with a colleague in order to consider alternative viewpoints and determine if the "draft" decision is "rational, understandable, and concise."

Administrative Law Judge Ann Marshall Young, also articulated this theme in her presentation, Writing and Editing to Make Your Rationale More Rational, at the 1997 Annual Meeting and Con-
ference of the National Association of Administrative Law Judges, in Denver, Colorado:

Seek and use feedback from colleagues wisely, consider it with an open mind, and don’t discount any suggestion out of hand. Discuss areas of perceived lack of clarity, to assist you in making your decision more understandable. Remember, however, that in the end your name goes on the decision, and you must ultimately be the judge of what the final product will be, and of whether you have done all you can reasonably do to assure that your writing meets the tests of precision, efficiency, memorability, persuasiveness, clarity, and coherence, in short, whether it makes sense.  

Judges, like lawyers, will disagree at times, in matters of substance and matters of style, and the final editor of your decisions is you.  

Furthermore, The Judge’s Book advocated the use of “plain words, simple sentences, and short paragraphs. Read it over, hunting for confusing phrases and inaccurate language. Better yet, read it to somebody else, a colleague, a law clerk, or a secretary. A little time and effort now can save major embarrassment later.”

Judge Patricia Wald, in her article entitled Some Thoughts on Beginnings and Ends: Court of Appeals Review of Administrative Law Judges’ Findings and Opinions, stressed the importance of eliminating confusion or inconsistencies in drafting decisions:

ALJs thus need to lay out for us not only the critical findings, but the basis on which they


80. Id.


82. Formerly Chief Judge of the United States Court of Appeals, District of Columbia Circuit.

have made them, even spoon-feeding us the record cites for the most important findings. You need to distinguish between the primary findings based on witnesses or documents and the secondary inferences you draw from those sources. You need to draw us a map of how both your primary and secondary findings lead you to your conclusions of law, and what legal standards you are applying to the facts. . . . I know that with article III judges, one's colleagues often succeed in picking up inconsistencies and gaps in one's reasoning or clarity that may produce confusion if left uncorrected. Many remands could be avoided by some comparable internal review process at all stages of agency decisionmaking. 84

Many administrative adjudicators are assisted in the drafting of decisions by a coterie of legal support staff including decision writers, law clerks, attorneys, paralegals, secretaries, and administrative assistants. Those benefiting from such support have the luxury of the self-contained peer review team. Others, however, perhaps constituting the majority of administrative adjudicators, may have no such staff. When one individual must conduct the hearing, as well as draft and type the decision, informally conferring with a colleague or formally undergoing a peer review may be the only alternative available to assure good quality.

Some of those administrative adjudicators who are most zealous in their opposition to any form of peer review are the very ones benefiting from support staff. For example, during the preparation of his article, Professor Russell L. Weaver discovered that the Social Security Administration had 850 administrative law judges, 650 staff attorneys, and 275 paralegal specialists; with the 925 staff attorneys and paralegal specialists serving primarily as decision writers, preparing initial drafts of decisions, and performing legal research. 85 The Department of Transportation had four attorney-advisors supporting

84. Id.
the administrative law judges by conducting research and drafting decisions.\textsuperscript{86}

These commentaries endorse conferring with colleagues, law clerks, and staff assistants; a teamwork approach that stresses the goal of achievement of quality through reviewing, analyzing, reasoning, exchanging ideas, identifying alternatives, and strategizing. Though the "bottom line" is not specifically addressed, Judge Aldisert pointed out:

Obviously, choosing the most literate law clerk is not enough. It is the judge who makes decisions and then must explain them. It is the judge who holds the commission. It is the judge whose name goes on the opinion. It is the judge who must assume 100 percent of the responsibility. The law clerk is an assistant, and only an assistant. The law clerk must help in research, in the drafting process and in expressing views of the law, but, and this is a big "but," every sentence the law clerk writes in the opinion must be totally understood and endorsed by the opinion-writing judge. To delegate some writing responsibilities to a law clerk is more than proper; it is an absolute necessity in this litigious age. This delegation, however, is legitimate only to the extent that the judge accepts the submitted language, understands what has been written, agrees with it and is willing to stake a professional reputation on it.\textsuperscript{87}

One of the explosive issues stressed by opponents of collegial conferring prior to the issuance of decisions is that of \textit{ex parte} communications and the relevance of the ABA Model Code of Judicial Conduct and the ABA Model Code of Judicial Conduct for State Administrative Law Judges. Canon 3 of the ABA Model Code of Judicial Conduct states, in part:

A judge shall not initiate, permit, or consider \textit{ex parte} communications, or consider other communications made to the judge outside

\textsuperscript{86} \textit{Id.} at 92.

\textsuperscript{87} \textit{Aldisert, supra} note 23, at 8-9.
the presence of the parties concerning a pending or impending proceeding except that: . . .
(c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges. 88

The Commentary to Canon 3(A)(4) of the Code of Judicial Conduct for State Administrative Law Judges states, in part: "The proscription against [ex parte] communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except as authorized by law to the limited extent permitted."89 This does not preclude a judge from consulting with other judges or subordinate personnel whose function is to aid the judges in carrying out adjudicative responsibilities.90

Administrative Law Judge Ronnie Yoder boldly speaks out against any "mandated" pre-issuance peer review, and charged that it "is antiethical [sic] to the concept of judicial independence, and raises serious questions concerning ex parte communications."91 He noted that prior to the 1990 amendments to the ABA Model Code of Judicial Conduct, there was controversy as to whether or not judges could confer with other judges because the Code itself did not specifically say they could.92 He acknowledged that the commentary had approved such discussions, but that the Code did not.93 As a result, the Code was amended to specifically permit such discussions.94

In his exemplar entitled Administrative Law Treatise, Professor Kenneth Culp Davis discussed the issue of deciding officers' consultation with staff:

May . . . [an Administrative Law Judge (ALJ)] talk over the problem [in a specific case] with a fellow ALJ? If he has doubts on any kind of problem, may he consult with the chief ALJ?

89. MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Cannon 3(A)(4) (1999).
90. See id.
91. Yoder & Hardwicke, supra note 10, at 77.
92. Id. at 78.
93. Id.
94. Id.
If his problem is one of law, may he consult a member of the agency's legal staff? May he use an assistant to help him analyze a bulky record? May he have a supervisor or an editor look over his report and criticize it for both substance and form? The operating answer to all of these questions is, yes. 95

Judge Jack B. Weinstein 96 also addressed the issue of judges consulting with one another regarding a pending case:

Some interjudicial consultations could arguably create an appearance of partiality or could deprive the parties of their right to full participation in the case. For example, one judge's comments about attorneys, witnesses, or parties could prejudice them in another judge's courtroom. Yet, in many instances, a judge should be able to take advantage of the wealth of legal knowledge, insight, and experience possessed by his colleagues. In the easy give-and-take of my own district, we often visit each other's chambers to discuss rulings that need to be made quickly. 97

He continued:

I believe that consultation among judges on the same court is as acceptable as consultation between a judge and clerk. This view extends, in my opinion, to consultation between judges in different federal districts and between state and federal judges working on related cases . . . . Judges should be able to consult with other judges in their own courthouse. It is often helpful to hear how other judges within the same court are handling similar cases. 98

95. 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 17:8, at 302 (2d ed. 1980).
96. Senior Judge of the United States District Court for the Eastern District of New York.
98. Id. at 15-16.
The courts have not shied away from the controversy either. In *People v. Hernandez*, the sentencing judge of one case had consulted with the sentencing judge in the cited case regarding both the circumstances of the cases and the meaning of a reviewing court’s opinion. The California Court of Appeals ruled that this consultation was proper. Specifically, the court ruled that:

The record does not support, nor is it reasonably susceptible of, any inference that the trial court received any evidence from another judge for any purpose. It is evident that the determination of what is the law is not evidence but, rather, a determination of the legal principles to be applied to evidence. Thus a discussion between judges as to the law applicable in the case before one of them and even the application of the law to the facts would not fall within the prohibitions of Penal Code section 1204.

The opinion continued:

It should be noted that if procedural due process prohibited conversations between judges in the context we have discussed, then conversations between judges and law clerks would also fall within the same prohibition. More importantly, as has been observed with any of the procedures discussed herein and even with a total prohibition on communications by the judge with other judges or court personnel, the enforcer of the prohibition and the person who would determine its violation is the judge himself. There is a presumption in the honesty and integrity of our judicial officers.

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100. *Id.* at 847.
101. *Id.* at 852.
102. *Id.*
103. *Id.* at 855 (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)).
The opinion concluded:

The judicial robe is a mantle of responsibility that entrusts an individual with the most sacred obligations that our society can impose "the protection of each citizen's rights in a neutral forum. The acceptance of the judicial function does not confer greater wisdom upon the individual but only greater responsibility. In carrying out that responsibility, judges must search their own minds and hearts in making decisions but they cannot do this without the benefit of the counsel they find in their brethren" this is so for the lowest magistrate and the highest court. 104

If you agree with Judges Wald, Weinstein, Hardwicke, Schoenbaum, and Young, Professor Davis, and others, that, with certain enumerated exceptions, it is ethically and professionally appropriate to confer with colleagues regarding pending matters, then another question is raised.

2. Does the Peer Review Actively Seek to Influence the Outcome of the Pending Decision, or Does the Peer Review Confine Itself to Clerical, Quality, and Compliance Reviews?

The outcome, the "bottom line," of pending cases is the flashpoint of controversy between administrative adjudicators and the agency. If the two sides can agree that, aside from the "bottom line," quality issues are also extremely important to the agency, the administrative adjudicator, and the system itself, then there should be no opposition to a pure Quality Review. Accordingly, if errors in legal analysis, accuracy, thoroughness, and logic, can be minimized by the Quality Peer Review, there should be little opposition to those features of the Peer Review Process. Nevertheless, despite those positive features, there remains an intractable minority, perhaps between twenty and twenty-five percent of those polled in a largely unscientific survey, of adjudicators who strongly oppose this form of peer review. Once again, the issue is not quality or practicality, but rather the highly charged "judicial independence." Of course, if the Quality

104. Hernandez, 206 Cal. Rptr. at 858.
Review slops over into the "bottom line," all bets are off, and the opposition figures increase.

C. Pre-Issuance Review - The Agency Compliance Review

To some, the third step in the process, what I have styled as the Agency Compliance Review, is merely a segue from the Quality Review with "minor" distinctions. To others, the magnitude of those distinctions is appreciable. The Agency Compliance Review presents a new set of concerns for, in this instance, the peer reviewer is not serving as the colleague or subordinate of the administrative adjudicator, but rather as the agent of one of the parties to the controversy, the agency. Even in the most benign of circumstances, the agency, through the assigned peer reviewer, is encouraging its perceptions of legal accuracy, thoroughness, and logic analysis. The agency, a party to the action, is attempting to influence the selection of facts for fact-finding, and the preference of law and written policy for legal analysis.

In some more egregious situations, the agency may exhort the adoption and employment of "informal" agency policy or unwritten agency policy, agency "secret law," to mandate a particular outcome. The other party has no input, and, in fact, may not even be cognizant of the ex parte input from the agency. Thus, the Agency Compliance Review engenders a significant degree of angst or opposition among administrative adjudicators.

This form of review, likewise, should be performed by a true "peer," a colleague, because it requires a magnitude of expertise and experience which is greater than that ordinarily possessed by the clerical reviewer, but, depending on the agency, may be performed by a Subject Matter Expert, an individual with expertise in a variety of areas, which may or may not include law or administrative adjudication.

1. Peer Review Should be "Outcome Indifferent." 105

In 1998, the Louisiana Legislature adopted the central panel model of agency adjudication, but carried its structural changes be-

yond that which had been experienced elsewhere. The most surprising provision found in the Louisiana Statute that states, in part: "[I]n an adjudication commenced by the [agency], the administrative law judge shall issue the final decision or order, . . . and the agency shall have no authority to override such decision or order." On its face, this provision may not be considered so unusual, but in this instance, it is, because the agency possesses no power to mandate improved quality or consistency, and it does not have the power to review, reverse, or even appeal the decision of the administrative adjudicator.

Maryland, on the other hand, which has also adopted the central panel model of agency adjudication, offers an interesting study in Agency Compliance Review. The Maryland Office of Administrative Hearings is an independent agency within the Executive Branch of state government reporting, not to any particular agency, but directly to the Governor. Chief Administrative Law Judge, John Hardwicke, established a division within the office which deals with Quality Assurance.

Quality Assurance in Maryland is maintained through what is called a Subject Matter Specialist (SMS) Process. In that process, prior to issuing a decision, the administrative adjudicator is required to submit the draft decision to a designated SMS, an administrative law judge with expertise in the subject area(s) being dealt with. The SMS examines the draft decision using a checklist, and, if the draft decision is in the correct format, has identified and discussed the applicable law, and the law was logically applied to the facts, the decision can be released, even if the SMS disagrees with the decision's "bottom line," a significant factor in maintaining the necessary degree of judicial decisional independence.

107. Id. at § 49:992(B)(2).
THE MARYLAND SMS DECISION CHECKLIST:

1. Format is incorrect
   Statement of the Case
   (i) insufficient procedural history
   (ii) parties not identified
   (iii) authority and/or procedure for the hearing not identified
   (iv) date, place of hearing missing
   (v) representatives at hearing not identified

   Issue(s) incorrectly identified

   Summary of Evidence incomplete
   (i) complete list and identification of exhibits not provided
   (ii) description of testimony incomplete

   (1) each witness (name and title) not identified
   (2) expert witness(es) with identification of expertise (name and title) not specified

   Findings of Fact inadequate
   (i) lacks statement of standard of proof
   (ii) recitation of testimony or evidence stated as fact
   (iii) incomplete recitation of facts to support conclusions
   (iv) facts not stated in logical order
   (v) findings include conclusions of law or discussion elements

   Fails to address and rule on motions
   Discussion is inadequate
   (i) fails to cite applicable law and quote when necessary
   (ii) does not apply law to the facts
   (iii) fails to contain complete analysis of relevant law
   (iv) refers to facts which have not been included in the Findings of Fact
   (v) fails to articulate basis for determinations on credibility
   (vi) fails to describe and resolve parties' arguments

   Conclusions of Law are inadequate
   (i) fails to reach conclusions for each issue raised
   (ii) fails to contain a concise statement as to whether cited law was or was not violated
   (iii) contains discussion elements

   Order is inadequate
   (i) fails to set forth exactly what the parties are to do as a result of the decision made
   (ii) does not follow from the conclusions of law

   Appeal/Review Rights are incorrect or incomplete
   (i) cites inappropriate rights (exceptions or appeal)
   (ii) states the incorrect procedure

2. Fails to conform to File Protocol
3. Contains inappropriate language or gratuitous comments.

108. SMS Decision Checklist to All ALJs. Susan S. Fox, Director, Quality Assurance, Maryland Office of Administrative Hearings. Presentation made at the 1996 Annual Meeting and Conference of the National Association of Administrative Law Judges, Nashville, Tenn.
The Maryland Process is not, unfortunately, a universal standard for an agency compliance review. Some agencies, in their respective pre-issuance review process, concentrate to varying degrees on different aspects of the decision and the decision-making process. Some agencies are seemingly concerned with decision format and structure, some are attentive to issue consistency, others are interested in technical thoroughness, and still others are alert to specific mandatory issues. Surely there can be no reluctance, on the part of the administrative adjudicator, in complying with agency decision format and structure requirements. Likewise, technical thoroughness and adequate treatment of mandatory issues should not create an issue pertaining to judicial independence. The obstacle arises when the administrative adjudicator and the agency peer reviewer differ in their views in three significant areas: (1) the materiality of certain facts and policy; (2) the interpretation of agency policy; and, (3) retroactive application of new agency policy. It is clear that the agency generally has the last word on policy, and the agency’s expressed interpretations regarding specific policies should be controlling. But, for a minority of administrative adjudicators, “judicial independence,” they believe, permits them to dismiss agency policy.

Separate 1992 surveys of administrative law judges and those administrative adjudicators not classified as administrative law judges, conducted by the Administrative Conference of the United States (ACUS), revealed several interesting impressions.

Of the administrative law judges surveyed for all agencies, when asked: “To what extent do you conceive of your job as involving... [a]pplying agency policies and regulations,” seventy-one percent of those surveyed responded, “great extent;” twenty-six percent responded, “some extent;” and the remaining three percent responded, “not significant extent.”109 Of other administrative adjudicators surveyed for all agencies, when asked the same question, seventy-eight percent of those surveyed responded, “frequent;” seventeen percent responded, “occasionally;” and the remaining five percent responded, “rarely/never.”110 Of administrative law judges surveyed for all agencies, when asked: “In reaching your decisions,

110. Id. at 1108, response 15.d.
how important do you consider... [p]ublished agency regulations,” ninety-five percent of those surveyed responded, “very,” four percent responded, “somewhat;” and the remaining one percent responded, “not.” Of other administrative adjudicators surveyed for all agencies, when asked the same question, eighty-seven percent of those surveyed responded, “very,” thirteen percent responded, “somewhat;” and 0.4 percent responded, “not.”

One striking response should also be noted. Of other administrative adjudicators surveyed for all agencies, when asked: “In comparison to ALJs, do you think you have... [d]uty to be bound [by] agency policy,” seventeen percent of those surveyed responded, “greater;” fifty-four percent responded, “the same;” and twenty-eight percent responded, “lesser.”

Thus, it appears that administrative adjudicators differ in their view of their professional responsibilities. The survey results leave one to ponder what the minority of administrative adjudicators are doing if their responsibilities do not involve applying agency policy; or how the administrative adjudicators other than administrative law judges view their responsibilities if they are less bound by agency policy than administrative law judges.

"It is the judge’s duty to decide all cases in accordance with agency policy."114
"... the agency always has the last word on policy..."115

One additional problem arises when policy is irregularly applied or when new or unpublished interpretations of published policy appear. Professor Morell Mullens suggested stretching the envelope when dealing with questionable agency policy.116 He cautioned:

111. Id. at 1073, response 16.b.
112. Id.
113. Id. at 1115, response 28.f.
115. Wald, supra note 83, at 666 (citing ITT Cont'l Baking Co. v. FTC, 532 F.2d 207, 219 (2d Cir. 1976)).
Although the judge should follow agency policy and the law, the judge’s decision may be the last opportunity to call the attention of the agency (or the courts if the agency denies review) to an important problem of law or policy. A judge who is wrong can easily be reversed, but a judge who is correct may prevent substantial inequity and injustice. Such action cannot be taken lightly but must reflect long and careful research and analysis. The judge’s facts and reasoning, based on the record and the law, should be so clearly set forth that the agency will know exactly what has been done and why.\footnote{Id. at 108.}

The reverse side of the exhortation is that when there are challenges made to clearly established agency policy, or new unpublished interpretations to published agency policy, the matter should normally be noted, but discussion and analysis of the disputed policy avoided, in a manner similar to the handling of challenges based upon constitutional grounds as matters not appropriate for discussion in the particular forum by the administrative adjudicator. The difficulty lies in the issue of what constitutes “policy” or “the agency rule,” on the one hand, and what is the “adjudication” on a factual record, on the other.


When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . If, however, the court determines Congress has not di-
rectly addressed the precise question at issue, the court does not simply impose its own construction on the statute, . . . as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.\textsuperscript{119}

The Court continued:

We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, . . . and the principle of deference to administrative interpretations has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.\textsuperscript{120}

\begin{quote}
"[I]f the legislative's intent is not plain to begin with, then the agency gets to decide what that intent was."\textsuperscript{121}
\end{quote}

Deference to agency policy, properly adopted or enacted agency policy, is appropriate. Obedience to improperly or illegally adopted agency policy, or newly revised contrary interpretations to long-standing interpretations of properly adopted or enacted agency policy, are inappropriate and should be avoided.

There is another potential conflict area regarding the agency compliance review, and it occurs when the agency seeks to influence consistency with earlier agency decisions. This becomes particularly

\begin{flushleft}\textsuperscript{119}. Id. at 842-43. \\
\textsuperscript{120}. Id. at 844. \\
\textsuperscript{121}. Justice W. Michael Gillette, \textit{Administrative Law Judges, Judicial Independence, and Judicial Review: Qui Custodiet Ipsos Custodes?}, 20 J.NAALJ 95, 102 (Spring 2000).\end{flushleft}
awkward when the decisions offered as "precedents" have, according to agency rules, regulations, and policies, no "precedential" value whatsoever, and merely predated the issuance of the decision undergoing scrutiny. Whether or not "non-precedential" decisions are required to be consistent is unclear. However, in general, agency consistency is important, and any departure from prior policies and standards accompanying a "reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored."  

The most pivotal issue raised by the Agency Compliance Review, and, in fact, the next question, is what happens if the peer reviewer determines that the decision fails to comply with minimum standards, for example: incorrect format; poorly defined issues; inaccurate or inadequate findings of fact; incorrect or incomplete policy; inadequate discussion; incomplete or inadequate conclusions of law; issues are not adequately disposed of; or the decision fails to adhere to clear legal precedent, and the administrative adjudicator refuses to make suggested modifications and corrections, either because he or she disagrees on substantive grounds, or based on the issue of judicial independence?

2. What Happens if the Peer Reviewer Determines That the Decision Fails to Comply With Minimum Agency Standards?

We come full circle with the question as to what happens if the peer reviewer determines that the decision fails to comply with minimum agency standards. Some administrative adjudicators will happily accept constructive criticism to improve their work product. Others, however, will resist any suggested changes. So long as the "bottom line" is not addressed, reasonable minds may differ on some subjective issues, such as discussions and conclusions, but there should be little, if any, dispute pertaining to format, issues, facts, or policy.

Continuing unresolved disputes may be resolved by including another colleague in the discussions. If the dispute remains unresolved, the options are few: (1) the decision can be released as even-

ually agreed, with the understanding that the administrative adjudicator’s accountability and responsibility may be revisited should subsequent events prove the peer reviewer(s) assessments correct; (2) the decision can be withheld by the agency for some subsequent unspecified agency action; or (3) the decision can be reversed by the agency head. In those agencies where the administrative adjudicator issues final decisions, the eventual result may be the withdrawal of the power to do so, with the implementation of a process establishing recommended decisions.

Despite the positive features of the Agency Compliance Review, the presence of the potential areas of dispute generates a sizable majority, perhaps approaching seventy-five percent of those polled in a largely unscientific survey, of adjudicators which strongly opposes this form of peer review. The issue is not quality or practicality, but rather the highly charged “judicial independence.” Of course, if the Agency Compliance Review approaches the “bottom line,” the opposition figures increase as the form of review develops into the Agency Acceptability Review.

D. Pre-Issuance Review - The Agency Acceptability Review

To many, the fourth step in the process, what I have styled as the Agency Acceptability Review, is merely the bold usurpation of decision-making by the agency, accompanied by the resultant loss of any decisional independence by the administrative adjudicator. To others, especially the agencies, it serves the legitimate purpose of ensuring high decisional quality and consistency. As with the Agency Compliance Review, in this instance, the peer reviewer is not serving as the colleague or subordinate of the administrative adjudicator, but rather as the agent of one of the parties to the controversy, the agency.

Despite justifying agency actions under the Agency Acceptability Review, higher decisional quality and consistency, the agency, through the assigned peer reviewer, is not merely encouraging its perceptions of legal accuracy, thoroughness, and logic analysis, or attempting to influence the selection of facts, for fact finding, and the preference of law and written policy, for legal analysis. Instead, it is mandating a particular outcome. This does not constitute ex parte input from the agency, but rather direct decisional imposition. Thus,
the Agency Acceptability Review engenders a firestorm of angst or opposition among administrative adjudicators.

This form of review can be performed by anyone because it requires no expertise or experience, but rather a goal of decisional consistency which is agency-friendly.

A brief study of the Social Security Administration’s attempts to impose such a process can be very instructive. A “targeting” process called the “Bellmon Review Program,” was instituted by the Social Security Administration to implement a section of the Social Security Disability Amendments of 1980 referred to as the “Bellmon Amendment.” The “Bellmon Amendment” measures designed to “improve decisional quality and accuracy,” was a manifold approach to a perceived problem which directed the Secretary of Health and Human Services to review decisions of administrative law judges, on her own motion, essentially because of concern over the high rate of reversals, viewed as decisions unfavorable to the agency, and the variances among administrative law judges. The program commenced in October 1981.

According to the then-Associate Commissioner of the Social Security Administration, the Bellmon Review was instituted, in part, because of “Congressional concern about high allowance rates.” He justified reviewing the decisions unfavorable to the agency, in part, because “studies had shown that decisions in this group would be the most likely to contain errors.”

As initially contemplated by the Bellmon Review process, individual administrative law judge’s decisions would be reviewed on the basis of the judge’s prior decisions. In other words, those administrative law judges whose earlier decisions were unfavorable to the agency at least seventy percent of the time were to be subjected to 100 percent review. Those whose decisions were more favorable to the agency would be reviewed on lower scales of seventy-five per-

125. Id.
126. Id.
127. Id.
128. Id.
cent, fifty percent, and twenty-five percent, respectively.\textsuperscript{129} Administrative law judges whose decisions were favorable, viewed as “accurate,” ninety-five percent of the time, would be removed from review.\textsuperscript{130} The legality of this “targeting” process was questioned by the agency’s own legal staff as having a “possible chilling effect on the decisional independence of targeted ALJs,” but the legal guidance was rejected.\textsuperscript{131} The agency’s intentions and expectations were unmistakable: AALJ allowance rates were “untenable,”\textsuperscript{132} and targeting would lead to “some reduction in allowance rates.”\textsuperscript{133}

The program had its desired “chilling” effect: the decline in allowance rates was viewed as “good news” to the agency.\textsuperscript{134}

A separate segment of the Bellmon Review described, but never implemented, provided for individualized “feedback and counseling” which some administrative law judges feared would serve to “direct high allowance ALJs how to develop, hear and decide cases.”\textsuperscript{135}

The next step of the Bellmon Review was “if, after further review an ALJ’s performance had not improved, other steps would be considered.”\textsuperscript{136} This provision was sensed as a warning that unreformed or unsuccessfully re-indoctrinated administrative law judges would be targeted for adverse personnel action, which could include dismissal.\textsuperscript{137}

Although described by the agency as a process separate from the Bellmon Review, some administrative law judges at a particularly troublesome office, one which had high allowance rates, viewed by the agency as having “significant deficiencies in the quality and accuracy” of decisions, were given training by senior agency personnel.\textsuperscript{138} The expressed purpose for the training was to “correct decisions and

\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 1136.
\textsuperscript{132} Id. at 1137.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1135.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 1137.
not to pressure [the administrative law judges] to reduce allowance rates.” The court disagreed:

The worthiness of defendants' stated goal of improving the quality and accuracy of decisions notwithstanding, targeting high allowance ALJs for review, counseling and possible disciplinary action was of dubious legality. . . . [T]he evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions in the name of accuracy. While there was no evidence that an ALJ consciously succumbed to such pressure, in close cases, and, in particular, where the determination of disability may have been based largely on subjective factors, as a matter of common sense, that pressure may have intruded upon the fact-finding process and may have influenced some outcomes.

The court concluded:

[D]efendants' unremitting focus on allowance rates in the individual ALJ portion of the Bellmon Review Program created an untenable atmosphere of tension and unfairness which violated the spirit of the APA, if no specific provision thereof. Defendants' insensitivity to that degree of decisional independence the APA affords to administrative law judges and the injudicious use of phrases such as "targeting," "goals" and "behavior modification" could have tended to corrupt the ability of administrative law judges to exercise that independence in the vital cases that they decide.

Both sides won segments of their dispute. The Bellmon Review Program was altered to such a degree that most of the objectionable features thereof were abolished, and those changes enabled

139. Id. at 1138.
140. Id. at 1141-42.
141. Id. at 1143.
the court to obviate the need for injunctive relief, permitting the agency to prevail, at that time. For the next few years all was quiet, until September 1997, when a newly revised form of the Bellmon Review Program was proposed and public comment solicited.142 But, that is the subject of another presentation.

It is unfortunate that agencies and others choose to deprecate administrative adjudicators for perceived past decisional transgressions, the issuance of decisions deemed to be contrary to the agency’s desires and interests, in an obvious effort to influence the “bottom line” of pending cases. There is a potential irrevocable “chilling” effect unleashed when a decision is unfairly disparaged, but the criticism extends beyond an assault upon the decision and ends up as an attack upon the judge and the system. In response to one such continuing media and political barrage, the chief judge and three of his predecessors of the Court of Appeals for the Second Circuit143 wrote a public release:

We have no quarrel with criticism of any decision rendered by any judge. Informed comment and disagreement from lawyers, academicians, and public officials have been hallmarks of the American legal tradition.

But there is an important line between legitimate criticism of a decision and illegitimate attack upon a judge. Criticism of a decision can illuminate issues and sometimes point the way toward better decisions. Attacks on a judge risk inhibition of all judges as they conscientiously endeavor to discharge their constitutional responsibilities.144

Despite agency professed concern for ensuring high decisional quality and consistency, Agency Acceptability Review has no place in a system which purports to offer due process and fundamental fairness. The overwhelming majority of those polled in a largely

unscientific survey, perhaps as many as ninety-five percent, strongly oppose this form of peer review. The issue is not quality or practicality, but rather the highly charged "judicial independence." The agency's power to usurp the decision-making process, accompanied by the resultant loss of any decisional independence by the administrative adjudicator, perhaps substituting "recommended decisions" for final ones, serves only to maintain the façade of due process and undermines the entire system. If the agency wishes to retain the power to issue its own decisions, in most cases, it has the power to do so. However, if the agency wishes to project the appearance of formality and due process, it should permit the peer review process to end with the Agency Compliance Review.

IV. CONCLUSION

It should be the combined goal of all involved in the administrative adjudication process that errors in grammar, syntax, punctuation, spelling, legal analysis, accuracy, thoroughness, logic, format, issues, facts, and policy, be minimized to the degree that they become invisible to the discussion as to the wisdom of the overall "bottom line." As argued by agencies, quality and consistency may be enhanced when these variables are routinely accomplished. However, while consistency may be an overriding objective, generally, it must be remembered that each decision must stand on its own merits and facts, and that attempts by anyone to mandate universal obedience to a vague notion of consistency, meaning many things to many people, will necessarily fail. Is due process being conducted when the decisions are either all favorable or all unfavorable to the agency? The answer is not the visceral reaction, "no," but rather, "maybe," depending on an analysis of the circumstances of the individual case(s).

Administrative adjudicators and their respective agencies are at odds over how to handle authority, accountability, responsibility, quality, and consistency through the peer review process. When the intractable positions of both sides come to a mutual understanding as to the genuine purposes of the adjudicative process and the value of the peer review process, the system will benefit. In truth, the system was established to furnish individuals a means of redress regarding governmental actions. The agencies acquiesce with the process and aggressively solicit agency-favorable decisions and accommodating administrative adjudicators. When the decisions become less than
desirable, the agency may criticize and demean the administrative adjudicator by characterizing the decisions as being of poor quality and inconsistent, and the adjudicator as a substandard performer. On the other side, the administrative adjudicator shrouds himself or herself in the robe and persona of the “real judge,” and generally assumes the responsibilities of the position. Due process is the acknowledged function, and fundamental fairness is the declared objective. To the dedicated and responsible administrative adjudicator, the agency is merely one of the parties to the dispute, and thus, accrues no particular advantage in the process. In reality, this impression is legitimate and commendable.