

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	
PHILIP J. MARGIOTTA,)	PACA APP Docket No. 03-0007
)	
Petitioner)	Decision and Order

Decision Summary

[1] I decide that Petitioner Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc., as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999. As the manager of Trombetta’s Hunts Point Terminal Market facility, while he was an officer of Trombetta (the Secretary), Philip J. Margiotta was “actively involved” in Trombetta’s activities, especially Trombetta’s Hunts Point Terminal Market activities. There is no evidence of wrongdoing by Philip J. Margiotta; yet by running the Hunts Point Terminal Market portion of the company, he was overwhelmingly “actively involved”, within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta’s PACA violations.¹ To be found to be “responsibly connected” or to be found to be “actively involved”, wrongdoing is not required.

¹ Trombetta, through employee Joseph (Joe Joe) Auricchio, violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Procedural History

[2] Petitioner Philip J. Margiotta (herein frequently Philip J. Margiotta), filed his petition for review on March 21, 2003. The agency record was filed on April 9, 2003.

[3] Philip J. Margiotta is represented by Mark C.H. Mandell, Esq., of Annandale, New Jersey.

[4] Respondent, Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, United States Department of Agriculture (herein frequently PACA), was represented first by David A. Richman, Esq., and then by Andrew Y. Stanton, Esq., with the Trade Practices Division, Office of the General Counsel, United States Department of Agriculture.

[5] This case was consolidated with the disciplinary action² for the hearing, and all the evidence was available for each case. The nine-day hearing was held before me, Jill S. Clifton, in New York, New York, on July 14-18, July 21-23, and August 21, 2003. Witnesses testified and exhibits were admitted into evidence. The transcript is referred to as “Tr.” Philip J. Margiotta’s exhibits are designated by “RX” (based on the disciplinary action). PACA’s exhibits are designated by “CX” and “AX” (based on the disciplinary action); and the Certified Agency Record exhibits are designated by “CARX”.

[6] Philip J. Margiotta (and Trombetta) submitted 22 exhibits, RX A through RX V, and a DVD submitted post-hearing.

[7] Philip J. Margiotta (and Trombetta) called 11 witnesses (Philip James (“Phil”) Margiotta, also known as Philip J. Margiotta (born in 1949), Tr. 498-551; 574-851, 996-1163, 1338-1381, 1390-1408, 1535-1545; Peter Silverstein, Tr. 872-924; Max Montalvo Tr. 932-974; Frank J.

² *In re M. Trombetta and Sons, Inc.*, 64 Agric. Dec. _____ (2005) (slip opinion, September 27, 2005).

Falletta, Tr. 1199-1221; Matthew John (“Matt”) Andras, Tr. 1221-1265; Harlow E. (“H.E.”) Woodward III, Tr. 1266-1300; Stephen Trombetta, Tr. 1311-1336, Martin A. (“Marty”) Shankman, Tr. 1412-1423; Patricia Baptiste, Tr. 1424-1433; Philip Harry Lucks, Tr. 1616-1638; and Philip Joseph (“Junior”) Margiotta, also known as P.J. Margiotta (born in 1924), Tr. 575, 1651-1681).

[8] PACA (and AMS) submitted the Certified Agency Record exhibits which are known as CARX, and 13 additional exhibits, CX 1 through CX 10; AX 1, AX 2, and AX 3.

[9] PACA (and AMS) called three witnesses (Joan Marie Colson, Tr. 25-127; William J. Cashin, Tr. 127-160, 172-358; and John Aloysius Koller, Tr. 359-371, 378-495, 1441-1532, 1546-1596, 1683-1725).

[10] All of the parties’ exhibits, and also ALJX 1 and ALJX 2 (*see* Tr. 1544-45), were admitted into evidence.

[11] The proposed transcript corrections, filed April 5, 2004, and April 12, 2004, were accepted.

[12] Philip J. Margiotta’s Proposed Findings of Fact, Conclusions of Law, and Order, with opening brief was timely filed on October 21, 2005; his reply was timely filed on November 30, 2005.

[13] PACA’s Proposed Findings of Fact, Conclusions, and Order with response brief was timely filed on November 14, 2005.

Findings of Fact

[14] The testimony of each witness was credible.

[15] Philip J. Margiotta, full name Philip James (“Phil”) Margiotta, is an individual who was born on August 13, 1949, and whose mailing address was 41 Bellain Avenue, Harrison, New York 10528. Tr. 498-500, 1607-08, 1684; CARX 3; AX 1.

[16] Philip J. Margiotta is fifth generation in the business known as M. Trombetta and Sons, Inc. (herein frequently referred to as Trombetta), tracing its roots to the 1890s. Tr. 500.

[17] Trombetta was owned 60% by Philip J. Margiotta's father, Philip Joseph ("Junior") Margiotta, also known as P.J. Margiotta; and 40% by Stephen ("Steve") Trombetta, at all times material herein and particularly in 1999. Tr. 1676-77.

[18] Trombetta's PACA license records covering 1998 through 2003 show Philip J. Margiotta as secretary; P.J. Margiotta (the father of Philip J. Margiotta (Tr. at 5)), as president, treasurer and 60 percent shareholder; and Stephen Trombetta as vice president and 40 percent shareholder. CARX 1.

[19] Philip J. Margiotta was not an owner of Trombetta, but he was an employee of Trombetta and an officer, the Secretary, of Trombetta. Tr. 499, 1338, 1341-1342.

[20] Philip J. Margiotta, during April through July 1999, was the manager of Trombetta's Hunts Point Terminal Market facility, while he was the Secretary of Trombetta. Tr. 499.

[21] Philip J. Margiotta ran Trombetta's business at the Hunts Point Terminal Market³ in the Bronx, New York, New York, and he had worked in the business for more than 30 years. Tr. 499, 1340, 1342, 1344.

[22] Trombetta's managers at all times material herein and particularly in 1999 were Philip J. Margiotta at the Hunts Point Terminal Market, and Stephen ("Steve") Trombetta at the Bronx Terminal Market. Tr. 502, 1677.

[23] P.J. Margiotta retired from active participation in Trombetta in 1993. He had not drawn a salary for more than ten years, at the time of the hearing. Tr. 1653, 1672, 1680.

³ Trombetta also owns a facility at the Bronx Terminal Market, which is approximately 10 miles from Trombetta's facility at the Hunts Point Terminal Market. Tr. 1312.

[24] Stephen Trombetta had visited Trombetta's Hunts Point Terminal Market facility only about once during the 10 years prior to the hearing. Tr. 1312.

[25] Trombetta's Hunts Point Terminal Market facility is where Trombetta, through its employee Joseph (Joe Joe) Auricchio, paid unlawful bribes and gratuities to William Cashin, a United States Department of Agriculture produce inspector, during April 1999 through July 1999. *In re M. Trombetta & Sons, Inc.*, 64 Agric. Dec. ____ (2005) (slip opinion, PACA Docket No. D-02-0025, September 27, 2005).

[26] Joseph (Joe Joe) Auricchio was acting in the scope of his employment as Trombetta's produce salesperson when he paid the unlawful bribes and gratuities, and Auricchio's willful violations of the PACA are deemed to be Trombetta's willful violations of the PACA. *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 756-57 (2001), *aff'd* 342 F.3d 584 (6th Cir. 2003).

[27] Trombetta was responsible under the PACA, notwithstanding any ignorance of the employee's actions, for the conduct of its employee who paid the unlawful bribes and gratuities to the United States Department of Agriculture produce inspector in connection with the federal inspections. *Post & Taback, Inc. v. Department of Agric.*, 123 Fed. Appx. 406 (D.C. Cir. 2005).

[28] Philip J. Margiotta oversaw Trombetta; he generally ran the firm. Tr. 499, 1340, 1342.

[29] Philip J. Margiotta bought produce on behalf of Trombetta, negotiated with the shippers, managed the transactions with the shippers, settled with the shippers, and sometimes arranged transportation. Tr. 1340, 1342, 1369.

[30] In carrying out his oversight responsibilities at Trombetta's Hunts Point Terminal Market facility, Philip J. Margiotta observed the merchandise as it was received from shippers and sold to customers. Tr. at 1342-43.

[31] Philip J. Margiotta ensured that the store was clean and neat and that produce was not lost due to negligence. Tr. 1342-43.

[32] Philip J. Margiotta observed the work of the foreman (who watches the porters) and the other employees. Philip J. Margiotta was responsible for addressing any union problems. Philip J. Margiotta supervised the office help, to ensure that Trombetta's purchases and sales were properly recorded. Tr. 1343-45.

[33] Philip J. Margiotta supervised the sales staff, advised them what product was coming into Trombetta, and what Philip J. Margiotta thought the market would be for the various commodities handled by Trombetta. Tr. 1344.

[34] Philip J. Margiotta decided which shippers to pay and, after consultation with the shippers, how much to pay them. Tr. 1369-70.

[35] Philip J. Margiotta hired all the sales help (Tr. 1346), including Joseph (Joe Joe) Auricchio. Tr. 505.

[36] Joseph (Joe Joe) Auricchio was one of Trombetta's employees monitored by Philip J. Margiotta. Tr. 508, 529-30, 550.

[37] Philip J. Margiotta failed to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[38] Philip J. Margiotta worked through the union to terminate two employees of Trombetta who had engaged in theft. Tr. 1344-45. Joseph (Joe Joe) Auricchio was also terminated. Tr. 1152.

[39] Philip J. Margiotta signed, as corporate secretary, Trombetta's PACA license renewal applications for 2001-2002 (CARX 1, p. 7), 2000-2001 (CARX 1, p. 11), 1999-2000 (CARX 1, p. 15), 1998-1999 (CARX 1, p. 19), and 1997-1998 (CARX 1, p. 23). See also Tr. 1362-1363.

[40] Philip J. Margiotta was authorized by Trombetta to sign checks and was on the signature card of Trombetta's bank. Tr. 1338-39; CARX 5, p. 3. Philip J. Margiotta signed most of the checks generated by Trombetta's Hunts Point Terminal Market facility. Tr. 1369; CARX 8.

[41] Among Trombetta's checks signed by Philip J. Margiotta were checks in payment for Trombetta's annual PACA license renewals, covering the years 1997-1998 through 2001-2002. CARX 1, pp. 8, 12, 16, 20, 24.

[42] Philip J. Margiotta signed two renewal applications for Trombetta's New York State Farm Products Dealer License, identifying himself as secretary of Trombetta, on April 8, 1998 and March 22, 1999, covering the periods May 1, 1998 through April 30, 1999, and May 1, 1999 through April 30, 2000, respectively. CARX 6 at pp. 1-2 and 3-4.

[43] The April 1999 issue of The Blue Book identified Philip J. Margiotta as supervisor of sales for Trombetta. CARX 9.

Discussion

[44] This Discussion, paragraphs [44] through [57], focuses on why I determine that Philip J. Margiotta was "actively involved" in the activities that led to Trombetta's failure to perform its duty to maintain fair trade practices required by the PACA. 7 U.S.C. § 499b(4).

[45] The standard for determining whether a person is actively involved in the activities resulting in a violation of the PACA is set forth in *In re Michael Norinsberg*, 58 Agric. Dec. 604 (1999) (Decision and Order on Remand), as follows:

A petitioner who participates in activities resulting in a violation of the PACA is actively involved in those activities, unless the petitioner demonstrates by a preponderance of the evidence that his or her participation was limited to the performance of ministerial functions only. Thus, if a petitioner demonstrates by a preponderance of the evidence that he or she did not exercise judgment, discretion, or control with respect to the activities that resulted in a violation of the PACA, the petitioner would not be found to have been actively involved in the activities that

resulted in a violation of the PACA and would meet the first prong of the responsibly connected test.

58 Agric. Dec. at 610-11.

[46] Philip J. Margiotta wrote to PACA on September 25, 2002:

Please note in your file that I respectfully deny that I was responsibly connected with M. Trombetta & Sons, Inc., in connection with the alleged violations alleged in the Complaint served with your letter to me regarding the above matter. Any acts forming the basis of that complaint were done or not done by a former employee of my company who had no authority to do so and of which I had neither knowledge nor the opportunity to control or stop.

I therefore dispute your Branch's initial determination and ask for a formal hearing as provided by law.

CARX 3.

[47] Trombetta's former employee, Joseph (Joe Joe) Auricchio, apparently acted alone in paying the unlawful bribes and gratuities.⁴ In 1999, he was earning between \$800 and \$900 per week as a salesperson for Trombetta; he did not earn any commissions as part of his salary; and he would receive bonuses equivalent to one or two weeks pay at Christmas. Tr. 532, 1131. On an income of \$40,000 to \$50,000 per year (Tr. 1138), did Joseph (Joe Joe) Auricchio pay, out of his own pocket, the unlawful bribes and gratuities amounting to \$7,000 to \$10,000 per year (ALJX 1, p. 2)? He could have. As Philip J. Margiotta explained, keeping his salesperson job may have been worth "paying off for," to Joseph (Joe Joe) Auricchio. Tr. 1136-1138. The salesperson job was a union job, with retirement benefits, and medical benefits, including dental. Joseph (Joe Joe) Auricchio was nearing retirement, and probably did not want to go back to trucking. The status of the salesperson job was a step upward from being a trucker or porter. Tr. 1137-1138.

⁴ On June 21, 2000, Joseph Auricchio was found to have paid approximately \$29,100 in cash bribes to USDA produce inspectors at the Hunts Point Terminal Market between 1996 and September 1999 (the only time period for which data was available), in connection with inspections of fresh fruit and vegetables at M. Trombetta & Sons, Inc. ALJX 1, p. 2; see A. Offense Level, including footnote.

[48] Joseph (Joe Joe) Auricchio worked in a partially glass sales booth (a portable room made out of metal and glass), located in the downstairs section of Trombetta's Hunts Point Terminal Market facility. Tr. 509, 515, 1126, 1150, 1345, 1348. Mr. Auricchio was able to pay unlawful bribes and gratuities to USDA produce inspectors without being observed. Tr. 137-138, 538-39, 543, 549-50, 1114-1119, 1120-1131.

[49] A determination from the disciplinary case follows.

Considering all of the evidence, Respondent (Trombetta), but for the actions of Joseph Auricchio, appears to have been trustworthy, honest, and fair-dealing. For the purpose of this Decision and Order, I find no culpability on the part of anyone within Respondent other than Joseph Auricchio. Of particular significance is that United States Department of Agriculture produce inspector William J. Cashin, who had been collecting bribes at Hunts Point Terminal Market for about 20 years and had been inspecting at Respondent's place of business for about 20 years, collected no bribes from Respondent until Joseph Auricchio started to work as a salesperson for Respondent in 1997. Also significant is that Mr. Cashin had already begun a bribe-taking relationship with Joseph Auricchio at another location at Hunts Point Terminal Market where Mr. Auricchio worked before he started working for Respondent. Nevertheless, I hold Respondent responsible for the actions of Joseph Auricchio, just as if Respondent itself had performed each of Mr. Auricchio's acts.

In re M. Trombetta & Sons, Inc., 64 Agric. Dec. _____ (2005) (slip opinion, September 27, 2005).

[50] There is no evidence that Philip J. Margiotta knew of or contributed to the payment of unlawful bribes and gratuities by Trombetta's employee Joseph (Joe Joe) Auricchio. Tr. 1152-1153, 1358, 1360. Philip J. Margiotta did fail to prevent Trombetta's employee Joseph (Joe Joe) Auricchio from paying unlawful bribes and gratuities. Tr. 525-27, 1358.

[51] The "activities that resulted in a violation of the PACA" are not limited to Joseph (Joe Joe) Auricchio's activities of wrongdoing. Being actively involved in innocent activities for Trombetta suffices. I find Philip J. Margiotta to have been actively involved during April through July 1999 in the "activities that resulted in a violation of the PACA", based upon his being Trombetta's Secretary

and his having full management responsibility for Trombetta's Hunts Point Terminal Market facility.

[52] Philip J. Margiotta argues that "there was nothing that Mr. Margiotta could do to discover Auricchio's actions and thus be chargeable with preventing or stopping them." Reply Brief, p. 6. I disagree. I find that Philip J. Margiotta's testimony establishes that he was not proactive in preventing illegal activities of the type engaged in by Mr. Auricchio, until after Mr. Auricchio's unlawful bribes and gratuities came to light. Tr. 520-27, 1161, 1346-58. Philip J. Margiotta did instruct Mr. Auricchio, once, probably in about 1995, after Mr. Auricchio told him he could probably get the guy (USDA) over here (to inspect a shipment): "Let me explain something to you very certainly; we've been here since it opened and we've been in business for a very long time; we do not, do not break the rules so just forget about it." Tr. 521. Explaining that Mr. Auricchio was "making an inference that he could pay them" . . . "to get them to come sooner," Philip J. Margiotta testified that he told Mr. Auricchio: "We never did that kind of stuff nor would we allow anyone that worked for us to do that sort of thing. And that's not only that. That if a truck comes in and there's 99 packages on it and you take off 102 and I find out that manifest better be changed to 102. I don't want more. I don't want less. And I don't pay anybody, period. and if you don't like it you can't work here. And that was the end of the conversation. Tr. 524-25.

[53] My determination does not, however, depend on whether Philip J. Margiotta should have done something more. It is sufficient under the PACA that Philip J. Margiotta was actively involved in Trombetta's activities that resulted in a violation of the PACA. Managing Trombetta's Hunts Point Terminal Market facility certainly entailed active involvement.

[54] Philip J. Margiotta was unable to establish the first of two prongs required to avoid being found responsibly connected. He failed to prove by a preponderance of the evidence that he was not

actively involved in Trombetta and Sons, Inc.'s failures, during April through July 1999, to perform its duty to maintain fair trade practices required by the PACA.

[55] During April through July 1999, Philip J. Margiotta was Trombetta's Secretary. An officer need not control a company to be found responsibly connected. Here, however, Philip J. Margiotta ran the company. Every officer of a corporation is held to be responsibly connected, unless he can prove that he should be excepted (by proving both prongs of the two prong test).

[56] Philip J. Margiotta cannot prove the first prong of the *Norinsberg* exception. Thus, Philip J. Margiotta must be determined to be responsibly connected to Trombetta during its PACA violations. Philip J. Margiotta's judgment, discretion, and control were exercised in the activities he undertook for Trombetta, including the running of the business, buying fruits and vegetables, supervising other Trombetta employees, paying the bills, and the like. Tr. 499.

[57] Philip J. Margiotta was responsibly connected with M. Trombetta & Sons, Inc. as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999.

Conclusions

[58] Philip J. Margiotta, the manager of Trombetta's Hunts Point Terminal Market facility while he was an officer of Trombetta (the Secretary), was "actively involved" in Trombetta's activities, especially Trombetta's Hunts Point Terminal Market activities.

[59] Trombetta's Hunts Point Terminal Market activities led to its violations of the PACA, when, through its employee, Joseph (Joe Joe) Auricchio, Trombetta failed to perform its duty to maintain fair trade practices.

[60] Wrongdoing is not required to be found to be "actively involved" within the meaning of 7 U.S.C. § 499a(b)(9).

[61] Wrongdoing is not required to be found to be responsibly connected as defined by 7 U.S.C. § 499a(b)(9).

[62] There is no evidence of wrongdoing by Philip J. Margiotta, yet by running Trombetta's Hunts Point Terminal Market facility, while he was an officer of Trombetta, he was overwhelmingly "actively involved", within the meaning of 7 U.S.C. § 499a(b)(9), in the activities which led to Trombetta's PACA violations.

[63] Philip J. Margiotta, by being the Secretary of M. Trombetta & Sons, Inc. who was "actively involved" within the meaning of 7 U.S.C. § 499a(b)(9) in the activities which led to Trombetta's PACA violations, was responsibly connected to Trombetta as defined by 7 U.S.C. § 499a(b)(9), during April through July 1999, when Trombetta violated section 2(4) of the Perishable Agricultural Commodities Act (the PACA), 7 U.S.C. § 499b(4), by failing to perform its duty to maintain fair trade practices required by the PACA.

Order

[64] This Decision affirms the determination by the Chief, PACA Branch, Fruit and Vegetable Programs, Agricultural Marketing Service, USDA, contained in his letter dated February 11, 2003 (AX 1, Tr. 1684), that Philip J. Margiotta was responsibly connected with Trombetta and Sons, Inc., Bronx, New York, during Trombetta's PACA⁵ violations.

[65] Accordingly, Philip J. Margiotta is subject to the licensing restrictions under section 4(b) of the PACA and the employment restrictions under section 8(b) of the PACA (7 U.S.C. §§ 499d(b), 499h(b)).

⁵ Section 2(4) of the PACA, 7 U.S.C. § 499b(4), during April through July 1999.

[66] This Decision and Order shall become final and effective thirty-five (35) days after service, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 31st day of January 2006

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
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Washington, DC 20250-9203
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APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral

argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145