

**RULES OF PRACTICE GOVERNING  
FORMAL ADJUDICATORY  
ADMINISTRATIVE PROCEEDINGS  
INSTITUTED BY THE SECRETARY**



COMPILED APRIL 20, 2005

**UNITED STATES DEPARTMENT OF AGRICULTURE**

## 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\*

AUTHORITY: 5 U.S.C. 301; 7 U.S.C. 61, 87e, 228, 268, 499o, 608c(14), 1592, 1624(b), 2151, 2279e, 2621, 2714, 2908, 3812, 4610, 4815, 4910, 6009, 6107, 6207, 6307, 6411, 6808, 7107, 7734, 8313; 15 U.S.C. 1828; 16 U.S.C. 620d, 1540(f), 3373; 21 U.S.C. 104, 111, 117, 120, 122, 127, 134e, 134f, 135a, 154, 463(b), 621, 1043; 43 U.S.C. 1740; 7 CFR 2.35, 2.41.

SOURCE: 42 FR 743, Jan. 4, 1977, unless otherwise noted.

##### § 1.130 Meaning of words.

As used in this subpart, words in the singular form shall be deemed to import the plural, and vice versa, as the case may require.

##### § 1.131 Scope and applicability of this subpart.

(a) The rules of practice in this subpart shall be applicable to all adjudicatory proceedings under the statutory provisions listed below as those provisions

have been or may be amended from time to time,<sup>1</sup> except that those rules shall not be applicable to reparation proceedings under section 6(c) of the Perishable Agricultural Commodities Act, 1930. Section 1.26 shall be inapplicable to the proceedings covered by this subpart.

Act of May 29, 1884, commonly known as the Animal Industry Act, section 7, as amended (21 U.S.C. 117).

Act of August 30, 1890, section 6, as amended (21 U.S.C. 104).

Act of February 2, 1903, commonly known as the Cattle Contagious Diseases Act of 1903, section 3, as amended (21 U.S.C. 122).

Act of March 3, 1905, section 6, as amended (21 U.S.C. 127).

Act of July 2, 1962, section 6(a), as amended (21 U.S.C. 134e).

Act of May 6, 1970, section 2, as amended (21 U.S.C. 135a).

Agricultural Marketing Agreement Act of 1937, as amended, section 8c(14), 7 U.S.C. 608c(14).

Animal Health Protection Act, section 10414 (7 U.S.C. 8313).

Animal Welfare Act, section 19 (7 U.S.C. 2149).

Beef Promotion and Research Act of 1985, section 9 (7 U.S.C. 2908).

Egg Products Inspection Act, section 18 (21 U.S.C. 1047).

Endangered Species Act of 1973, as amended, section 11(a) (16 U.S.C. 1540(a)).

Egg Research and Consumer Information Act, as amended, 7 U.S.C. 2714, Pub. L. 96-276, 94 Stat. 541.

Federal Land Policy and Management Act of 1976, section 506 (43 U.S.C. 1766).

Federal Meat Inspection Act, sections 4, 6, 7(e), 8, and 401 (21 U.S.C. 604, 606, 607(e), 608, 671).

Federal Seed Act, section 409 (7 U.S.C. 1599).

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\* Any supplemental rules of practice pertaining to particular proceedings are included in regulations promulgated under the statute authorizing the relevant proceedings.

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<sup>1</sup>See also the regulations promulgated under these statutes for any supplemental rules relating to particular circumstances arising thereunder.

Fluid Milk Promotion Act of 1990, section 1999L [7 U.S.C. 6411].

Forest Resources Conservation and Shortage Relief Act of 1990, section 492 (16 U.S.C. 620d).

Fresh Cut Flowers and Fresh Cut Greens Promotion and Consumer Information Act of 1993, section 9 [7 U.S.C. 6808]

Honey Research, Promotion, and Consumer Information Act, section 11 (7 U.S.C. 4610).

Horse Protection Act of 1970, sections 4(c) and 6 (15 U.S.C. 1823(c), 1825).

Lacey Act Amendments of 1981, section 4 (a) and (b) (16 U.S.C. 3373 (a) and (b)).

Lime Research, Promotion, and Consumer Information Act of 1990, as amended, section 1958 [7 U.S.C. 6207]

Mushroom Promotion, Research, and Consumer Information Act of 1990, section 1928 [7 U.S.C. 6107]

Packers and Stockyards Act, 1921, as supplemented, sections 203, 312, and 401 of the Act, and section 1, 57 Stat. 422, as amended by section 4, 90 Stat. 1249 (7 U.S.C. 193, 204, 213, 221)

Pecan Promotion and Research Act of 1990, section 1914 [7 U.S.C. 6009]

Perishable Agricultural Commodities Act, 1930, sections 1(b)(9), 3(c), 4(d), 6(c), 8(a), 8(b), 8(c), 8(e), 9, and 13(a) (7 U.S.C. 499a(b)(9), 499c(c), 499d(d), 499f(c), 499h(a), 499h(b), 499h(c), 499h(e), 499i, 499m(a))

Plant Protection Act, section 424 (7 U.S.C. 7734).

Pork Promotion, Research, and Consumer Information Act of 1985, section 1626 (7 U.S.C. 4815).

Potato Research and Promotion Act, as amended, 7 U.S.C. 2621, Pub. L. 97-244, 96 Stat. 310.

Poultry Products Inspection Act, sections 6, 7, 8(d), and 18 (21 U.S.C. 455, 456, 457(d), 467).

Sheep Promotion, Research, and Information Act of 1994 [7 U.S.C. 7107].

Soybean Promotion, Research, and Consumer Information Act, section 1972 [7 U.S.C. 6307].

Swine Health Protection Act, sections 5 and 6 (7 U.S.C. 3804, 3805)

Title V of the Agricultural Risk Protection Act of 2000, section 501(a) (7 U.S.C. 2279e).

United States Cotton Standards Act, as supplemented, section 3 of the Act and section 2 of 47 Stat. 1621 (7 U.S.C. 51b, 53).

United States Grain Standards Act, sections 7(g)(3), 9, 10, and 17A(d) (7 U.S.C. 79(g)(3), 85, 86, 87f-1(d)).

United States Warehouse Act, sections 12 and 25 (7 U.S.C. 246, 253).

Virus-Serum-Toxin Act (21 U.S.C. 156).

Watermelon Research and Promotion Act, section 1651 (7 U.S.C. 4910).

(b) These rules of practice shall also be applicable to:

(1) Adjudicatory proceedings under the regulations promulgated under the Agricultural Marketing Act of 1946 (7 U.S.C. 1621 *et seq.*) for the denial or withdrawal of inspection, certification, or grading service;<sup>1</sup>

(2) Adjudicatory proceedings under the regulations promulgated under the Animal Quarantine and Related Laws (21 U.S.C. 111 *et seq.*) for the suspension or revocation of accreditation of veterinarians (9 CFR parts 160, 161);

(3) Proceedings for debarment of counsel under § 1.141(d) of this subpart; and

(4) Other adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the Assistant Secretary for Administration.

[42 FR 743, Jan. 4, 1977, as amended at 42 FR 15406, Mar. 22, 1977; 45 FR 68381, Oct. 15, 1980; 47 FR 15559, Apr. 12, 1982; 47 FR 30451, July 14, 1982; 48 FR 28189, June 21, 1983; 49 FR 21293, May 21, 1984; 49 FR 37727, Sept. 26, 1984; 53 FR 1001, Jan. 15, 1988; 53 FR 35296, Sept. 13, 1988; 56 FR 22106, May 14, 1991; 60 FR 8455, Feb. 14, 1995; 60 FR 33329, June 28, 1995; 61 FR 11503, Mar. 21, 1996; 66 FR 36908, July 16, 2001; 67 FR 70674, Nov. 26, 2002; 68 FR 6340, Feb. 7, 2003]

### § 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

*Administrator* means the Administrator of the Agency administering the statute involved, or any officer or employee of the Agency to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act for the Administrator.

*Complainant* means the party instituting the proceeding.

*Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

*Decision* means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

*Hearing* means that part of the proceeding which involves the submission of evidence before the Judge for the record in the proceeding.

*Hearing Clerk* means the Hearing Clerk, United States Department of Agriculture, Washington, DC 20250.

*Judge* means any Administrative Law Judge appointed pursuant to 5 U.S.C. 3105 and assigned to the proceeding involved.

*Judicial Officer* means an official of the United States Department of Agriculture delegated authority by the Secretary of Agriculture, pursuant to the Act of April 4, 1940 (7 U.S.C. 450c-450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. App. (1988)), to perform the function involved (§

2.35(a) of this chapter), or the Secretary of Agriculture if the authority so delegated is exercised by the Secretary.

*Mail* means to deposit an item in the United States Mail with postage affixed and addressed as necessary to cause it to be delivered to the address shown by ordinary mail, or by certified or registered mail if specified.

*Petitioner* means an individual who has filed a petition for review of a determination that the individual is responsibly connected to a licensee within the meaning of 7 U.S.C. 499a(b)(9).

*Re-mail* means to mail by ordinary mail to an address an item that has been returned after being sent to the same address by certified or registered mail.

*Respondent* means the party proceeded against.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30673, July 27, 1990; 60 FR 8455, Feb. 14, 1995; 61 FR 11503, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

### § 1.133 Institution of proceedings.

(a) *Submission of information concerning apparent violations.* (1) Any interested person desiring to submit information regarding an apparent violation of any provision of a statute listed in § 1.131 or of any regulation, standard, instruction, or order issued pursuant thereto, may file the information with the Administrator of the agency administering the statute involved in accordance with this section and any applicable statutory or regulation provisions. Such information may be made the basis of any appropriate proceeding covered by the rules in this subpart, or any other appropriate proceeding authorized by the particular statute or the regulations promulgated thereunder.

(2) The information may be submitted by telegram, by letter, or by a preliminary statement of facts, setting forth the essential details of the transaction complained of. So far as practicable, the

information shall include such of the following items as may be applicable:

(i) The name and address of each person and of the agent, if any, representing such person in the transaction involved;

(ii) Place where the alleged violation occurred;

(iii) Quantity and quality or grade of each kind of product or article involved;

(iv) Date of alleged violation;

(v) Car initial and number, if carlot;

(vi) Shipping and destination points;

(vii) If a sale, the date, sale price, and amount actually received;

(viii) If a consignment, the date, reported proceeds, gross, net;

(ix) Amount of damage claimed, if any;

(x) Statement of other material facts, including terms of contract; and

(xi) So far as practicable, true copies of all available papers relating to the transaction complained about, including shipping documents, letters, telegrams, invoices, manifests, inspection certificates, accounts of sales and any special contracts or agreements.

(3) Upon receipt of the information and supporting evidence, the Administrator shall cause such investigation to be made as, in the opinion of the Administrator, is justified by the facts. If such investigation discloses that no violation of the Act or of the regulations, standards, instructions, or orders issued pursuant thereto, has occurred, no further action shall be taken and the person submitting the information shall be so informed.

(4) The person submitting the information shall not be a party to any proceeding which may be instituted as a result thereof and such person shall have no legal status in the proceeding, except as a subpoenaed witness or as a deponent in a deposition taken without expense to such person.

(b) *Filing of complaint or petition for review.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether

based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

(2) Any person determined by the Chief, PACA Branch, pursuant to §§ 47.47-47.49 of this title to have been responsibly connected within the meaning of 7 U.S.C. 499a(b)(9) to a licensee who is subject or potentially subject to license suspension or revocation as the result of an alleged violation of 7 U.S.C. 499b or 499h(b) or as provided in 7 U.S.C. 499g(d) shall be entitled to institute a proceeding under this section and to have determined the facts with respect to such responsibly connected status by filing with the Hearing Clerk a petition for review of such determination.

(3) As provided in 5 U.S.C. 558, in any case, except one of willfulness or one in which public health, interest, or safety otherwise requires, prior to the institution of a formal proceeding which may result in the withdrawal, suspension, or revocation of a "license" as that term is defined in 5 U.S.C. 551(8), the Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995; 61 FR 11503, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

### **§ 1.134 Docket number.**

Each proceeding, immediately following its institution, shall be assigned a docket number by the Hearing Clerk, and thereafter the proceeding shall be referred to by such number.

**§ 1.135 Contents of complaint or petition for review.**

(a) *Complaint.* A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

(b) *Petition for review.* The Petition for Review of responsibly connected status shall describe briefly and clearly the determination sought to be reviewed and shall include a brief statement of the factual and legal matters that the petitioner believes warrant the reversal of the determination.

[42 FR 743, Jan. 4, 1977, as amended at 61 FR 11503, Mar. 21, 1996]

**§ 1.136 Answer.**

(a) *Filing and service.* Within 20 days after the service of the complaint (within 10 days in a proceeding under section 4(d) of the Perishable Agricultural Commodities Act, 1930), or such other time as may be specified therein, the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding. The attorney may file an appearance of record prior to or simultaneously with the filing of the answer. The answer shall be served upon the complainant, and any other party of record, by the Hearing Clerk. As response to a petition for review of responsibly connected status, the Chief, PACA Branch, shall within ten days after being served by the Hearing Clerk with a petition for review, file with the Hearing Clerk a certified copy of the agency record upon which the Chief, PACA Branch, made the determination that the individual was responsibly connected to a licensee under the Perishable Agricultural Commodities Act, 7 U.S.C.

499a *et seq.*, and such agency record shall become part of the record in the review proceeding.

(b) *Contents.* The answer shall:

(1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or

(2) State that the respondent admits all the facts alleged in the complaint; or

(3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

[42 FR 743, Jan. 4, 1977, as amended at 61 FR 11504, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

**§ 1.137 Amendment of complaint, petition for review, or answer; joinder of related matters.**

(a) *Amendment.* At any time prior to the filing of a motion for a hearing, the complaint, petition for review, answer, or response to petition for review may be amended. Thereafter, such an amendment may be made with consent of the parties, or as authorized by the Judge upon a showing of good cause.

(b) *Joinder.* The Judge shall consolidate for hearing with any proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, any petitions for review of determination of status by the Chief, PACA Branch, that individuals are responsibly connected, within the meaning of 7 U.S.C. 499a(b)(9), to the licensee during the period of the alleged violations. In any

case in which there is no pending proceeding alleging a violation of the Perishable Agricultural Commodities Act, 7 U.S.C. 499a *et seq.*, but there have been filed more than one petition for review of determination of responsible connection to the same licensee, such petitions for review shall be consolidated for hearing.

[61 FR 11504, Mar. 21, 1996, as amended at 68 FR 6340, Feb. 7, 2003]

### **§ 1.138 Consent decision.**

At any time before the Judge files the decision, the parties may agree to the entry of a consent decision. Such agreement shall be filed with the Hearing Clerk in the form of a decision signed by the parties with appropriate space for signature by the Judge, and shall contain an admission of at least the jurisdictional facts, consent to the issuance of the agreed decision without further procedure and such other admissions or statements as may be agreed between the parties. The Judge shall enter such decision without further procedure, unless an error is apparent on the face of the document. Such decision shall have the same force and effect as a decision issued after full hearing, and shall become final upon issuance to become effective in accordance with the terms of the decision.

### **§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been

filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however,* That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

### **§ 1.140 Conferences and procedure.**

(a) *Purpose and scope.* (1) Upon motion of a party or upon the Judge's own motion, the Judge may direct the parties or their counsel to attend a conference at any reasonable time, prior to or during the course of the hearing, when the Judge finds that the proceeding would be expedited by a conference. Reasonable notice of the time, place, and manner of the conference shall be given. The Judge may order each of the parties to furnish at or subsequent to the conference any or all of the following:

- (i) An outline of the case or defense;
- (ii) The legal theories upon which the party will rely;
- (iii) Copies of or a list of documents which the party anticipates introducing at the hearing; and
- (iv) A list of anticipated witnesses who will testify on behalf of the party. At the discretion of the party furnishing such list of witnesses, the names of the witnesses need not be furnished if they are otherwise identified in some meaningful way such as a short statement of the type of evidence they will offer.

(2) The Judge shall not order any of the foregoing procedures that a party can show is inappropriate or

unwarranted under the circumstances of the particular case.

(3) At the conference, the following matters shall be considered:

- (i) The simplification of issues;
- (ii) The necessity of amendments to pleadings;
- (iii) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;
- (iv) The limitation of the number of expert or other witnesses;
- (v) Negotiation, compromise, or settlement of issues;
- (vi) The exchange of copies of proposed exhibits;
- (vii) The identification of documents or matters of which official notice may be requested;
- (viii) A schedule to be followed by the parties for completion of the actions decided at the conference; and

(ix) Such other matters as may expedite and aid in the disposition of the proceeding.

(b) *Reporting.* A conference will not be stenographically reported unless so directed by the Judge.

(c) *Manner of Conference.* (1) The conference shall be conducted by telephone or correspondence unless the Judge determines that conducting the conference by audio-visual telecommunication:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the conference; or

(iii) Would cost less than conducting the conference by telephone or correspondence. If the Judge determines that a conference conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the conference, the conference shall be conducted by personal attendance of any individual who is expected to participate in the conference, by telephone, or by correspondence.

(2) If the conference is not conducted by telephone or correspondence, the conference shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the conference by personal attendance of any individual who is expected to participate in the conference:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the conference; or
- (iii) Would cost less than conducting the conference by audio-visual telecommunication.

(d) *Order.* Actions taken as a result of a conference shall be reduced to a written appropriate order, unless the Judge concludes that a stenographic report shall suffice, or, if the conference takes place within 7 days of the beginning of the hearing, the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

(e) *Related matters.* Upon motion of a respondent, the Judge may order the attorney for the complainant to produce and permit the respondent to inspect and copy or photograph any relevant written or recorded statements or confessions made by such respondent within the possession, custody or control of the complainant.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995]

### **§ 1.141 Procedure for hearing.**

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed. A petition for review shall be deemed a request for a hearing. Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing. Waiver of hearing shall not be deemed to be a waiver of the right to request oral argument before the Judicial Officer upon appeal of



the Judge's decision. In the event the respondent denies any material fact and fails to file a timely request for a hearing, the matter may be set down for hearing on motion of the complainant or upon the Judge's own motion.

(b) *Time, place, and manner.* (1) If any material issue of fact is joined by the pleadings, the Judge, upon motion of any party stating that the matter is at issue and is ready for hearing, shall set a time, place, and manner for hearing as soon as feasible after the motion is filed, with due regard for the public interest and the convenience and necessity of the parties. The Judge shall file with the Hearing Clerk a notice stating the time and place of the hearing.<sup>2</sup> This notice shall state whether the hearing will be conducted by telephone, audio-visual telecommunication, or personal attendance of any individual expected to participate in the hearing. The Judge's determination regarding the manner of the hearing shall be made in accordance with paragraphs (b)(3) and (b)(4) of this section. If any change in the time, place, or manner of the hearing is made, the Judge shall file with the Hearing Clerk a notice of such change, which notice shall be

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<sup>2</sup>The place of hearing in a proceeding under the Packers and Stockyards Act shall be set in accordance with the Packers and Stockyards Act (7 U.S.C. 228(e) and (f)). In essence, if there is only one respondent, the hearing is to be held as near as possible to the respondent's place of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent and they have their places of business or residence within a single unit of local government, a single geographical area within a State, or a single State, the hearing is to be held as near as possible to their places of business or residence depending on the availability of an appropriate location for conducting the hearing. If there is more than one respondent, and they have their places of business or residence distant from each other, 7 U.S.C. 228(e) and (f) have no applicability.

served upon the parties, unless it is made during the course of an oral hearing and made part of the transcript or recording, or actual notice is given to the parties.

(2)(i) If any material issue of fact is joined by the pleadings and the matter is at issue and is ready for hearing, any party may move that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing rather than by audio-visual telecommunication. Any motion that the hearing be conducted by telephone or personal attendance of any individual expected to attend the hearing must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than by audio-visual telecommunication.

(ii) Within 10 days after the Judge issues a notice stating the manner in which the hearing is to be conducted, any party may move that the Judge reconsider the manner in which the hearing is to be conducted. Any motion for reconsideration must be accompanied by a memorandum in support of the motion stating the basis for the motion and the circumstances that require the hearing to be conducted other than in accordance with the Judge's notice.

(3) The hearing shall be conducted by audio-visual telecommunication unless the Judge determines that conducting the hearing by personal attendance of any individual who is expected to participate in the hearing:

- (i) Is necessary to prevent prejudice to a party;
- (ii) Is necessary because of a disability of any individual expected to participate in the hearing; or
- (iii) Would cost less than conducting the hearing by audio-visual telecommunication. If the Judge determines that a hearing conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the hearing, the hearing shall be conducted by personal attendance of any individual who is expected to participate in the hearing or by telephone.

(4) The Judge may, in his or her sole discretion or in response to a motion by a party to the proceeding, conduct the hearing by telephone if the Judge finds that a hearing conducted by telephone:

(i) Would provide a full and fair evidentiary hearing;

(ii) Would not prejudice any party; and

(iii) Would cost less than conducting the hearing by audio-visual telecommunication or personal attendance of any individual who is expected to participate in the hearing.

(c) *Appearances.* The parties may appear in person or by attorney of record in the proceeding. Any person who appears as attorney must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

(d) *Debarment of attorney.* (1) Whenever a Judge finds that a person acting as attorney for any party to the proceeding is guilty of unethical or contumacious conduct, in or in connection with a proceeding, the Judge may order that such person be precluded from further acting as attorney in the proceeding. An appeal to the Judicial Officer may be taken from any such order, but no proceeding shall be delayed or suspended pending disposition of the appeal: *Provided*, That the Judge shall suspend the proceeding for a reasonable time for the purpose of enabling the party to obtain another attorney.

(2) Whenever it is found, after notice and opportunity for hearing, that a person, who is acting or has acted as attorney for another person in any proceeding before the United States Department of Agriculture, is unfit to act as such counsel because of such unethical or contumacious conduct, such person will be precluded from acting as counsel in any or all proceedings before the Department as found to be appropriate.

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all

the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

(2) If the petitioner in the case of a Petition for Review of a determination of responsibly connected status within the meaning of 7 U.S.C. 499a(b)(9), having been duly notified, fails to appear at the hearing without good cause, such petitioner shall be deemed to have waived the right to a hearing and to have voluntarily withdrawn the petition for review.

(f) *Order of proceeding.* Except as may be determined otherwise by the Judge, the complainant shall proceed first at the hearing.

(g) *Written statements of direct testimony.* (1) Except as provided in paragraph (g)(2) of this section, each party must exchange with all other parties a written narrative verified statement of the oral direct testimony that the party will provide at any hearing to be conducted by telephone; the direct testimony of each employee or agent of the party that the party will call to provide oral direct testimony at any hearing to be conducted by telephone; and the direct testimony of each expert witness that the party will call to provide oral direct testimony at any hearing to be conducted by telephone. The written direct testimony of witnesses shall be exchanged by the parties at least 10 days prior to the hearing. The oral direct testimony provided by a witness at a hearing conducted by telephone will be limited to the presentation of the written direct testimony, unless the Judge finds that oral direct testimony which is supplemental to the written direct testimony would further the public interest and would not constitute surprise.

(2) The parties shall not be required to exchange testimony in accordance with this paragraph if the

hearing is scheduled to begin less than 20 days after the Judge's notice stating the time of the hearing.

(h) *Evidence--(1) In general.* (i) The testimony of witnesses at a hearing shall be on oath or affirmation and subject to cross-examination.

(ii) Upon a finding of good cause, the Judge may order that any witness be examined separately and apart from all other witnesses except those who may be parties to the proceeding.

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

(iv) Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable.

(2) *Objections.* (i) If a party objects to the admission of any evidence or to the limitation of the scope of any examination or cross-examination or to any other ruling of the Judge, the party shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the Judge.

(ii) Only objections made before the Judge may subsequently be relied upon in the proceeding.

(3) *Depositions.* The deposition of any witness shall be admitted in the manner provided in and subject to the provisions of § 1.148.

(4) *Exhibits.* Unless the Judge finds that the furnishing of copies is impracticable, four copies of each exhibit shall be filed with the Judge: *Provided*, That, where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. A true copy of an exhibit may be substituted for the original.

(5) *Official records or documents.* An official government record or document or entry therein, if

admissible for any purpose, shall be admissible in evidence without the production of the person who made or prepared the same, and shall be prima facie evidence of the relevant facts stated therein. Such record or document shall be evidenced by an official publication thereof or by a copy certified by a person having legal authority to make such certification.

(6) *Official notice.* Official notice shall be taken of such matters as are judicially noticed by the courts of the United States and of any other matter of technical, scientific, or commercial fact of established character: *Provided*, That the parties shall be given adequate notice of matters so noticed, and shall be given adequate opportunity to show that such facts are erroneously noticed.

(7) *Offer of proof.* Whenever evidence is excluded by the Judge, the party offering such evidence may make an offer of proof, which shall be included in the transcript or recording. The offer of proof shall consist of a brief statement describing the evidence excluded. If the evidence consists of a brief oral statement, it shall be included in the transcript or recording in toto. If the evidence consists of an exhibit, it shall be marked for identification and inserted in the hearing record. In either event, the evidence shall be considered a part of the transcript or recording and hearing record if the Judicial Officer, upon appeal, decides the Judge's ruling excluding the evidence was erroneous and prejudicial. If the Judicial Officer decides the Judge's ruling excluding the evidence was erroneous and prejudicial and that it would be inappropriate to have such evidence considered a part of the hearing record, the Judicial Officer may direct that the hearing be reopened to permit the taking of such evidence or for any other purpose in connection with the excluded evidence.

(i) *Transcript or recording.* (1) Hearings to be conducted by telephone shall be recorded verbatim by electronic recording device. Hearings conducted by audio-visual telecommunication or the personal attendance of any individual who is expected to participate in the hearing shall be transcribed, unless

the Judge finds that recording the hearing verbatim would expedite the proceeding and the Judge orders the hearing to be recorded verbatim. The Judge shall certify that to the best of his or her knowledge and belief any recording made pursuant to this paragraph with exhibits that were accepted into evidence is the record of the hearing.

(2) If a hearing is recorded verbatim, a party requests the transcript of a hearing or part of a hearing, and the Judge determines that the disposition of the proceeding would be expedited by a transcript of the hearing or part of a hearing, the Judge shall order the verbatim transcription of the recording as requested by the party.

(3) Recordings or transcripts of hearings shall be made available to any person at actual cost of duplication.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8455, Feb. 14, 1995; 61 FR 11504, Mar. 21, 1996; 68 FR 6340, Feb. 7, 2003]

### **§ 1.142 Post-hearing procedure.**

(a) *Corrections to transcript or recording.* (1) Within the period of time fixed by the Judge, any party may file a motion proposing corrections to the transcript or recording.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given at the hearing and to contain an accurate description or reference to all exhibits received in evidence and made part of the hearing record, and shall be deemed to be certified without further action by the Judge.

(3) As soon as practicable after the close of the hearing and after consideration of any timely objections filed as to the transcript or recording, the Judge shall issue an order making any corrections to the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto

the original transcript or recording by the Hearing Clerk (without obscuring the original text).

(b) *Proposed findings of fact, conclusions, orders, and briefs.* Prior to the Judge's decision, each party shall be afforded a reasonable opportunity to submit for consideration proposed findings of fact, conclusions, order, and brief in support thereof. A copy of each such document filed by a party shall be served upon each of the other parties.

(c) *Judge's decision.* (1) The Judge may, upon motion of any party or in his or her own discretion, issue a decision orally at the close of the hearing, or within a reasonable time after the closing of the hearing.

(2) If the decision is announced orally, a copy thereof, excerpted from the transcript or recording, shall be furnished to the parties by the Hearing Clerk. Irrespective of the date such copy is mailed, the issuance date of the decision shall be the date the oral decision was announced.

(3) If the decision is in writing, it shall be filed with the Hearing Clerk and served upon the parties as provided in § 1.147.

(4) The Judge's decision shall become final and effective without further proceedings 35 days after the issuance of the decision, if announced orally at the hearing, or if the decision is in writing, 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145; *Provided, however,* that no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

[42 FR 743, Jan. 4, 1977, as amended at 53 FR 7177, Mar. 7, 1988; 60 FR 8456, Feb. 14, 1995; 68 FR 6340, Feb. 7, 2003]

### **§ 1.143 Motions and requests.**

(a) *General.* All motions and requests shall be filed with the Hearing Clerk, and served upon all the parties, except (1) requests for extensions of time

pursuant to § 1.147, (2) requests for subpoenas pursuant to § 1.149, and (3) motions and requests made on the record during the oral hearing. The Judge shall rule upon all motions and requests filed or made prior to the filing of an appeal of the Judge's decision pursuant to § 1.145, except motions directly relating to the appeal. Thereafter, the Judicial Officer will rule on any motions and requests, as well as the motions directly relating to the appeal.

(b) *Motions entertained.* (1) Any motion will be entertained other than a motion to dismiss on the pleading.

(2) All motions and request concerning the complaint must be made within the time allowed for filing an answer.

(c) *Contents.* All written motions and requests shall state the particular order, ruling, or action desired and the grounds therefor.

(d) *Response to motions and requests.* Within 20 days after service of any written motion or request, or within such shorter or longer period as may be fixed by the Judge or the Judicial Officer, an opposing party may file a response to the motion or request. The other party shall have no right to reply to the response; however, the Judge or the Judicial Officer, in the Judge's or the Judicial Officer's discretion, may order that a reply be filed.

(e) *Certification to the judicial officer.* The submission or certification of any motion, request, objection, or other question to the Judicial Officer prior to the filing of an appeal pursuant to § 1.145 shall be made by and in the discretion of the Judge. The Judge may either rule upon or certify the motion, request, objection, or other question to the Judicial Officer, but not both.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30673, July 27, 1990; 68 FR 6340, Feb. 7, 2003]

## § 1.144 Judges.

(a) *Assignment.* No Judge shall be assigned to serve in any proceeding who (1) has any pecuniary

interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has any conflict of interest which might impair the Judge's objectivity in the proceeding.

(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

(2) A Judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying.

(c) *Powers.* Subject to review as provided in this subpart, the Judge, in any assigned proceeding, shall have power to:

(1) Rule upon motions and requests;

(2) Set the time, place, and manner of a conference and the hearing, adjourn the hearing, and change the time, place, and manner of the hearing;

(3) Administer oaths and affirmations;

(4) Issue subpoenas as authorized by the statute under which the proceeding is conducted, requiring the attendance and testimony of witnesses and the production of books, contracts, papers, and other documentary evidence at the hearing;

(5) Summon and examine witnesses and receive evidence at the hearing;

(6) Take or order the taking of depositions as authorized under these rules;

(7) Admit or exclude evidence;

(8) Hear oral argument on facts or law;

(9) Require each party to provide all other parties and the Judge with a copy of any exhibit that the party intends to introduce into evidence prior to any hearing to be conducted by telephone or audio-visual telecommunication;

(10) Require each party to provide all other parties with a copy of any document that the party intends to use to examine a deponent prior to any

deposition to be conducted by telephone or audio-visual telecommunication;

(11) Require that any hearing to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties and the Judge are able to transmit and receive documents during the hearing;

(12) Require that any deposition to be conducted by telephone or audio-visual telecommunication be conducted at locations at which the parties are able to transmit and receive documents during the deposition;

(13) Do all acts and take all measures necessary for the maintenance of order, including the exclusion of contumacious counsel or other persons; and

(14) Take all other actions authorized under these rules.

(d) *Who may act in the absence of the Judge.* In case of the absence of the Judge or the Judge's inability to act, the powers and duties to be performed by the Judge under these rules of practice in connection with any assigned proceeding may, without abatement of the proceeding unless otherwise directed by the Chief Judge, be assigned to any other Judge.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6340, Feb. 7, 2003]

### **§ 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 prehearing 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 judicial officer 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]

### **§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.**

(a) *Petition requisite--(1) Filing; service; ruling.* A petition for reopening the hearing to take further evidence, or for rehearing or reargument of the proceeding, or for reconsideration of the decision of the Judicial Officer, must be made by petition filed with the Hearing Clerk. Every such petition must state specifically the grounds relied upon. Any such petition filed prior to the filing of an appeal of the Judge's decision pursuant to § 1.145 shall be ruled upon by the Judge, and any such petition filed thereafter shall be ruled upon by the Judicial Officer.

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

(b) *Procedure for disposition of petitions.* Within 20 days following the service of any petition provided for in this section, any party to the proceeding may file with the Hearing Clerk a reply

thereto. As soon as practicable thereafter, the Judge or the Judicial Officer, as the case may be, shall announce the determination whether to grant or deny the petition. The decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely petition. Such decision shall not be final for purposes of judicial review until the petition is denied or the decision is affirmed or modified pursuant to the petition and the time for judicial review shall begin to run upon the filing of such final action on the petition. In the event that any such petition is granted, the applicable rules of practice, as set out elsewhere herein, shall be followed. A person filing a petition under this section shall be regarded as the moving party, although such person shall be referred to as the complainant or respondent, depending upon the designation in the original proceeding.

**§ 1.147 Filing; service; extensions of time; and computation of time.**

(a) *Filing; number of copies.* Except as otherwise provided in this section, all documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be filed in quadruplicate: *Provided*, That where there are more than two parties in the proceeding, an additional copy shall be filed for each additional party. Any document or paper required or authorized under the rules in this part to be filed with the Hearing Clerk shall, during the course of an oral hearing, be filed with the Judge.

(b) *Who shall make service.* Copies of all such documents or papers required or authorized by the rules in this part to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, or by some other employee of the Department, or by a U.S. Marshal or deputy marshal.

(c) *Service on party other than the Secretary.* (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for

adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

(2) Any document or paper, other than one specified in paragraph (c)(1) of this section or written questions for a deposition as provided in § 1.148(d)(2), shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of mailing by ordinary mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual.

(3) Any document or paper served other than by mail, on any party to a proceeding, other than the Secretary or agent thereof, shall be deemed to be received by such party on the date of:

(i) Delivery to any responsible individual at, or leaving in a conspicuous place at, the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, or

(ii) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.



(d) *Service on another.* Any subpoena, written questions for a deposition under § 1.148(d)(2), or other document or paper, served on any person other than a party to a proceeding, the Secretary or agent thereof, shall be deemed to be received by such person on the date of:

(1) Delivery by certified mail or registered mail to the last known principal place of business of such person, last known principal place of business of the attorney or representative of record of such person, or last known residence of such person if an individual;

(2) Delivery other than by mail to any responsible individual at, or leaving in a conspicuous place at, any such location; or

(3) Delivery to such party if an individual, to an officer or director of such party if a corporation, or to a member of such party if a partnership, at any location.

(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

(1) A certified or registered mail receipt returned by the postal service with a signature;

(2) An official record of the postal service;

(3) An entry on a docket record or a copy placed in a docket file by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;

(4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided* that such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record for such a party, or an official or employee of the United States or of a State or political subdivision thereof.

(f) *Extensions of time.* The time for the filing of any document or paper required or authorized under

the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

(g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

## **§ 1.148 Depositions.**

(a) *Motion for taking deposition.* Upon the motion of a party to the proceeding, the Judge may, at any time after the filing of the complaint, order the taking of testimony by deposition. The Motion shall be in writing, shall be filed with the Hearing Clerk, and shall set forth:

(1) The name and address of the proposed deponent;

(2) The name and address of the person (referred to hereafter in this section as the “officer”) qualified under the regulations in this part to take depositions, before whom the proposed examination is to be made;

(3) The proposed time and place of the examination, which shall be at least 15 days after the date of the mailing of the motion; and

(4) The reasons why such deposition should be taken, which shall be solely for the purpose of eliciting testimony which otherwise might not be available at the time of hearing, for uses as provided in paragraph (g) of this section.

(b) *Judge's order for taking deposition.* (1) If the Judge finds that the testimony may not be otherwise available at the hearing, the taking of the deposition may be ordered. The order shall be filed with the Hearing Clerk and shall state:

(i) The time of the deposition;

(ii) The place of the deposition;

(iii) The manner of the deposition (telephone, audio-visual telecommunication, or personal attendance of those who are to participate in the deposition);

(iv) The name of the officer before whom the deposition is to be made; and

(v) The name of the deponent. The officer and the time, place, and manner need not be the same as those suggested in the motion for the deposition.

(2) The deposition shall be conducted by telephone unless the Judge determines that conducting the deposition by audio-visual telecommunication:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the deposition;

or

(iii) Would cost less than conducting the deposition by telephone. If the Judge determines that a deposition conducted by audio-visual telecommunication would measurably increase the United States Department of Agriculture's cost of conducting the deposition, the deposition shall be conducted by personal attendance of any individual who is expected to participate in the deposition or by telephone.

(3) If the deposition is not conducted by telephone, the deposition shall be conducted by audio-visual telecommunication unless the Judge

determines that conducting the deposition by personal attendance of any individual who is expected to participate in the deposition:

(i) Is necessary to prevent prejudice to a party;

(ii) Is necessary because of a disability of any individual expected to participate in the deposition;

or

(iii) Would cost less than conducting the deposition by telephone or audio-visual telecommunication.

(c) *Qualifications of officer.* The deposition shall be made before the Judge or before an officer authorized by the law of the United States or by the law of the place of the examination to administer oaths, or before an officer authorized by the Secretary to administer oaths.

(d) *Procedure on examination.* (1) The deponent shall be examined under oath or affirmation and shall be subject to cross-examination. Objections to questions or documents shall be in short form, stating the grounds of objections relied upon. The questions propounded, together with all objections made (but not including argument or debate), shall be recorded verbatim. In lieu of oral examination, parties may transmit written questions to the officer prior to the examination and the officer shall propound such questions to the deponent.

(2) The applicant shall arrange for the examination of the witness either by oral examination, or by written questions upon agreement of the parties or as directed by the Judge. If the examination is conducted by means of written questions, copies of the applicant's questions must be received by the other party to the proceeding and the officer at least 10 days prior to the date set for the examination unless otherwise agreed, and any cross questions of a party other than the applicant must be received by the applicant and the officer at any time prior to the time of the examination.

(e) *Certification by officer.* The officer shall certify on the deposition that the deponent was duly sworn and that the deposition is a true record of the deponent's testimony. The officer shall then securely seal the deposition, together with one copy

thereof (unless there are more than two parties in the proceeding, in which case there should be another copy for each additional party), in an envelope and mail the same by registered or certified mail to the Hearing Clerk.

(f) *Corrections to the transcript or recording.*

(1) At any time prior to the hearing, any party may file a motion proposing corrections to the transcript or recording of the deposition.

(2) Unless a party files such a motion in the manner prescribed, the transcript or recording shall be presumed, except for obvious typographical errors, to be a true, correct, and complete transcript or recording of the testimony given in the deposition proceeding and to contain an accurate description or reference to all exhibits in connection therewith, and shall be deemed to be certified correct without further procedure.

(3) At any time prior to use of the deposition in accordance with paragraph (g) of this section and after consideration of any objections filed thereto, the Judge may issue an order making any corrections in the transcript or recording which the Judge finds are warranted, which corrections shall be entered onto the original transcript or recording by the Hearing Clerk (without obscuring the original text).

(g) *Use of deposition.* A deposition ordered and taken in accordance with the provisions of this section may be used in a proceeding under these rules if the Judge finds that the evidence is otherwise admissible and (1) that the witness is dead; (2) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; (3) that the party offering the deposition has endeavored to procure the attendance of the witness by subpoena, but has been unable to do so; or (4) that such exceptional circumstances exist as to make it desirable, in the interests of justice, to allow the deposition to be used. If the party upon whose motion the deposition was taken refuses to offer it in evidence, any other party may offer the deposition or any part thereof in evidence. If only part of a deposition is offered in evidence by

a party, an adverse party may require the introduction of any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

### § 1.149 Subpoenas.<sup>3</sup>

(a) *Issuance of subpoenas.* The attendance and testimony of witnesses and the production of documentary evidence from any place in the United States on behalf of any party to the proceeding may be required by subpoena at any designated place of hearing if authorized by the statute under which the proceeding is conducted. Subpoenas shall be issued by the Judge upon a reasonable showing by the applicant of the grounds and necessity thereof; and with respect to subpoenas for the production of documents, the request shall also show their competency, relevancy, and materiality. All requests for subpoenas shall be in writing, unless waived by the Judge for good cause shown. Except for good cause shown, requests for subpoenas shall be received by the Judge at least 10 days prior to the date set for the hearing.

(b) *Service of subpoenas.* Subpoenas may be served by any person not less than 18 years of age. The party at whose instance a subpoena is issued shall be responsible for service thereof. Subpoenas shall be served as provided in § 1.147.

[42 FR 743, Jan. 4, 1977, as amended at 55 FR 30674, July 27, 1990; 60 FR 8457, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

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<sup>3</sup>This section relates only to subpoenas for the stated purpose and has no relevance with respect to investigatory subpoenas.

**§ 1.150 Fees of witnesses.**

Witnesses summoned under these rules of practice shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the officer taking the same, shall be entitled to the same fees as are paid for like services in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears or the deposition is taken.

**§ 1.151 Ex parte communications.**

(a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss ex parte the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided*, That procedural matters shall not be included within this limitation; and *Provided further*, That the Judge or Judicial Officer may discuss the merits of the case with such a person if all parties to the proceeding, or their attorneys have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record.

(b) No interested person shall make or knowingly cause to be made to the Judge or Judicial Officer an ex parte communication relevant to the merits of the proceeding.

(c) If the Judge or the Judicial Officer receives an ex parte communication in violation of this section, the one who receives the communication shall place in the public record of the proceeding:

- (1) All such written communications;
- (2) Memoranda stating the substance of all such oral communications; and
- (3) All written responses, and memoranda stating the substance of all oral responses thereto.

(d) Upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this section, the Judge or Judicial

Officer may, to the extent consistent with the interests of justice and the policy of the underlying statute, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(e) To the extent consistent with the interests of justice and the policy of the underlying statute, a violation of this section shall be sufficient grounds for a decision adverse to the party who knowingly commits a violation of this section or who knowingly causes such a violation to occur.

(f) For purposes of this section *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or the proceeding.

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