

mandant's decision on appeal, the Board may:

(1) If it finds the error incurable, set aside the entire decision and dismiss the charges; or

(2) If it finds the error curable, set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration.

(d) When a matter has been remanded to the Commandant under paragraph (c) of this section, he may act himself in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the examiner who heard the case or to another examiner, with appropriate directions.

§ 425.35 Action after remand.

When a case has been remanded under § 425.30, a party still has all rights of review under 46 CFR Part 137 and this part as applicable.

By the National Transportation Safety Board.

[SEAL] JOSEPH J. O'CONNELL, Jr.,
Chairman.

[F.R. Doc. 68-464; Filed, Jan. 11, 1968;
8:47 a.m.]

Title 16—COMMERCIAL PRACTICES

Chapter I—Federal Trade Commission

PART 15—ADMINISTRATIVE OPINIONS AND RULINGS

Advertising Offering Sale of Treatment for Athlete's Foot

§ 15.159 Advertising offering sale of treatment for athlete's foot.

(a) The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

(b) For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

(c) The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether

the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

(d) Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so.

(38 Stat. 717, as amended; 15 U.S.C. 41-58)

Issued: January 11, 1968.

By direction of the Commission.

[SEAL] JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 68-465; Filed, Jan. 11, 1968;
8:47 a.m.]

PART 15—ADMINISTRATIVE OPINIONS AND RULINGS

Advertising Promoting Sale of Information and Product

§ 15.160 Advertising promoting sale of information and a product.

(a) The Commission issued an advisory opinion in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

(b) The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

(c) Its opinion concluded with the following statement: "The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered."

(d) "This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so."

(38 Stat. 717, as amended; 15 U.S.C. 41-58)

Issued: January 11, 1968.

By direction of the Commission.

[SEAL] JOSEPH W. SHEA,
Secretary.

[F.R. Doc. 68-466; Filed, Jan. 11, 1968;
8:47 a.m.]

Title 22—FOREIGN RELATIONS

Chapter I—Department of State

[Dept. Reg. 108.576]

PART 41—VISAS: DOCUMENTATION OF NONIMMIGRANTS UNDER THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED

Validity of Nonimmigrant Visas

Part 41, Chapter I, Title 22 of the Code of Federal Regulations is being amended to provide that, in certain circumstances, an indefinite validity visa stamped in an expired passport may be considered to be valid for application for admission into the United States.

Paragraph (c) of § 41.122 is amended to read:

§ 41.122 Validity of visas.

(c) *Validity of visa and number of applications for admission.* Except as provided in paragraph (d) of this section a nonimmigrant visa shall have the validity prescribed in schedules made available to consular officers by the Department, which reflect, as nearly as practicable, the reciprocal treatment accorded U.S. nationals by the government of the country of which the alien is a national or stateless resident. Nonimmigrant visas issued pursuant to section 101(a)(15)(B) of the Immigration and Nationality Act may, in the discretion of the consular officer, be made valid indefinitely and for an unlimited number of applications for admission for aliens who: (1) Are nationals of countries which offer reciprocal treatment to U.S. citizens, as determined by the Department of State; (2) are in possession of a valid passport in which the visa may be stamped; and (3) have satisfied the consular officer that they are bona fide visitors and will continue to maintain that status for an indefinite period of time. An indefinite validity visa shall not be valid for application for admission into the United States if the passport in which the visa is stamped has expired, except that in the case of an alien's first entry after expiration of the visaed passport it may be considered as valid provided the alien is also in possession of a valid passport issued by the appropriate authorities of the country of which he is a national as required by section 212(a)(26) of the Act and § 41.112. In all such cases the admission of the alien shall be authorized under the condition that the alien, before applying for admission on future occasions, shall have applied at a U.S. consular office abroad for transfer of the visa to a valid passport.

Effective date. The amendment to the regulation contained in this order shall become effective upon publication in the FEDERAL REGISTER.

The provisions of section 4 of the Administrative Procedure Act (80 Stat. 383; 5 U.S.C. 553) relative to notice of proposed rule making are inapplicable

to this order because the regulation contained herein involves foreign affairs functions of the United States.

(Sec. 104, 66 Stat. 174; 8 U.S.C. 1104)

BARBARA M. WATSON,
Acting Administrator, Bureau of
Security and Consular Affairs.

JANUARY 8, 1968.

[F.R. Doc. 68-441; Filed, Jan. 11, 1968;
8:45 a.m.]

Title 43—PUBLIC LANDS: INTERIOR

Chapter II—Bureau of Land Management, Department of the Interior

SUBCHAPTER A—GENERAL MANAGEMENT (1000)

[Circular No. 2238]

PART 1720—PROGRAMS AND OBJECTIVES

Subpart 1727—Designation of Areas and Sites

DESIGNATION OF NATURAL RESOURCE EXPERIMENT AND RESEARCH AREAS

On page 15546 of the FEDERAL REGISTER of November 8, 1967, there was published a notice and text of a proposed amendment of § 1727.1 of Title 43, Code of Federal Regulations. The purpose of the amendment is to provide for an additional type of designation for public and other Federal lands exclusively administered by the Secretary of the Interior through the Bureau of Land Management, namely, Natural Resource Experiment and Research Areas. Such designation will identify and improve public knowledge of the experimental and research efforts under way on these lands, and provide a basis for interpreting these efforts.

Interested persons were given 30 days within which to submit comments, suggestions, or objections with respect to the proposed amendment. No comments, suggestions, or amendments have been received. The proposed amendment is hereby adopted without change, and is set forth below. This amendment shall become effective at the beginning of the 30th calendar day following the date of this publication in the FEDERAL REGISTER.

STEWART L. UDALL,
Secretary of the Interior.

A new subparagraph is added to § 1727.1(b) to read as follows:

§ 1727.1 Areas or sites that may be designated.

(b) * * *

(4) *Natural resource experiment and research areas.* These are relatively small areas of land which are used for research or experimental purposes.

JANUARY 5, 1968.

[F.R. Doc. 68-463; Filed, Jan. 11, 1968;
8:47 a.m.]

Title 47—TELECOMMUNICATION

Chapter I—Federal Communications Commission

[Docket No. 16473; FCC 68-18]

PART 0—COMMISSION ORGANIZATION

PART 1—PRACTICE AND PROCEDURE

Discovery Procedures

Report and order. In the matter of amendment of Part 1 of the rules of practice and procedure to provide for discovery procedures.

1. A notice of rule making proposing adoption of discovery procedures was released by the Commission on February 28, 1966 (FCC 66-173) and was published in the FEDERAL REGISTER on March 4, 1966 (31 F.R. 3403). At the time the notice was issued, the Commission had before it Recommendation 30 of the Interim Administrative Conference of the United States and a resolution of the Practice and Procedure Committee of the Federal Communications Bar Association, both advocating adoption of appropriate discovery procedures, and tentatively concluded that such procedures would be a "useful addition to the rules of practice and procedure." Comments on the proposed rules were filed on March 24, 1966, by the law firm of Alk and Lubic, and on September 6, 1966, by the Columbia Broadcasting System, Inc., and the Federal Communications Bar Association. Though containing several important reservations and a number of suggestions for improvement of the proposed procedures, the comments supported the adoption of discovery procedures. In addition, members of the Commission's staff and representatives of the FCBA met and discussed the proposed rules. The Commission has carefully considered the views of all participants and has concluded that discovery procedures should be adopted. The interest and effort of those who have filed comments and joined in discussion with the staff are appreciated; many of the suggestions advanced have been given effect in the rules.

2. The new rules are set forth below. Changes in the sequence and combination of the provisions have been made, in the interest of clarity and better organization, which do not vary the substance of the rules as proposed. Section 0.461 has been modified to provide for the handling of requests for inspection of Commission records filed in the context of a hearing proceeding. The section entitled "Admission of facts and genuineness of documents" (now § 1.246), which contains a procedure for reaching agreement prior to hearing, has been grouped with other related provisions (see §§ 1.246-1.250) under a new heading, "Prehearing Procedures." The section entitled "Production of Statements," which codifies the Jencks rule,¹ has been

included as § 1.362 with other provisions relating to evidence. Procedures governing discovery and the production and preservation of evidence for use at the hearing are set forth in §§ 1.311-1.325. Sections 1.311 and 1.313 apply generally to the various procedures available. Sections 1.315-1.319 provide for the taking of depositions, and § 1.321 governs their use at the hearing. Section 1.323 governs interrogatories to parties to be answered in writing. Section 1.325 provides for the production of documents and things and for entry upon real property. Collateral subpoena procedures are set forth in § 1.333.

3. A number of substantive changes have also been made in the rules as proposed, on the basis of the comments and further Commission study. These changes, and some which have been advocated but not made, are discussed below. Sections 1.311-1.325 derive from existing Commission rules (§§ 1.311-1.319) which provide for the taking of depositions for purposes other than discovery, and from the Federal Rules of Civil Procedure, which provide for both discovery and the production and preservation of evidence. These new rules provide discovery procedures to facilitate preparation for the hearing, eliminate surprise, and promote fairness. It is hoped that more thorough preparation for hearing will produce a better record and expedite the decision-making process. When used for the preservation of evidence, these procedures are intended to avoid a failure of justice where it appears that it may not be possible to obtain the personal appearance of a witness at the hearing, and to promote the convenience of parties, witnesses and the Commission where it appears that the personal appearance of a witness at the hearing is unnecessary. They may also be used to facilitate the preparation of exhibit material based on documents or things in the possession, custody or control of other parties.

4. Several matters initially warrant emphasis and special comment. First, while the new rules contain a comprehensive set of prehearing procedures, they should not be invoked indiscriminately. Intelligent selection should be made of the particular procedure or combination of procedures which will prove most effective and expeditious in a particular set of circumstances. Secondly, the utility of these procedures will be dependent in no small part on the cooperation of the communications bar. In the civil courts, discovery takes place in the typically lengthy period between the filing of a complaint and the commencement of the trial. In Commission proceedings, the initial prehearing conference has normally been held about 30 days after designation of a proceeding for hearing, and the hearing proper has commenced within a relatively brief period following the conference. Since discovery is normally to be completed prior to the conference, and since the prehearing procedures are being expanded (see § 1.246), use of these procedures may delay commencement of both

¹Jencks v. United States, 353 U.S. 657 (1957).

the conference and the hearing. Thus, in each case, it is desirable for counsel to weigh the value of using these procedures against the time required for their completion. In some cases, the value of the information sought may easily justify extensive use of the procedures. In others, however, the marginal value of the information may warrant restraint in their use in the interest of expedition. Finally, we wish to emphasize that the presiding officer will have full control over the use of these procedures. Under §§ 1.311(c) and 1.313, it is within his power to preclude any use, or particular uses, of these procedures in a particular case if he finds that their use will not contribute to the proper conduct of the proceeding, and he has adequate authority to prevent use of the procedures for purposes of delay and to prevent the abuse of parties or witnesses.

5. *Applicability, § 1.311(a).* These procedures may be used for purposes of discovery in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing. The reference to the Administrative Procedure Act has been added to make it clear that discovery is not available in record rule making proceedings. The procedures now followed in such proceedings adequately provide for the disclosure of relevant facts. Discovery is available, however, with respect to the adjudicatory aspects of cases which may contain both adjudicatory and rule making issues. In addition, the procedures may be used for purposes other than discovery in record rule making proceedings.

6. We have considered the comments urging that the discovery procedures should not apply to the comparative aspects of application proceedings, and have decided to utilize them in these proceedings. We feel that discovery should serve the same useful purposes in comparative proceedings as it serves in others. It is suggested that the need for discovery in such proceedings is less and that the danger of abuse may be greater. However, we do not agree that the need is less, and adequate authority has been vested in the presiding officer under § 1.313 to limit or preclude discovery if the procedures should be abused or if their use would not be of value in a particular proceeding. See paragraph 4, *supra*.

7. *Scope of examination, § 1.311(b).* In one set of comments, it was suggested that we allow the examination of persons and parties to ascertain whether grounds exist for enlargement of the issues. This suggestion has been given careful consideration but has been rejected, at least for the present. The scope of the examination will be limited to matters relevant to the hearing issues, as originally proposed. In certain proceedings the range of possible issues is very broad. The use of discovery to ascertain whether grounds exist for enlargement of the issues would be difficult to limit and would offer substantial opportunity for abuse. The effort made in our Policy Statement On Comparative Broadcast Hearings of

July 28, 1965, 30 F.R. 9660, to avoid unduly prolonging the hearing process by "fishing expeditions" into an applicant's every possible minor blemish would be undercut, without apparent sufficient compensating benefit, by permitting discovery beyond the range of the issues set for hearing.

8. *Limitations on discovery from the Commission, § 1.311(b) (1)-(4).* Section 1.311(b) (1)-(4) contains four limitations on discovery from the Commission. The first of these is that the informer's privilege shall encompass information which may lead to disclosure of the informer's identity. The passage in the proposed rules providing for "broad construction" of the privilege has been deleted.

9. The second limitation is that Commission personnel may be questioned for purposes of discovery only by written interrogatories under § 1.323. Interrogatories are to be served on the appropriate Bureau Chief and are to be answered and signed by such personnel with knowledge of the facts as the Commission may deem appropriate. We have carefully considered adverse comment on a similar provision contained in the proposed rules, but conclude that such a provision is necessary. At any one time, there are numerous hearing cases pending before the Commission. A multiplicity of demands on the Commission's limited staff would seriously interfere with its capacity to discharge its regular duties. The Commission is in this respect in a different position from that of private parties, who will normally be called upon to give depositions only in the single case in which they are participating. Furthermore the written interrogatory may well be the most useful of the several procedural devices, since a party may, in one set of interrogatories, obtain an answer to each of his questions from the person best able to furnish it, without time-consuming questioning to determine in advance the particular staff member who has knowledge of the facts.

10. The third of these provisions concerns the discovery, production and inspection of Commission records, and testimony concerning their contents. It provides that Commission personnel may be questioned regarding the existence, general nature and description, custody, condition, and location of Commission records. Secondly, it provides that the production of Commission records for inspection is governed by the Public Information Act of 1966 and the Commission's implementing rules (§§ 0.451-0.461). These rules establish two categories of Commission records—those which are routinely made available to any person who presents himself at the place where the records are kept, and those which are not routinely available for inspection. Requests for inspection of records in the latter category may now be submitted by any person under § 0.461. Normally, such requests are acted upon by the Executive Director. Where the records are sought by a party to a hearing proceeding for purposes of that proceeding, the need for information in the

hearing is one of the factors to be considered in determining whether the records should be made available. In such circumstances, the presiding officer is in the best position to determine whether inspection should be permitted. Section 0.461 has accordingly been amended to provide for action by the presiding officer on requests for inspection in these circumstances. This provision provides, finally, that Commission personnel may not be questioned concerning the contents of Commission records until the records are made available for inspection. If the records are not made available for inspection, the reasons for withholding the records will be stated, and those reasons will apply with equal effect to testimony concerning their contents. This restriction, it should be made clear, pertains only to testimony concerning the contents of records *per se* and is not intended to limit the examination of Commission personnel regarding facts as to which they have direct personal knowledge independent of those records. Thus, for example, though investigative reports are normally withheld from inspection, and testimony concerning the contents of the reports would not be allowed, this would not preclude the parties from examining the Commission investigator concerning the facts of the case, subject to any other applicable limitations.

11. The last of these limiting provisions provides that Commission personnel may be questioned generally regarding the existence, description, nature, custody, condition, and location of documents and things, and persons having knowledge of relevant facts, and otherwise limits the examination of Commission personnel to facts of the case as to which they have direct personal knowledge. Thus, the rule permits questioning of Commission personnel concerning the identity of persons who have knowledge of relevant facts, and concerning the general nature of the information such persons may be able to furnish, but would not permit questioning concerning the information furnished by such persons during an investigation. Parties should seek such information from the person with direct knowledge of the facts. The purpose of discovery is to find the potential witness and to determine what he knows—not what he has related to the Commission's investigator. Where Commission personnel have direct personal knowledge of the facts of the case, they may be questioned concerning such facts on written interrogatories in the same manner as parties to the proceeding.

12. *Preliminary deposition procedures, §§ 1.315 and 1.316.* A number of technical changes have been made in the procedures to be followed before depositions are taken. The number of copies of the notice and related pleadings to be furnished the Commission, for example, has been reduced to five from the 15 copies required by the rules as proposed. The most important of the changes pertains to depositions upon written interrogatories. The proposed rules, following the Federal rules, provided for direct, cross,

redirect, and recross interrogatories. This series of written questions, we feel, is cumbersome and somewhat more extensive than what would normally be needed or utilized by the parties to Commission proceedings. The final rules provide for original interrogatories, additional interrogatories to be asked of the same witness at the same time and place, and cross interrogatories limited to matters raised in such original or additional interrogatories.

13. *The taking of depositions, § 1.318.* The procedures to be followed at the deposition hearing have been combined in § 1.318. They are essentially the same as those proposed. Section 1.318(e) has been conformed to Rule 30(e) of the Federal rules by including provision for waiver of the reading of the deposition by or to the witness prior to its being signed.

14. *Objections to the taking of depositions, § 1.319.* Procedures relating to objections to depositions are set out in § 1.319. They provide, first, that objections shall, if possible, be made in pleadings prior to the deposition hearing. See § 1.319(a). Secondly, they provide that errors of any kind which might be obviated, removed or cured if promptly presented are waived unless seasonable objection thereto is made at the taking of the deposition. Objections of this kind, which essentially relate to matters of form, are to be resolved by counsel if possible; and, if they cannot reach agreement, the testimony is to be taken subject to the objection. See § 1.319(b). If the notice to take depositions is carefully drafted, and if the examination is properly conducted, it should be possible to avoid the need to refer objections to the presiding officer for a ruling after the deposition hearing has begun. Nevertheless, we conceive that objections based on relevancy or privilege, or on the manner in which the examination is being conducted, may in some cases require a ruling by the presiding officer during the taking of depositions. In such cases, provision has been made for expeditious determination of the questions presented. See § 1.319(c). One form such a ruling may take it, should be noted, is that adequate notice has not been given of the matters to which the line of questioning objected to relates, or that, adequate notice having been given, the objection is untimely. The presiding officer is not limited to considerations of this kind. He may rule on the question of relevancy or privilege or take any action which is appropriate under § 1.313. As suggested in the comments, interlocutory appeals from such rulings are not allowed.

15. These procedures are designed to protect parties and deponents at the deposition hearing with a minimum of interruption of the hearing pending rulings on objections by the presiding officer. The delay and expense of such interruptions could otherwise frustrate the discovery process. In the Federal rules, there is reference to disputed questions to the court in the district where the deposition is being taken and the

imposition of costs and reasonable expenses. See, for example, Rules 30(d) and 37(a). We have selected other means for achieving the protective purposes of this rule because we are doubtful that those used by the courts are available to us or would be entirely satisfactory.

16. In the notice, we stated that, "an unreasonable refusal to admit a fact subsequently proved, unexplained failure to respond to a notice for the taking of a deposition, or other misuse of these procedures will be considered as reflecting upon a party's fitness to be a licensee." In the comments, it has been suggested that if any "misuse" of these procedures will be considered to reflect on a party's fitness, the threat inferable from this phrase may discourage use of the discovery process by a party-licensee. It should be made clear, however, that the "misuse" which would reflect on a party's fitness is a deliberate or willful abuse of process, as where the procedures are used for purposes of delay or for the purpose of imposing expense on adverse parties, or where there is a deliberate and unexplained refusal to cooperate in the discovery process. Such misuse is properly to be taken into account, we believe.

17. *Use of depositions at the hearing, § 1.321.* Provisions relating to the use of depositions at the hearing have been combined in § 1.321. Except for minor changes, they are the same as those contained in the proposed rules. The comments suggested that unlimited use of depositions be permitted if the witness is more than 100 miles from the place of hearing, as provided in Rule 26(d)(3) of the Federal rules. In Federal court proceedings, however, witnesses are usually located in the judicial district or within 100 miles of the place of trial, and the court's subpoena power operates only within such an area. See Federal Rule 45(e). Thus, if the deposition is not used and if the witness does not voluntarily appear, the testimony is lost. The Commission's subpoena power, on the other hand, is not so limited, and witnesses in its hearing proceedings are often located at much greater distances than 100 miles from the place of hearing. If unlimited use of depositions were permitted in such cases, many Commission proceedings would be converted into trials by deposition. We conclude, therefore, that the 100-mile provision would not be appropriate in Commission proceedings. Financial hardship to parties or witnesses because of the distance of witnesses from the place of hearing can be raised in a showing of "exceptional circumstances" under § 1.321(d)(3).

18. *Admissions of fact and genuineness of documents, § 1.246.* Section 1.246 now contains the following provisions which were not contained in the proposed rule: (1) Time periods are specified for the service of requests for admissions; (2) copies of the request and the answer must be served on other parties and on the presiding officer; (3) the presiding officer may rule on the objections without additional pleadings; and (4) a ruling upholding the objections is not subject to interlocutory appeal. In the comments,

it was suggested that use of an admission be limited to the proceeding in which it is made (see Federal Rule 36(b)). For reasons set forth in the notice, this suggestion has been rejected. The Commission is interested in determining the facts as they are, not as the parties may agree that they are for purposes of a particular case. Thus, if facts are not true or documents are not genuine, their truth or genuineness should be denied, even though the party answering the request might not consider them sufficiently material to warrant challenge in the particular proceeding.

19. *The production of statements, § 1.362.* This provision (now § 1.362) applies the Jencks rule (enunciated in *Jencks v. United States*, 353 U.S. 657 (1957)), and modified in section 3500 of the Criminal Code) to all witnesses in adjudicatory proceedings. One of the parties commenting, noting that the rule is applied only against the Government in criminal cases, opposes a broader application to Commission proceedings and suggests that it be discarded rather than so applied. In our judgment, however, a rule requiring the production of written statements previously made by a witness and related to his direct testimony is a useful device in any proceeding in which the truth is sought and may, with equal reason, be applied to Government and non-Government witnesses. The fact that it has not previously been so applied in judicial proceedings is not in itself a basis for limiting its application in Commission proceedings.

20. *Time periods.* In one set of comments, finally, it is suggested that 5 days be added to the time limitations specified in the proposed rules. The time limitations have been reviewed and in some cases have been altered. The time limits have not, however, been generally extended. The limits set forth in the final rules are considered reasonable, especially in view of our desire to avoid excessive delay in commencement of the hearing pending completion of discovery. In this respect, it should be noted that where successive time periods are calculated from a single date (see, e.g., §§ 1.315 and 1.316), the special computation-of-time provisions set out in § 1.4(f), (g), and (h) cannot reasonably be utilized in computing the date upon which action is required. In such cases, the number of days specified in the rule is the actual number of days within which action is required; except as provided in § 1.4(i) in the case of documents filed with the Commission, that period is not enlarged by § 1.4. It should, in addition, be made clear that the 24-hour period specified in § 1.319(e)(2) is not enlarged in any way by the provisions of § 1.4. When the discovery procedures are invoked, parties and counsel are expected to direct themselves with energy to their successful completion and to take extraordinary measures, if necessary, to avoid undue delay in commencement of the hearing.

21. *Effective date.* The rules set forth below pertain to matters of procedure and will be made effective on February 1, 1968. In cases designated for hearing

prior to the date the rules are effective, the presiding officer should allow or disallow the use of the various procedures in the interest of fairness and orderly procedure.

22. Authority for the amendments set forth below is contained in sections 4 (i) and (j), 303(r), and 409 of the Communications Act of 1934, as amended, 47 U.S.C. 154 (i) and (j), 303(r), and 409; and in the Public Information Act of 1966, 5 U.S.C. 552.

In view of the foregoing: *It is ordered*, Effective February 1, 1968, that Parts 0 and 1 of the rules and regulations are amended as set forth below and that this proceeding is terminated.

(Secs. 4, 303, 409, 48 Stat., as amended, 1066, 1082, 1096; 47 U.S.C. 154, 303, 409; and 5 U.S.C. 552)

Adopted: January 4, 1968.

Released: January 11, 1968.

FEDERAL COMMUNICATIONS
COMMISSION,

[SEAL] BEN F. WAPLE,
Secretary.

Parts 0 and 1 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

1. Section 0.461(e) is added to read as follows:

§ 0.461 Requests for inspection of materials not routinely available for public inspection.

(e) (1) If the request is related to a hearing proceeding and is filed by a party to that proceeding, it shall be served on all other parties to the proceeding.

(2) The presiding officer will act on the request under the procedures and criteria set out in paragraphs (b) and (c) of this section and may also call for and consider pleadings filed by parties to the proceeding.

(3) Any party to the hearing and any person who has participated in proceedings on the request may appeal the presiding officer's ruling to the Commission. Appeals shall be filed within 5 days after the order is released. Oppositions to the appeal shall be filed within 5 days after the time for filing appeals has expired. Additional pleadings may be filed only if specifically authorized or requested by the Commission.

(4) Orders granting requests for inspection are stayed pending appeal and judicial review, in accordance with subparagraph (2) of paragraph (d) of this section.

2. The undesignated center heading preceding § 1.221 is revised to read as follows: "Participants and Issues."

3. The following changes are made in provisions located between the end of § 1.245 and the beginning of § 1.258:

a. The undesignated center heading following § 1.245 is revised to read as follows: "Prehearing Procedures."

b. Section 1.246 is added to read as follows:

§ 1.246 Admission of facts and genuineness of documents.

(a) Within 20 days after the time for filing a notice of appearance has expired; or within 20 days after the release of an order adding parties to the proceeding (see §§ 1.223 and 1.227) or changing the issues (see § 1.229); or within such shorter or longer time as the presiding officer may allow on motion or notice, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents identified in and exhibited by a clear copy with the request or of the truth of any relevant matters of fact set forth in the request.

(b) Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof, or within such shorter or longer time as the presiding officer may allow on motion or notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters, or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(c) A copy of the request and of any answer shall be served by the party filing on all other parties to the proceeding and upon the presiding officer.

(d) Written objections to the requested admissions may be ruled upon by the presiding officer without additional pleadings. Rulings may be appealed only if the written objections are overruled.

c. Section 1.251 is redesignated § 1.248, paragraph (c) (2) is revised, and paragraph (c) (6) (ii) of that section is deleted as follows:

§ 1.248 Prehearing conferences; hearing conferences.

(c) * * *

(2) The admission of facts and of the genuineness of documents (see § 1.246), and the possibility of stipulating with respect to facts;

* * *

(6) * * *

(ii) [Deleted]

* * *

§ 1.255 [Amended]

d. Section 1.255(d) is redesignated § 1.249 and a headnote to that section is added, to read as follows:

§ 1.249 Prehearing statement.

e. Section 1.250 is added to read as follows:

§ 1.250 Discovery and preservation of evidence; cross-reference.

For provisions relating to prehearing discovery and preservation of admissible evidence, see §§ 1.311-1.325.

f. An undesignated center heading is added following § 1.250, to read as follows: "Hearing and Intermediate Decision."

4. The undesignated center heading preceding the § 1.311 is revised to read as follows; §§ 1.311-1.319 are deleted, and §§ 1.311-1.325 are added in lieu thereof to read as follows:

THE DISCOVERY AND PRESERVATION
OF EVIDENCE

§ 1.311 General.

Sections 1.311-1.325 provide for taking the deposition of any person (including a party), for interrogatories to parties, and for orders to parties relating to the production of documents and things and for entry upon real property. These procedures may be used for the discovery of relevant facts, for the production and preservation of evidence for use at the hearing, or for both purposes.

(a) *Applicability.* For purposes of discovery, these procedures may be used in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing. For the preservation of evidence, they may be used in any case which has been designated for hearing and is conducted under the provisions of this subpart (see § 1.201).

(b) *Scope of examination.* Persons and parties may be examined regarding any matter, not privileged, which is relevant to the hearing issues, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection to use of these procedures that the testimony will be inadmissible at the hearing if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. The use of these procedures against the Commission is subject to the following additional limitations:

(1) The informer's privilege shall encompass information which may lead to the disclosure of an informer's identity.

(2) Commission personnel may not be questioned by deposition for the purposes of discovery except on special order of the Commission, but may be questioned by written interrogatories under § 1.323. Interrogatories shall be served on the appropriate Bureau Chief (see § 1.21(b)). They will be answered and signed by those personnel with knowledge of the facts. The answers will be served by the Secretary of the Commission upon parties to the proceeding.

* Statement of Commissioner Cox in which Commissioner Bartley joins filed as part of the original document.

(3) The inspection of Commission records is governed by the Public Information Act of 1966 and by §§ 0.451-0.461 of this chapter. The production of Commission records for inspection and copying is subject to these provisions and is considered under criteria set forth therein. See, in particular, § 0.461(e). Commission personnel may be questioned by written interrogatories regarding the existence, general nature and description, custody, condition and location of Commission records, but may not be questioned concerning their contents unless the records are available (or are made available) for inspection under §§ 0.451-0.461. See § 0.451(b)(4) of this chapter.

(4) Subject to subparagraphs (1) through (3) of this paragraph, Commission personnel may be questioned generally by written interrogatories regarding the existence, description, nature, custody, condition and location of relevant documents and things and regarding the identity and location of persons having knowledge of relevant facts, and may otherwise only be examined regarding facts of the case as to which they have direct personal knowledge.

(c) *Schedule for use of the procedures.* (1) Except as provided in this paragraph or as otherwise ordered by the presiding officer, the use of these procedures shall be completed prior to the initial pre-hearing conference. The presiding officer may at any time order the parties or their attorneys to appear at a conference to consider the proper use of these procedures or the time to be allowed for such use.

(2) After the record has been closed, the parties may be permitted to take the testimony of witnesses, by deposition, for use in the event of further hearing proceedings, on motion, and solely to avoid a failure of justice.

(d) *Who shall act.* Actions provided for in §§ 1.311-1.325 will, in most cases, be taken by the officer designated to preside at the hearing (see § 1.241). If the proceeding, or a particular matter to which the action relates, is before the Commission, the Review Board, a commissioner or panel of commissioners, or the Chief Hearing Examiner, the action will be taken by such officer or body. The term "presiding officer", as used in §§ 1.311-1.325 shall be understood to refer to the appropriate officer or body. See §§ 0.341, 0.351, 0.365, and 1.271 of this chapter.

(e) *Stipulations regarding the taking of depositions.* If all of the parties so stipulate in writing and if there is no interference to the conduct of the proceeding, depositions may be taken before any person, at any time (subject to the limitation below) or place, upon any notice and in any manner, and when so taken may be used like other depositions. An original and one copy of the stipulation shall be filed with the Secretary of the Commission, and a copy of the stipulation shall be served on the presiding officer, at least 3 days before the scheduled taking of the deposition.

§ 1.313 Protective orders.

The use of the procedures set forth in §§ 1.311-1.325 is subject to control by the presiding officer, who may issue any order consistent with the provisions of those sections which is appropriate and just for the purpose of protecting parties and deponents or of providing for the proper conduct of the proceeding. The order may specify any measures, including the following, to assure proper conduct of the proceeding or to protect any party or deponent from annoyance, expense, embarrassment or oppression:

(a) That depositions shall not be taken or that interrogatories shall not be answered.

(b) That certain matters shall not be inquired into.

(c) That the scope of the examination or interrogatories shall be limited to certain matters.

(d) That depositions may be taken only at some designated time or place, or before an officer, other than that stated in the notice.

(e) That depositions may be taken only by written interrogatories or only upon oral examination.

(f) That after being sealed, the deposition shall be opened only by order of the presiding officer.

§ 1.315 Depositions upon oral examination—notice and preliminary procedure.

(a) *Notice.* A party to a hearing proceeding desiring to take the deposition of any person upon oral examination shall give a minimum of 15 days notice in writing to every other party, to the person to be examined, and to the presiding officer. An original and three copies of the notice shall be filed with the Secretary of the Commission. Related pleadings shall be served and filed in the same manner. The notice shall contain the following information:

(1) The name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The time and place for taking the deposition of each person to be examined, and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(3) The matters upon which each person will be examined. See § 1.319.

(b) *Opposition motions.* Within 10 days after the notice to take depositions has been served, a motion opposing the taking of depositions may be filed by any party to the proceeding or by the person to be examined. See § 1.319(a).

(c) *Protective order.* On his own motion within the same 10-day period, or on motion made by any party or by the person to be examined, the presiding officer may issue a protective order. See § 1.313.

(d) *Depositions taken without an order therefor.* If an opposition is not filed within 10 days after service of the notice to take depositions and if no action is taken by the presiding officer on

his own motion within that period, the depositions described in the notice may be taken. An order for the taking of depositions is not required.

§ 1.316 Depositions upon written interrogatories—notice and preliminary procedure.

(a) *Service of interrogatories; notice.* A party to the hearing proceeding desiring to take the deposition of any person upon written interrogatories shall serve the interrogatories upon every other party and shall give a minimum of 20 days notice in writing to every other party and to the person to be examined. An original and three copies of the interrogatories and the notice (and of all related pleadings) shall be filed with the Secretary of the Commission. A copy of the interrogatories and the notice (and of all related pleadings) shall be served on the presiding officer. The notice shall contain the following information:

(1) The name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The time and place for taking the deposition of each person to be examined, and the name or descriptive title and address of the officer before whom the deposition is to be taken.

(3) The matters upon which each person will be examined. See § 1.319.

(b) *Additional interrogatories.* Within 5 days after the filing and service of the original interrogatories, any other party to the proceeding may, in the same manner, file and serve additional interrogatories to be asked of the same witness at the same time and place, with notice to the witness of any additional matters upon which he will be examined.

(c) *Cross interrogatories.* Within 10 days after the filing and service of the original interrogatories, any party to the proceeding may, in the same manner, file and serve cross interrogatories, which shall be limited to matters raised in the original or in the additional interrogatories.

(d) *Motion to limit or suppress.* Within 15 days after the filing and service of the original interrogatories, any party to the proceeding may move to limit or suppress any original, additional or cross interrogatory, and the person to be examined may file a motion opposing the taking of depositions. See § 1.319(a).

(e) *Protective order.* On his own motion within the same 15-day period, or on motion made by any party or by the person to be examined, the presiding officer may issue a protective order. See § 1.313.

(f) *Depositions taken without an order therefor.* If a motion opposing or to limit or suppress the interrogatories is not filed within 15 days after filing of the original interrogatories and if no action is taken by the presiding officer on his own motion within that period, the deposition of the witness upon those interrogatories may be taken. An order for the taking of depositions is not required.

§ 1.318 The taking of depositions.

(a) *Persons before whom depositions may be taken.* Depositions shall be taken before any judge of any court of the United States; any U.S. Commissioner; any clerk of a district court; any chancellor, justice or judge of a supreme or superior court; the mayor or chief magistrate of a city; any judge of a county court, or court of common pleas of any of the United States; any notary public, not being of counsel or attorney to any party, nor interested in the event of the proceeding; or presiding officers, as provided in § 1.243.

(b) *Attendance of witnesses.* The attendance of witnesses at the taking of depositions may be compelled by the use of subpoena as provided in §§ 1.331-1.340.

(c) *Oath; transcript.* The officer before whom the deposition is to be taken shall administer an oath or affirmation to the witness and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed, unless the parties agree otherwise.

(d) *Examination.* (1) In the taking of depositions upon oral examination, the parties may proceed with examination and cross-examination of deponents as permitted at the hearing. In lieu of participating in the oral examination, parties served with the notice to take depositions may transmit written interrogatories to the officer designated in the notice, who shall propound them to the witness and record the answers verbatim.

(2) In the taking of depositions upon written interrogatories, the party who served the original interrogatories shall transmit copies of all interrogatories to the officer designated in the notice, who shall propound them to the witness and record the answers verbatim.

(e) *Submission of deposition to witness; changes; signing.* When the testimony is fully transcribed, the deposition of each witness shall be submitted to him for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill, cannot be found, or refuses to sign.

If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver, the illness or absence of the witness, or of his refusal to sign, together with the reason (if any) given therefor; and the deposition may then be used as fully as though signed, unless upon a motion to suppress, the presiding officer holds that the reason given for the refusal to sign requires rejection of the deposition in whole or in part.

(f) *Certification of deposition and filing by officer; copies.* The officer shall certify on the deposition that the witness was duly sworn by him, that the deposi-

tion is a true record of the testimony given by the witness, and that said officer is not of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly send the original and two copies of the deposition and of all exhibits, together with the notice and any interrogatories received by him, by certified mail to the Secretary of the Commission.

§ 1.319 Objections to the taking of depositions.

(a) *Objections to be made by motion prior to the taking of depositions.* If there is objection to the substance of any interrogatory or to examination on any matter clearly covered by the notice to take depositions, the objection shall be made in a motion opposing the taking of depositions or in a motion to limit or suppress the interrogatory as provided in §§ 1.315 (b) and 1.316(d) and shall not be made at the taking of the deposition.

(b) *Objections to be made at the taking of depositions.* Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition. If such objection is made, counsel shall, if possible, agree upon the measures required to obviate, remove, or cure such errors. The measures agreed upon shall be taken. If agreement cannot be reached, the objection shall be noted on the deposition by the officer taking it, and the testimony objected to shall be taken subject to the objection.

(c) *Additional objections which may be made at the taking of depositions.* Objection may be made at the taking of depositions on the ground of relevancy or privilege, if the notice to take depositions does not clearly indicate that the witness is to be examined on the matters to which the objection relates. See paragraph (a) of this section. Objection may also be made on the ground that the examination is being conducted in such manner as to unreasonably annoy, embarrass, or oppress a deponent or party.

(1) When there is objection to a line of questioning, as permitted by this paragraph, counsel shall, if possible, reach agreement among themselves regarding the proper limits of the examination.

(2) If counsel cannot agree on the proper limits of the examination the taking of depositions shall continue on matters not objected to and counsel shall, within 24 hours, either jointly or individually, telegraph statements of their positions to the presiding officer, together with the telephone numbers at which they and the officer taking the depositions can be reached, or shall otherwise jointly confer with the pre-

siding officer. If individual statements are submitted, copies shall be provided to all counsel participating in the taking of depositions.

(3) The presiding officer shall promptly rule upon the question presented or take such other action as may be appropriate under § 1.313, and shall give notice of his ruling, by telephone, to counsel who submitted statements and to the officer taking the depositions. The presiding officer shall thereafter reduce his ruling to writing.

(4) The taking of depositions shall continue in accordance with the presiding officer's ruling. Such rulings are not subject to appeal.

§ 1.321 Use of depositions at the hearing.

(a) No inference concerning the admissibility of a deposition in evidence shall be drawn because of favorable action on the notice to take depositions.

(b) Except as provided in this paragraph and in § 1.319, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(1) Objections to the competency of a witness, or the competency, relevancy or materiality of testimony are waived by failure to make them before or during the taking of depositions if (and only if) the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Objection on the ground of privilege is waived by failure to make it before or during the taking of depositions.

(c) A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subparagraph (2) of paragraph (d) of this section. At the hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) At the hearing (or in a pleading), any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the presiding officer finds: (i) That the witness is dead; or (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open hearing, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts.

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any hearing has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

§ 1.323 Interrogatories to parties.

(a) *Interrogatories.* Any party may serve upon any adverse party written interrogatories to be answered in writing by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories shall be served upon all parties to the proceeding. An original and three copies of the interrogatories, answers, and all related pleadings shall be filed with the Secretary of the Commission. A copy of the interrogatories, answers and all related pleadings shall be served on the presiding officer.

(1) Except as otherwise provided in a protective order, the number of interrogatories or sets of interrogatories is not limited.

(2) Except as provided in such an order, interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered.

(b) *Motion to limit or suppress.* Within 10 days after the service of interrogatories, the party on whom they were served may file a motion to limit or suppress any of them. The motion shall be served on all other parties to the proceeding. Answers to interrogatories to which objection is made shall be deferred until the motion has been acted on.

(c) *Protective order.* On his own motion within the same 10-day period, or on motion made by the party on whom the interrogatories were served, the presiding officer may issue a protective order. See § 1.313.

(d) *Answers.* Interrogatories shall be answered separately and fully in writing under oath or affirmation. Answers shall be signed by the person making them. The party to whom the interrogatories were directed shall serve a copy of the answers on all other parties to the proceeding within 15 days after service of the interrogatories, unless the presiding officer, on motion and notice and for good cause shown, enlarges or shortens the time. Answers may be used in the same manner as depositions of a party (see § 1.321(d)).

§ 1.325 Discovery and production of documents and things for inspection, copying, or photographing.

(a) Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of § 1.313, the presiding officer may (1) order any party except the Commission (see paragraph (b) of this section) to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by § 1.311(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by § 1.311(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

(b) Any party seeking the production of Commission records which are not routinely available for inspection (see §§ 0.456, 0.457, and 0.459 of this chapter) may file a request for inspection under § 0.461 of this chapter. See, in particular, § 0.461(e).

5. In § 1.333, paragraphs (e) and (f) are added, to read as follows:

§ 1.333 Requests for issuance of subpoena.

(e) Requests for issuance of a subpoena ad testificandum to enforce a notice to take depositions shall be submitted in writing. Such requests may be submitted with the notice or at a later date. The request shall not be granted until the period for the filing of motions opposing the taking of depositions has expired or, if a motion has been filed, until that motion has been acted on. Regardless of the time when the subpoena request is submitted, it need not be accompanied by a showing that relevant and material evidence will be adduced, but merely that the person will be examined regarding a nonprivileged matter which is relevant to the hearing issues. The subpoena request may ask that a subpoena duces

tecum be contemporaneously issued commanding the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by § 1.311(b) but in that event the subpoena request will be subject to the provisions of § 1.313 and paragraph (b) of this section.

(f) Requests for issuance of a subpoena duces tecum to enforce an order for the production of documents and things for inspection and copying under § 1.325 may be submitted with the motion requesting the issuance of such an order. Regardless of the time when the subpoena request is submitted, it need not be accompanied by a showing that relevant and material evidence will be adduced, but merely that the documents and things to be examined contain non-privileged matter which is relevant to the subject matter of the proceeding.

6. Section 1.362 is added to read as follows:

§ 1.362 Production of statements.

After a witness is called and has given direct testimony in a hearing, and before he is excused, any party may move for the production of any statement of such witness, or part thereof, pertaining to his direct testimony, in possession of the party calling the witness, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be directed to the presiding officer. If the party declines to furnish the statement, the testimony of the witness pertaining to the requested statement shall be stricken.

[F.R. Doc. 68-471; Filed, Jan. 11, 1968; 8:48 a.m.]

Title 49—TRANSPORTATION

Subtitle A—Office of the Secretary of Transportation

[OST Docket No. 15]

PART 95—ADVISORY COMMITTEES

The purpose of this amendment is to provide a uniform regulation, for use throughout the Department of Transportation, relating to the formation and use of advisory committees.

The regulation applies to all committees, boards, commissions, councils, conferences, panels, task forces, or similar groups, including industry advisory committees, and to subcommittees and subgroups thereof, which are formed within the Department for the purpose of obtaining advice or recommendations, or for any other purpose, and which are not composed entirely of officers or employees of the Government.

Executive Order 11007, dated February 26, 1962, prescribes general rules for the formation and use of advisory committees by departments and agencies of the Government. Section 7 of the Executive order authorizes Department heads to

prescribe additional regulations, consistent with the order, "to govern the formation or use of such committees, or the appointment of members thereof."

The regulation applies to advisory committees of the Office of the Secretary of Transportation and each of the operating administrations of the Department of Transportation—the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, and the St. Lawrence Seaway Development Corporation. It does not apply to the National Transportation Safety Board.

Since this amendment relates to departmental management, procedures, and practices, notice and public procedure thereon is unnecessary and it may be made effective in less than 30 days after publication in the *FEDERAL REGISTER*.

This amendment is made under the authority of section 7 of Executive Order 11007, dated February 26, 1962 (Title 3, CFR 572 (1959-63 Comp.)) and section 9 of the Department of Transportation Act (49 U.S.C. 1657).

In consideration of the foregoing, Title 49 of the Code of Federal Regulations is amended by adding the following new Part 95 "Advisory Committees", effective January 12, 1968.

Issued in Washington, D.C., on January 5, 1968.

ALAN S. BOYD,
Secretary of Transportation.

- Sec. 95.1 Applicability.
- 95.3 Definitions.
- 95.5 Use of advisory committees generally.
- 95.7 Industry advisory committees: Membership.
- 95.9 Meetings; other than industry advisory committees.
- 95.11 Meetings; industry advisory committees.
- 95.13 Antitrust laws.
- 95.15 Conflicts of interest statutes, orders, and regulations.

AUTHORITY: The provisions of this Part 95 issued under sec. 7, E.O. 11007, Feb. 26, 1962 (3 CFR Part 572 (1959-63 Comp.)); sec. 9, Department of Transportation Act (49 U.S.C. 1657).

§ 95.1 Applicability.

(a) This part prescribes uniform regulations governing the formation and use of advisory committees by the Office of the Secretary of Transportation, the U.S. Coast Guard, the Federal Aviation Administration, the Federal Highway Administration, the Federal Railroad Administration, and the St. Lawrence Seaway Development Corporation. It does not apply to the National Transportation Safety Board.

(b) This part applies to advisory committees formed or used by the organizations named in paragraph (a) of this section. It also applies to those organizations whenever they affiliate with, participate in, or use similar advisory committees formed or used by other departments or agencies of the Executive Branch of the Government, unless specifically exempted under paragraph (c) of this section. Advisory committees

whose membership includes "consultants and advisers" are subject to this part regardless of whether those members are considered to be Government employees on the days they attend committee meetings.

(c) This part does not apply to—

(1) Any advisory committee the purpose, composition, and operation of which is specified by statute, unless and to the extent that statute authorizes the President to prescribe regulations for the committee's formation and use.

(2) Any advisory committee composed wholly of representatives of State or local agencies or of charitable, religious, educational, civic, social welfare, or similar nonprofit organizations.

(3) Any local, regional, or national committee whose only function is to disseminate information for public agencies, or any local civil committee whose primary function is to perform a public service, other than giving advice or making recommendations to the Government.

§ 95.3 Definitions.

For the purposes of this part—

(a) "Advisory committee" includes any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee, or other subgroup thereof, which is formed within the Department in the interest of obtaining advice or recommendations, or for any other purpose, and which is not composed wholly of officers or employees of the Government. It also includes any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or subgroup thereof, which is not formed within the Department, but only during the period it is being used by the Department in the same manner as a Government-formed advisory committee.

(b) "Industry advisory committee" includes any advisory committee composed predominately of members or representatives of a single industry or group of related industries, or any subdivision of a single industry, made on a geographic, service, or product basis.

(c) "Department" means Department of Transportation.

(d) "Secretary" means the Secretary of Transportation.

§ 95.5 Use of advisory committees generally.

(a) Advisory committees are formed to provide a means of obtaining advice, views, and recommendations of benefit to the operations of the Government from industrialists, businessmen, scientists, engineers, educators, and other public and private citizens whose experience and talents would not otherwise be available to the Department. An advisory committee may be used when its counsel is desired on matters under consideration by any part of the Department. Unless specifically authorized by law to the contrary, no advisory committee may be used for functions which are not solely advisory. Determinations of action to be taken with respect to matters upon

which an advisory committee advises or recommends may be made only by a full-time, salaried officer or employee of the Government.

(b) An advisory committee may be established to serve the Department as a whole, the Office of the Secretary, any operating administration, any combination of the Office of the Secretary and the operating administrations, or the operating administrations collectively. However, no advisory committee may be formed or used unless (1) the committee is specifically authorized by law, or (2) the committee is specifically approved, in writing, by the Secretary or his designee, to be in the public interest in connection with the performance of duties imposed on the Department or any part of it.

§ 95.7 Industry advisory committees: Membership.

Each industry advisory committee must be reasonably representative of the group of industries, the single industry, or the product segment thereof to which it relates, taking into account the size and function of business enterprises in the industry or industries and their location, affiliation, and competitive status among other factors. Selection of industry members shall, unless otherwise provided by statute, be limited to persons actively engaged in operations in the particular industry, industries, or segments concerned, except in cases in which the Secretary or his designee considers that such a limitation would interfere with effective committee operations.

§ 95.9 Meetings; other than industry advisory committees.

(a) Meetings of an advisory committee, other than an industry advisory committee, may be held only at the call, or with the advance approval, of a full-time, salaried officer or employee of the Department, with an agenda formulated or approved by that officer or employee.

(b) Each meeting shall be chaired by, or be conducted in the presence of, a full-time, salaried officer or employee of the Government who is required to adjourn the meeting whenever he considers it to be in the public interest.

(c) Minutes shall be kept of each meeting. As a minimum, the minutes must contain a record of the persons present, a description of the matter discussed and conclusions reached, and a copy of any report received, issued, or approved by the committee. The accuracy of all minutes must be certified to by a full-time, salaried officer or employee of the Government who was present during the meeting to which the minutes pertain.

(d) The Secretary or his designee may waive any requirement of this section in any case in which he determines that—

(1) Compliance with that requirement would interfere with the proper functioning of the committee or would be impracticable;

(2) Adequate provisions are made to assure otherwise that the operation of the committee is subject to Government control and purpose; and

(3) The waiver is in the public interest.

§ 95.11 Meetings; industry advisory committees.

(a) Meetings of an industry advisory committee may be held only at the call of a full-time, salaried officer or employee of the Department, with an agenda formulated by that officer or employee.

(b) Each meeting shall be chaired by a full-time, salaried officer or employee of the Government who is required to adjourn the meeting whenever he considers it to be in the public interest.

(c) A verbatim transcript shall be kept of the proceedings at each meeting, including the name of each person present, his affiliation, and the capacity in which he attended, except in any case in which the Secretary or his designee determines that a verbatim transcript would interfere with the proper functioning of the committee or would be impracticable and therefore waives the requirement as being in the public interest. In such a case the procedure prescribed in § 95.9(c) applies.

(d) No industry advisory committee may receive, compile, or discuss data or reports showing the current or projected commercial operations of any identified business enterprise.

§ 95.13 Antitrust laws.

The activities of advisory committees are subject to the antitrust laws and committee members are not immune from prosecution under those laws. The Department of Justice takes the position that it retains complete freedom to institute proceedings, either civil or criminal, or both, in the event that any particular plan or course of action is used to accomplish unlawful private ends, and to institute civil actions to enjoin continuance of any act or practices found not to be in the public interest and persisted in after notice to desist. This part is intended to minimize the possibility of violating the antitrust laws. Industry representatives and Government personnel officially connected with advisory committees should be advised of the antitrust aspects of the committee activity.

§ 95.15 Conflicts of interest statutes, orders, and regulations.

There is a body of statutes, orders, and regulations prescribed by the President, the Secretary, and other authorities, dealing with conflicts of interest and designed to prevent any conflict between the official duties and status of Government officers and employees and their private interest. Government officers and employees are required to comply with all applicable laws, orders, and regulations. Part 99 of this chapter sets forth a comprehensive list of the conflicts of interest statutes and guidelines for the employees of the Department to follow in the application of these statutes to part-time advisers and consultants to the Government. Any officer or employee appointed to serve on an advisory committee who has any doubt or question respecting a possible conflict of interest shall seek specific legal advice on his individual situation.

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