

of Proposed Rule Making, the Commission will consider whether to remove the quality performance regulations for cable television systems and whether to relax the signal leakage limits.

This meeting may be continued the following work day to allow the Commission to complete appropriate action.

Additional information concerning this meeting may be obtained from Judith Kurtich, FCC Public Affairs Office, telephone number (202) 254-7674. William J. Tricarico,

Secretary, Federal Communications Commission.

[FR Doc. 85-1329 Filed 1-14-85; 12:18 pm]

BILLING CODE 6712-01-M

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

TIME AND DATE: 10:00 a.m., Wednesday, January 16, 1985.

PLACE: Room 600, 1730 K Street, NW., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following:

1. Jim Walter Resources, Inc., Docket No. SE 84-23. (Issues include whether the administrative law judge erred in vacating a citation alleging non-compliance with a notice of safeguard issued pursuant to 30 CFR 75.1403-5(g)).

2. Monterey Coal Company, Docket No. LAKE 83-61. (Issues include whether the administrative law judge erred in concluding that a violation of 30 CFR 75.316, dealing with ventilation plans, was significant and substantial.)

Any person intending to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Thus, the Commission may, subject to the limitations of 29 CFR 2706.150(a)(3) and 2706.160(e), ensure access for any handicapped person who gives reasonable advance notice.

CONTACT PERSON FOR MORE INFORMATION: Jean Ellen (202) 653-5632.

Jean H. Ellen,

Agenda Clerk.

[FR Doc. 85-1353 Filed 1-14-85; 3:08 pm]

BILLING CODE 6735-01-M

4

FOREIGN CLAIMS SETTLEMENT COMMISSION

[F.C.S.C. Meeting Notice No. 1-85]

Announcement in Regard to Commission Meetings and Hearings.

The Foreign Claims Settlement Commission, pursuant to its regulations (45 CFR Part 504), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice in regard to the scheduling of open meetings and oral hearings for the transaction of Commission business and other matters specified, as follows:

Date, Time, and Subject Matter

Tuesday, January 22, 1985 at 10:30 a.m.

Consideration of Final Decisions on objections, Amended Final Decisions, and Petitions to Reopen claims issued under the Second Czechoslovakian Claims Program.

Wednesday, January 23, 1985 at 10:30 a.m.

Consideration of Claim No. CZ-3474—Claim of Joseph Karel Hasek

Subject matter listed above, not disposed of at the scheduled meeting, may be carried over to the agenda of the following meeting.

All meetings are held at the Foreign Claims Settlement Commission, 1111 20th Street, NW., Washington, D.C. Requests for information, or advance notices of intention to observe a meeting, may be directed to: Administrative Officer, Foreign Claims Settlement Commission, 1111 20th Street, NW., Room 409, Washington, DC 20579. Telephone: (202) 653-6155.

Dated at Washington, D.C., on January 9, 1985.

Judith H. Lock,

Administrative Officer.

[FR Doc. 85-1322 Filed 1-14-85; 11:38 am]

BILLING CODE 4410-01-M

5

LEGAL SERVICES CORPORATION BOARD OF DIRECTORS MEETING

TIME AND DATE: The meeting will commence at 8:30 a.m. on Friday, January 25, 1985 and continue until all official business is completed. (The meeting will recess from 10:00 a.m. to 1:00 p.m.).

PLACE: Capitol Holiday Inn, 550 C Street, SW., Washington, D.C.

STATUS OF MEETING: Open (Portion of meeting is to be closed to discuss personnel, personal, criminal, litigation, and investigatory matters under 45 CFR 1622.5 (a), (d), (e), (f) and (h)).

MATTERS TO BE CONSIDERED:

1. Approval of Agenda
2. Approval of Draft Minutes—December 20, 1984
3. Report from the President
4. FY 1986 Budget Mark Impact—Report from the Office of Comptroller—Report from the Office of Field Services—Report from Supplemental Program Representative

—Report from National and State Support Representative

—Report from Native American and Migrant Program Representative

5. Additional Funding Sources

—Report from the Office of Information Management

—Report from the Field Programs on Additional Funding Sources

—Report from the IOLTA Representative

—Report from ACCA Representative

CONTACT PERSON FOR MORE

INFORMATION: Thomas J. Opsut, Executive Office, (202) 272-4040.

Dated: January 14, 1985.

Donald P. Bogard,

President.

[FR Doc. 85-1323 Filed 1-14-85; 11:38 am]

BILLING CODE 6920-35-M

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NATIONAL COUNCIL ON THE HANDICAPPED

TIMES AND DATES:

9:00 a.m.-5:00 p.m., January 23, 1985.

9:00 a.m.-5:00 p.m., January 24, 1985.

9:30 a.m.-3:30 p.m., January 25, 1985.

PLACE: Saturn/Venus Room, Capitol Holiday Inn, 550 C Street, SW., Washington, DC.

STATUS: Open meeting.

MATTERS TO BE CONSIDERED: General Business including:

Approval of Minutes
Projects With Industry Evaluation Standards
Independent Living Evaluation Standards
NCH Staff Report
Presentation by National Service Providers

Please Note.—Any person requiring an interpreter or other special services, please contact NCH Staff no later than January 22, 1985.

CONTACT FOR MORE INFORMATION: Lex Frieden, Executive Director, NCH, (202) 453-3846.

Lex Frieden,

Executive Director, National Council on the Handicapped.

[FR Doc. 85-1344 Filed 1-14-85; 12:18 pm]

BILLING CODE 6820-69-M

7

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of January 14, 21, 28, and February 4, 1985.

PLACE: Commissioners' Conference Room, 1717 H Street, NW., Washington, D.C.

STATUS: Open and closed.

MATTERS TO BE CONSIDERED:

Week of January 14

Monday, January 14—2:00 p.m.:

Proposed Legislative Package on Regulatory Reform (Public Meeting)

Tuesday, January 15—10:00 a.m.:

Discussion of Adjudication Matters Related to Catawba-1 (Closed—Exemption 10)

Wednesday, January 16—11:00 a.m.:

Affirmation Meeting (Public Meeting) (if needed)

2:00 p.m.:

Discussion of Need For and Impact of Further TMI-1 Hearings (Public Meeting)

Thursday, January 17—10:00 a.m.:

Discussion/Possible Vote on Full Power Operating License for Catawba-1 (Public Meeting)

Week of January 21—Tentative

Wednesday, January 23—10:00 a.m.:

Affirmation Meeting (Public Meeting) (if needed)

Week of January 28—Tentative

Tuesday, January 29—10:00 a.m.:

Discussion of Plant Issues with Regional Administrators (Public Meeting)

1:30 p.m.:

Affirmation/Discussion of San Onofre Order (Public Meeting) (Tentative)

Wednesday, January 30—10:00 a.m.:

Discussion of Management-Organization and Internal Personnel Matters (Closed—Exemptions 2 and 6)

Thursday, January 31—10:00 a.m.:

Discussion of 1985 Policy and Planning Guidance (Public Meeting)

2:00 p.m.:

Affirmation Meeting (Public Meeting) (if needed)

Week of February 4—Tentative

Tuesday, February 5—2:00 p.m.:

Briefing by INPO (Public Meeting)

Thursday, February 7—2:00 p.m.:

Briefing by EPRI on Standard Design Process (Public Meeting)

3:30 p.m.:

Affirmation Meeting (Public Meeting) (if needed)

Friday, February 8—10:00 a.m.:

Periodic Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting)

To verify the status of meetings call (recording)—(202) 634-1498.

CONTACT PERSON FOR MORE

INFORMATION: Julia Corrado (202) 634-1410.

Dated: January 11, 1985.

George T. Mazuzan,

Office of the Secretary.

[FR Doc. 85-1376 Filed 1-14-85; 3:48 pm]

BILLING CODE 7590-01-M

federal register

Wednesday
January 16, 1985

Part II

Department of Transportation

Office of the Secretary

14 CFR Ch. II, Subchapter B
Transfer of Civil Aeronautics Board
Functions to DOT; Procedural
Regulations; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Ch. II, Subchapter B

[Docket No. 82; Amdt. No. T-2]

Transfer of Civil Aeronautics Board Functions to DOT; Procedural Regulations

AGENCY: Office of the Secretary (OST), DOT.

ACTION: Final rule.

SUMMARY: This final rule amends 14 CFR Parts 300 through 326, which set forth the procedural regulations of the Civil Aeronautics Board (CAB). On January 1, 1985, the CAB cases to exist and a number of its remaining functions will transfer to DOT consistent with the requirements of the Airline Deregulation Act of 1978 and the Civil Aeronautics Board Sunset Act of 1984. The amendments are necessary to facilitate the efficient transfer of those CAB functions to DOT as indicated in the notice of proposed rulemaking (NPRM) proposing these amendments (Notice 84-17; 49 FR 46006; November 21, 1984). Changes will also be required in the CAB's economic regulations to reflect the procedures that will apply to DOT's administration of the transferring functions. The Department, however, is not making substantive changes to the economic regulations governing the transferring CAB functions at this time. Those regulations will be carried over by the Department when the CAB cases to exist.

DATES: This final rule becomes effective on January 1, 1985.

FOR FURTHER INFORMATION CONTACT: Warren Dean, Assistant General Counsel for International Law, (202) 426-2972, or Vance Fort, Director, Special Programs, Office of the Assistant Secretary for Policy and International Affairs, (202) 426-4341, Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590.

SUPPLEMENTARY INFORMATION:

Background

The Airline Deregulation Act of 1978 (ADA) mandated regulatory reform for the air transportation industry. As part of the regulatory reform process, the ADA provides for the sunset of the Civil Aeronautics Board (CAB) and the transfer to other agencies, effective January 1, 1985, of those CAB functions that are to continue. As amended by the Civil Aeronautics Board Sunset Act of 1984 (Pub. L. 98-443, October 4, 1984) (Sunset Act), the ADA provides that

most of the CAB's remaining functions will transfer to DOT, with certain other functions transferring to the United States Postal Service. This final rule amends the CAB's procedural regulations for DOT consistent with the jurisdictional scheme established by the ADA.

Under the terms of the ADA, as amended, the following CAB functions will transfer to DOT:

- *International aviation*, including participation in bilateral negotiations, selection and certification of U.S. carriers to serve on international routes; granting foreign air carriers authority to serve the United States; regulation of international fares and rates; investigation of unfair or deceptive practices or unfair methods of competition in foreign air transportation; action on unfair, deceptive, or discriminatory practices complaints in foreign air transportation; and regulation of international air mail rates.

- *Essential Air Service Program*, a ten-year subsidy program expiring October 1988, which guarantees a minimum level of air service to all communities that had certificated air carrier service when the ADA was enacted, and to certain other communities.

- *Section 43 Employee Protection*, which provides for the determination of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain Federal financial benefits.¹

- *Consumer Protection and Air Carrier Fitness*, programs affecting both foreign and domestic air transportation which were specifically transferred to the Department by the Sunset Act.

- *Antitrust authority*, which provides for approval and antitrust immunity for mergers and similar transactions, interlocking relationships, and intercarrier agreements. This authority, except as it relates to agreements in

foreign air transportation, expires on January 1, 1989, under the provisions of the Sunset Act.

These and most other functions previously performed by the CAB will be carried out within the Office of the Secretary of Transportation.

International aviation functions, Section 43 labor determinations, air carrier fitness demonstrations, antitrust functions and economic analysis of the airline industry will be performed by the Office of the Assistant Secretary for Policy and International Affairs. The Essential Air Service Program will be carried out within a new office to be established within the Office of the Secretary. Consumer functions will be performed by the Office of the Assistant Secretary for Governmental Affairs. The Department's Research and Special Programs Administration (RSPA) will continue the CAB's information gathering functions. The Department has issued amendments to 49 CFR Part 1 and 14 CFR Part 385 (49 FR; December 31, 1984) making delegations and assigning duties to the various offices within DOT to carry out former CAB functions.

Adoption of Amended CAB Procedural Regulations

In order to succeed to the CAB functions with a minimum of disruption, DOT is adopting the CAB's current procedural regulations (appearing as Parts 300 through 326 of Title 14, Code of Federal Regulations) to carry out these functions with as few changes as possible. As explained below, certain modifications are necessary to reflect the organizational structure of DOT and its operating administrations and as technical corrections to omit references to terminating functions and functions transferring to other agencies. More importantly, DOT is adopting certain additional procedural arrangements to ensure that the administrative decisions of the Department—particularly with respect to the selection of carriers for foreign route authority—will not be subject to improper influence. A more detailed discussion of the issue and the Department's resolution of it appears in the DOT Plan for Sunset of the Civil Aeronautics Board, dated February 1984, a copy of which is in the rulemaking docket. The issue is also covered in the discussion of comments on Notice 84-7, which is set forth later in this preamble.

This final rule and amendments to 49 CFR Part 1 and 14 CFR Part 385, are only the first of several rulemaking documents to be issued by the Department to fully effectuate the transfer of CAB functions to DOT. Under the Sunset Act, the Department

¹ On May 17, 1984, the U.S. District Court for the District of Columbia held section 43 of the Airline Deregulation Act unconstitutional. *Alaska Airlines v. Donovan* (Civ. Action No. 84-0485 (D.D.C. May 17, 1984)).

The Department of Justice has filed a notice of appeal from this decision in the U.S. Court of Appeals for the District of Columbia.

In addition, the Civil Aeronautics Board responded to the District Court's decision by issuing orders 84-8-85 (August 17, 1984) and 84-11-54 (November 14, 1984), which stayed all further proceedings in the 10 employee protection cases pending before the Board.

In the event that the Employee Protection Program is reinstated by action of the Courts or of the Congress, responsibility for it will still transfer to the Department of Transportation, which will make its determinations in accord with the final rules adopted pursuant to this notice.

was assigned several additional functions, including the carrying out of the CAB's antitrust authority. The Department is in the process of developing an NPRM proposing regulations to implement this antitrust authority.

The changes being made to the CAB's procedures in this final rule reflect a delegation of the CAB functions by the Secretary to the Assistant Secretary for Policy and International Affairs in most cases. This is consistent with the delegation of most international decisions and other important transportation issues to the DOT Policy Office, to be acted upon on behalf of the Secretary subject to the Secretary's reserved authority (see 49 CFR 1.43) to act in the place of the Assistant Secretary for Policy and International Affairs when the Secretary believes it warranted. A few delegations have been made to other elements of the Department, such as the delegation of data collection to RSPA and the delegation of consumer protection functions to the Assistant Secretary for Governmental Affairs. A new office has been constituted to administer EAS functions, although review of its final actions has been assigned by the Secretary to the Assistant Secretary for Policy and International Affairs. As mentioned previously, these delegations and assignment of functions were prescribed in separate final rules setting forth revisions to 49 CFR Part 1 and 14 CFR Part 385.

This final rule includes one significant departure from routine delegations to assure adequate insulation against potential improper influence on DOT decisions in certain hearing cases. In the case of carrier selection proceedings under section 401 of the Federal Aviation Act, as amended, for international route authority and such other hearing cases as the Secretary deems appropriate, this final rule reflects a special delegation. In those cases, the authority to make final binding decisions will be lodged at the level of the senior career official in the Policy Office, and review of exercises of such delegated authority will be limited to the alternatives of (1) unqualified approval by the Assistant Secretary, or (2) remand to the career official for action consistent with such remand. Any order of remand would be without specific recommendation by the Assistant Secretary for final action, but with a full explanation of the basis for remand. The Secretary * could exercise

this delegated review authority in place of the Assistant Secretary but would be subject to the same restrictions. The Secretary would exercise the review authority only where the decision involves important national transportation policy issues. As in all cases involving formal evidentiary hearings, this decisionmaking process will be in conformity with the requirements of 5 U.S.C. 556 and other applicable provisions of the Administrative Procedure Act (APA), and decisions will be based solely upon the record of the proceeding. These changes to CAB's regulations are set forth in § 302.22a of the rule. It should be noted that, as adopted, these provisions are more detailed than was proposed in Notice 84-17. The changes are discussed in greater detail below.

One other noteworthy modification to CAB organizational arrangements is made in this final rule. To provide a separate advocate of the public interest in adversarial proceedings, the Department has created a new Office of the Assistant General Counsel for Aviation Enforcement and Proceedings within the General Counsel's office. This office will be supervised by an Assistant General Counsel and the Deputy General Counsel only, and not by the General Counsel who will instead provide counsel to the decisionmakers in the Policy Office and to the Secretary on agency decisions. The public counsel will take responsibility for litigating formal hearing cases and enforcement matters before the administrative law judges (ALJs) or other duly constituted decisionmakers. The public counsel's participation in the decisionmaking phase will be limited to on-the-record submissions. The actions of this new office will not be reviewable or reversible, except by the Deputy General Counsel. A comparable arrangement was used at the CAB for initiation of enforcement proceedings by the General Counsel's Office. Staff within the Office of the Assistant Secretary for Policy and International Affairs and staff within the Office of the Assistant Secretary for Governmental Affairs that are responsible for assisting the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in the performance of its responsibilities will be strictly prohibited from discussing such cases with staff participating in the decisionmaking process.

An Office of Hearings has been established in the Office of the Assistant

Secretary for Administration staffed by administrative law judges who will conduct all formal hearing cases. The CAB docket section functions, with the exception of Sunshine Act functions which are not applicable to DOT proceedings, will be carried out in a newly established Documentary Services Division in the Office of the General Counsel.

A brief summary of the important decisionmaking procedures follows:

Carrier Selection Process at DOT

The carrier selection process for route awards in foreign air transportation will be similar to that now used by the CAB; i.e., a quasi-judicial process subject to the requirements of the APA would apply, including separation of functions, on-the-record decisionmaking, and rules governing *ex parte* contacts. This process and the APA requirements would ensure fairness and integrity in carrier selection decisions.

In hearing cases, the Department will issue an instituting order establishing the public goals, policies, and criteria for the proceeding. DOT staff may appear in such proceedings, as appropriate, in a public counsel role similar to that performed by the CAB's Bureau of International Aviation in the past. The DOT staff position will be prepared for presentation to the ALJ by the Office of the General Counsel's new Office of the Assistant General Counsel for Aviation Enforcement and Proceedings in conjunction with selected staff of the Office of the Assistant Secretary for Policy and International Affairs. Public counsel, airlines, and other interested parties will present their positions to the ALJ. In each hearing case, an ALJ will conduct a formal, on-the-record hearing and normally issue a recommended decision regarding the carrier to be selected. This recommendation will be reviewed by the senior career official in the Office of the Assistant Secretary for Policy and International Affairs who is authorized to render a final decision of the Department pursuant to the procedures described below.

The Assistant Secretary for Policy and International Affairs has discretionary authority, delegated by the Secretary, to review each decision after its adoption by the senior career official, but this authority is limited to approving the decision or remanding it for reconsideration. The Secretary will have discretion to exercise this review authority in place of the Assistant Secretary, subject to the same limitations, in cases involving important national transportation policy issues. More detailed information on the review

* Under 49 CFR Part 1, the Deputy Secretary has the authority of the Secretary in all matters, and

reference to the Secretary in the rules being adopted here includes the Deputy Secretary.

procedures for hearing cases in carrier selection proceedings is set forth below in the discussion of the comments received and the discussion of changes made to the NPRM.

Presidential review will continue to be limited, under Section 801 of the Federal Aviation Act, to national security and foreign relations considerations. Judicial review will continue to be available to any party dissatisfied with the outcome of the decision, to the same extent as under present law.

Essential Air Service Process at DOT

A new Office of Essential Air Service (EAS) has been established as a separate office within the Office of the Secretary to administer the EAS subsidy program. This new office will conduct negotiations with carriers, set subsidy and service levels, establish community EAS standards, process carrier selection cases, evaluate and monitor air carrier performance, and perform other related EAS functions currently carried out by the CAB. EAS community hearings, conducted by senior staff members from the Office of EAS, the Office of the General Counsel, and the Office of Governmental Affairs, will be instituted when necessary to consider appeals of the essential air transportation service level determinations. The Assistant Secretary for Policy and International Affairs, acting pursuant to authority delegated by the Secretary, will have the discretion to review and adjust service level determinations as well as make decisions on carrier selection and subsidy levels. The Secretary will have discretion to exercise this review authority in place of the Assistant Secretary.

Section 43 Employee Protection Process at DOT

Determinations of whether the termination of airline employees is due primarily to deregulation, thereby making them eligible for certain Federal financial benefits, are the responsibility of the Assistant Secretary for Policy and International Affairs. As indicated below in the discussion of comments to the NPRM, the Department will review the procedures applicable to these cases at such time as the legal status of these cases is clarified.

Discussion of Comments

Ten comments were received in response to Notice 84-17. Due consideration has been given to each comment submitted to the docket. The more important comments are discussed below under descriptive subheadings.

Insulated Decisionmaking Process

A number of comments were received questioning the Secretarial review process as it was proposed in § 302.22a concerning the responsibilities of the DOT decisionmaker in hearing and non-hearing cases. The questions raised included the following: (1) Will the Assistant Secretary, Deputy Secretary or the Secretary perform the review? (2) Who will initiate Secretarial review? (3) Will the parties to the proceeding have any input as to decisions on Secretarial review? (4) What, if any, will be the guidelines and limitations upon Secretarial review? (5) Will there be any time limits on the initiation or completion of Secretarial review? (6) Will the parties be permitted to seek reconsideration of action taken under the Secretarial review process? (7) Will the parties be permitted to seek reconsideration of a determination of the Secretary not to undertake review?

Several commenters expressed the view that to ensure insulation against potential improper influence in hearing cases, Secretarial review should be conducted openly, on the record and within a well defined framework. These comments also noted that the proposed rule, unlike the preamble, did not say that remand would be "without specific recommendation for final action" or that it would be accompanied with "a full explanation of the basis for remand."

The Department has clarified the proposed "review and remand" procedure that will apply in hearing cases subject to the "insulated" decisionmaking process. Under the rule, as adopted herein, decisions of the senior career official in those cases are subject to review at the discretion of the Assistant Secretary before being issued as final decisions of the Department. Either the Assistant Secretary or Secretary may conduct this discretionary review. Given the stringent statutory timeframe within which many hearing cases must be concluded, the procedures do not provide for petitions at this stage by parties for Assistant Secretary or Secretary review of the senior career official's decision. Parties are encouraged, however, to include in their briefs to the senior career official any arguments they may wish to make that discretionary review should be undertaken in a particular case. Further, a party seeking review of a final order of the Department may file a petition for reconsideration under § 302.37 with the Assistant Secretary. If Secretarial reconsideration is requested, the petition would have to state why

reconsideration at the Secretarial level is warranted.

If the Assistant Secretary or Secretary undertakes review of a decision of the senior career official before it is issued as a final decision, the notice establishing review will announce the scope and schedule for such review. In most cases review will be based solely upon the record that has been developed in the proceeding. In unusual cases, the notice may provide for further proceedings, including provision for additional briefs or oral argument if deemed appropriate.

Any party may file a petition for reconsideration of a final order of the Department pursuant to § 302.37. The petition should specify the reasons for requesting such reconsideration, including any questions of national transportation policy that may be involved. The Assistant Secretary will grant or deny the petition unless, because the case is deemed to involve important issues of national transportation policy, the Secretary chooses to grant or deny the petition. If the petition is granted, the decision will be remanded to the senior career official for a new final order consistent with the reasons specified in the notice of remand.

The Secretary may exercise the review or reconsideration authority of the Assistant Secretary when cases involve important national transportation policy issues. Once review is undertaken, however, the Secretary may remand the case based upon any lawful grounds. They include failure to base a decision upon substantial evidence, failure to adhere to Department policy and precedent, erroneous interpretation of law or regulation and any other prejudicial error. The Secretary's review authority in insulated proceedings, like that of the Assistant Secretary for Policy and International Affairs, is limited only by the requirement that the case may not be reversed but only remanded for final action consistent with a written explanation of the basis for such remand.

Non-Insulated Decisionmaking Process

One commenter asked that DOT clarify whether there will be a Secretarial review process in non-hearing cases and whether the Secretary or the Deputy Secretary may act as DOT decisionmaker in non-hearing cases under the proposed rule. Another commenter suggested that the decisionmaking responsibilities in hearing and non-hearing cases should be treated the same and that "hearing

case" and "non-hearing case" be defined.

The Department has added a definition of "hearing cases" to the rule (see § 302.24). The term "hearing cases" was used in the CAB's regulations in the past. The new definition clarifies such usage to make it clear that a hearing case refers to a proceeding involving an oral evidentiary hearing.

The decisionmaking process specified in the rule for non-hearing cases provides that the Assistant Secretary for Policy and International Affairs or his delegate will ordinarily make such decisions, unless the matter concerns the Department's consumer protection functions which are the responsibility of the Assistant Secretary for Governmental Affairs. All hearing cases not assigned to the senior career official will be decided by the Assistant Secretary for Policy and International Affairs. Consistent with the terms of the delegation of authority to these officials, however, the Secretary may make any decision in lieu of these officials (see 49 CFR 1.43). If a person seeks Secretarial review of a final decision by an Assistant Secretary he or she should do so by petition for reconsideration to the deciding official stating the basis for requesting such review. In sum, these rules do not authorize any direct appeals or petitions to the Secretary. The Secretary and Deputy Secretary may review or decide matters whenever they deem it warranted. They will consider requests for review of Department decisions, however, only on the basis of petitions for reconsideration to the Assistant Secretary involved. The scope and procedures for such review will be established in any order granting such reconsideration.

Separation of Functions Under Rules of Conduct

One commenter argued that the existing rule of conduct, which permits a supervisor to advise a decisionmaker about a case in which a staff member, who reports to the supervisor, is participating, should not be transferred to DOT. The Department disagrees. The organization established by the Department will ensure compliance with the separation of functions requirements of the Administrative Procedure Act.

Applicability of Rules of Conduct to Secretary, Deputy Secretary and Assistant Secretary

One commenter suggested that § 300.1 of the rules of conduct be amended to specifically cover the Secretary, Deputy Secretary and Assistant Secretary in the definition of "DOT employee(s)." It was argued that § 300.4(a), mandating

separation of functions in hearing cases, be revised to expressly apply to the Secretary, Deputy Secretary, Assistant Secretary and their advisors.

Section 300.1 by its terms covers the Secretary, Deputy Secretary, and the Assistant Secretaries of the Department, and the word "Officials" has been added to make that clear. Section 300.4 dealing with separation of functions, has been amended to make it clear that its provisions apply only after a hearing has been noticed by either an instituting order or a complaint (in enforcement cases).

Number of Copies Required To Be Filed of Docketed Pleadings

Comments were received criticizing the number of copies of docketed pleadings required to be filed. These commenters expressed the view that the requirement for an original and 19 copies is excessive. The Department agrees. Proposed § 302.3 has been changed to require the filing of an original and twelve copies. The number of copies to be filed will be reevaluated in the months ahead to determine whether it should be reduced even further.

International Air Transportation Competition Act Complaints

One commenter requested that DOT establish rules of procedure for handling complaints filed against foreign airlines under sections 9 and 23 of the International Air Transportation Competition Act (IATCA). It was argued that the CAB has dealt with these complaints on an *ad hoc* basis, and that the lack of procedure for handling these complaints makes more difficult the adequate development of a record and the rendering of informed decisions. It was further suggested that the lack of specific regulations raises due process questions under the Administrative Procedure Act and the Constitution.

The Department does not agree that the lack of specific IATCA complaint procedures prejudices the decisionmaking process in these cases. Nevertheless, it may be that regulations in this area might improve the efficiency of these proceedings. The Department will examine this question carefully to determine whether it is appropriate for future rulemaking.

Administration of Employee Protection Program

Two organizations commented on the effect of the proposed rules on employee protection proceedings under section 43 of the Airline Deregulation Act of 1978. One of those commenters expressed concern that the proposed rule did not

include any specific provision for expediting those proceedings, in response to the recent court decision in *Air Line Pilots Assn. v. CAB* (D.C. Cir., Oct. 30, 1984).

The Department does not believe it is either necessary or appropriate to adopt a specific rule at this time relating to expedition of the section 43 proceedings. The Department believes the regulations being adopted and other related procedures provide sufficient flexibility to expedite any aviation administrative proceedings, including the section 43 cases, where appropriate. In addition, it should be noted that the CAB has stayed the employee protection proceedings, pending the appeal of another court decision (*Alaska Air Lines v. Donovan*, D.D.C., May 19, 1984) which held Section 43 to be unconstitutional. The Department believes it would be premature and unwise to determine in this regulatory proceeding, which was intended only to adapt the CAB's general procedural rules to reflect DOT's organizational structure, such specific questions as whether and how the section 43 proceedings should be expedited.

The commenters also questioned whether the proposed rules for the section 43 proceedings would adequately assure due process, in light of prior DOT participation as a party in the proceedings before the Board. The Department appreciates the need to assure due process and proper separation of functions in all of the administrative proceedings that transfer from the CAB, but believes that the proposed regulations provide the necessary safeguards. The regulations assure proper insulation of the decisionmakers from those in advocacy roles: § 300.4 provides that any DOT employee who is participating or who has participated in a hearing as a party shall have no substantive communication with either the administrative law judge or the DOT decisionmaker in the proceeding.

With regard specifically to the section 43 proceedings, the Department has already instituted procedures internally to prevent substantive communications between those DOT employees involved in the cases as a "party" (i.e., those who participated in developing the position expressed to the CAB) and those who would serve as or advise the DOT decisionmaker. The restrictions in these cases are similar to those applicable to enforcement proceedings (see § 300.4 (a) and (c)), and the CAB has commented favorably upon them. CAB Order 84-11-54 (served Nov. 21, 1984) at 3-4.

Participation in the Department's filings with the Board in the section 43 cases has been carefully limited to attorneys reporting only to the Deputy General Counsel and several economic analysts; these employees have had no substantive contacts on the subject with other DOT attorneys or with the DOT officials likely to decide section 43 cases (see § 302.22a). Neither the current Assistant Secretary for Policy and International Affairs nor the current senior career official in that office has had any involvement with the development of the position expressed to the CAB in the DOT filings. Any person who participated in such matters would be disqualified from either serving as, or providing advice to, the DOT decisionmaker.

The Department will continue to require that the separation of function requirements be scrupulously followed in all hearing cases, including the section 43 proceedings. The Department believes the procedures outlined above will assure due process and fair treatment to all parties concerned. Accordingly, the Department does not believe any additional separation or insulation regulations for the employee protection cases are warranted.

Procedures for Essential Air Service (EAS) Determinations

One commenter recommended that procedural criteria for deciding appeals to essential air service determinations be established. That commenter expressed the view that the DOT decisionmaker should only reverse the recommendation of the three-member EAS panel if the panel has failed to adhere to existing policy or has failed to base a recommendation upon substantial evidence.

The Department disagrees with this comment. The EAS panel is not a decisionmaking body. It is convened for the purpose of processing the appeal and obtaining comment on the determination. The final decision on the appeal will be made by the Assistant Secretary for Policy and International Affairs. This procedure is based upon that used by the CAB.

Other Matters

One commenter submitted comments that dealt with the consumer regulations as they apply to the needs of handicapped travelers. These comments were beyond the scope of this rulemaking, but may be relevant to future proceedings.

Another commenter suggested that the transfer of CAB functions to DOT provides an excellent opportunity for closer coordination of aviation

economic and safety policy objectives, especially as it applies to EAS. The Department agrees with this comment.

One commenter suggested that the NPRM does not adequately dispose of the delegations of CAB functions set forth in Part 385. As mentioned previously, that was the subject of separate rulemaking.

Another commenter criticized the comment period as being inadequate. The Department regrets the need for a short comment period and will leave this docket open to allow for persons to suggest further improvements to its regulations.

Finally, a commenter suggested that DOT not adopt amendments to Part 302, recently adopted by the CAB, that would relieve foreign air carriers from the requirement to serve notice on other carriers when they apply (a) for permit authority for charter or non-scheduled operations, and (b) for exemption authority for charter or nonscheduled operations when the applications are filed more than 16 days prior to the proposed start of service. This commenter felt that the elimination of this service requirement would make it more difficult for interested U.S. carriers to respond to these permits and exemption requests in a full and timely manner. This comment was beyond the scope of the notice, but the Department will examine this issue carefully to determine whether further action is appropriate.

Changes to the NPRM

Changes to Part 300

Various refinements have been made to Part 300, which establishes rules of conduct that apply to the carrying out of the transferring functions. First, § 300.0 has been modified to include the term "officials" to make clear the Department's intent that these rules apply to the Secretary, Deputy Secretary and Assistant Secretaries.

Several minor changes have been made to proposed § 300.2, which deals with *ex parte* communications. Initially, proposed §§ 300.2(b)(4)(ii) and 300.2(b)(4)(v) have been revised to delete the reference to the handling of *ex parte* communications in informal rulemaking proceedings thereby making the provisions consistent with current DOT policies. Guidelines for the handling of such communications in informal rulemaking proceedings are contained in DOT Order 2100.2. It should be noted, however, that the provisions of § 300.2 continue to apply to exemption proceedings conducted under 14 CFR Chapter II and to any rulemaking proceedings conducted

under that Chapter after notice and an opportunity for an oral evidentiary hearing (hearing cases).

A second change that is being made to § 300.2 involves proposed paragraph (c)(9). That paragraph has been revised to make it clear that the *ex parte* rules continue to apply to Federal agencies which choose to participate as parties in a non-hearing proceeding (other than an informal rulemaking) by making filings on the record. The description of a hearing case in § 300.2(b)(4)(i) has been revised to be consistent with § 302.24 and to more closely reflect the kinds of cases covered. Section 300.4, dealing with separation of functions, has been amended to make it clear that its provisions apply only after a hearing has been noticed.

Changes to Part 302

The principal change to Part 302 deals with the scope and procedures for the "insulated" decisionmaking process. This process involves the assignment of a hearing case to the senior career official of the Office of the Assistant Secretary for Policy and International Affairs. That official is authorized to issue a final decision of the Department based upon a recommended decision of the ALJ, and review of the senior career official's decision by superior officials is limited to review and remand authority only.

After reviewing carefully this proposed procedure, public comments and the Department's new responsibilities under the Sunset Act, the Department has further considered the categories of hearing cases that should be assigned to the senior career official and thereby be subject to the insulated decisionmaking process. That process is designed to ensure that improper influence will have no role in hearing cases that involve choices among competing parties. Carrier selection cases constitute the most obvious and important category in this regard. The Sunset Act transferred authority to the Department for several other kinds of proceedings, such as carrier fitness determinations and antitrust determinations which, while frequently the subject of formal hearing procedures, do not raise the same considerations. Further, antitrust proceedings frequently raise important issues of transportation policy and it is appropriate that the most senior officials of the Department have plenary authority over such issues.

Accordingly, it has been determined that at this time only international carrier selection proceedings will be made subject to the "insulated"

decisionmaking process by regulation. The Secretary, however, may assign other hearing cases to the senior career official for "insulated" decisionmaking procedures as appropriate. Such assignments will be made on a case-by-case basis and announced in the order instituting the proceeding.

The procedures applicable to the "insulated" decisionmaking process are specified in more detail in the final rule than in the NPRM. The senior career official is specifically authorized to make final decisions on the basis of a recommended decision of the ALJ. The decision of the senior career official, however, is not issued as a final order of DOT until 14 days after its adoption, during which period the Assistant Secretary for Policy and International Affairs may determine whether review is appropriate. If the Assistant Secretary undertakes review of the senior career official's decision, a "notice of review" will specify the scope, timetable and further procedures, if any, for such review. Petitions for discretionary review during this 14-day period will not be entertained. If any party believes important issues of national transportation policy are raised in a proceeding, they should make such argument in their briefs to the senior career official.

Following issuance of a final decision, any party may file a petition for reconsideration pursuant to § 302.37.² If a party seeks reconsideration by the Assistant Secretary for Policy and International Affairs (or the Secretary), the petition should specify the reasons for requesting such reconsideration, including any questions of national transportation policy that may be involved. The Assistant Secretary ordinarily will grant or deny the petition. If the petition is granted, the final order will be remanded to the senior career official for a final order consistent with the reasons specified in such order of remand.

This insulated procedure allows the Assistant Secretary to review decisions of the senior career official and the

opportunity for interested parties to request such review either in their briefs to the senior career official or through petitions for reconsideration of final decisions. It minimizes, however, the procedural burdens and delay inherent in such review. As specified in § 302.22a, the Secretary may exercise the authority of the Assistant Secretary to review or reconsider decisions of the senior career official. It is expected that the Secretary will do so only in the most important cases. Parties are free to request Secretarial review in authorized filings before the senior career official or the Assistant Secretary, but unauthorized documents requesting such review will not be entertained by the Department.

Finally, Subpart Q of Part 302, applicable to carrier selection proceedings, has been revised to provide that exceptions to the initial or recommended decisions and briefs in these proceedings must be filed within 7 and 14 days, respectively, of the date that the decision is adopted and served by the administrative law judge. The rules also provide that initial or recommended decisions will be issued by the administrative law judge and be effective 14 days after it is adopted and served. This procedure will allow the record to be complete for consideration by the senior career official at the time the administrative law judge's decision is issued.

In summary, the insulated decisionmaking procedure in carrier selection proceedings for international route authority is as follows. The Department will initiate the proceedings by issuing an instituting order. The administrative law judge will conduct an evidentiary hearing and adopt a recommended decision within 136 days. The decision will be issued by the administrative law judge, and forwarded with any exceptions and briefs filed, 14 days after it is adopted and served. The senior career official will adopt a decision based upon the recommendation of the administrative law judge ordinarily within 45 days after that decision is issued. (This deadline will be specified in the instituting order.) The decision of the senior career official will be transmitted to the President for review under section 801⁴ of the Federal Aviation Act not later than 14 days after it is adopted, unless notice of review is issued by the Assistant Secretary or the Secretary. Any such notice of review will be served on the parties and will

establish the scope, timetable and further procedures, if any, for review. Upon review, the Assistant Secretary for Policy and International Affairs (or the Secretary in cases involving important national transportation policy issues) may either affirm the decision of the senior career official or reverse and remand the decision for further action consistent with such order of remand. The senior career official will then enter a final decision that will be transmitted to the President for review under section 801.

Upon completion of Presidential review, any interested person may petition the Department for reconsideration of its final order, whether or not review had been conducted by the Assistant Secretary or Secretary previously. Any section 401 certificates associated with the Department's final order will not become effective for 30 days after service of the order to allow time for the Assistant Secretary to consider any petition for reconsideration and answers thereto. The Assistant Secretary (or the Secretary in cases involving important national transportation policy issues) may either grant or deny the petition. If granted, the final order will be remanded to the senior career official for action consistent with such remand, including where appropriate a further stay of any certificates in question.

New Part 303

As mentioned previously in this document, the Department is in the process of developing an NPRM to propose procedures for the CAB's transferring antitrust authority. That rulemaking proceeding, however, will not be completed before January 1, 1985. Accordingly, Subparts L and P of Part 302 and Part 315 will remain in effect on an interim basis, which changes to reflect the transfer of these functions to DOT. These provisions, however, have been consolidated and moved to Part 303, consistent with the format the Department has selected for its upcoming NPRM on antitrust matters.

Other Changes

Several editorial changes to the regulations were made; many of those changes provided consistency in language usage. Changes suggested by the Postal Service were also made to eliminate certain anachronisms in the CAB's rules. For example, the terms "regular mail" and "air mail" were changed to "express mail", "first class mail" and "priority mail"; "Postmaster General" and "Post Office Department"

² In cases subject to section 801 of the Federal Aviation Act, the senior career official's decision will not become final until the President's review has been completed. Thus, a petition for reconsideration may not be filed until after completion of the section 801 review process. Because an affected certificate may not be altered without a new proceeding, in order to allow for reconsideration, the senior career official's final order will provide that the associated certificate(s) will not become effective until 30 days after service of the order. Section 302.37 requires reconsideration petitions to be filed within 10 days (rather than 20), with answers due within another 10 days. This will allow 10 days for the Assistant Secretary to stay the effective date of the certificate(s) if additional time is needed.

⁴ Decisions transmitted to the President will be served on the parties consistent with the requirements of section 1 of Executive Order No. 11920, which authorizes the classification of these decisions.

were changed to "U.S. Postal Services" or "Postal Service."

Changes made by the CAB to the Procedural Regulations after May 1, 1984 were incorporated. For example, Part 302, Subpart D dealing with "Rules Applicable to Exemption Proceedings" was revised. Also, § 302.1705 dealing with "Service of Documents" was amended. "The Special Operating Authorization of Charter Air Carriers," § 302.1020-27, was eliminated since those provisions are now obsolete.

Subpart G of Part 302 dealing with "Rules Applicable To Adequacy of Service Petitions" is outmoded and was eliminated.

Additionally, changes were made to reflect amendments to the Federal Aviation Act by the CAB Sunset Act of 1984. For example, sections 403, 410, and 417 were repealed. Portions of sections 401 and 407 were also eliminated.

Regulatory Evaluation and Regulatory Flexibility Act Determination

This final rule was evaluated under Executive Order 12291, "Federal Regulation," dated February 17, 1981, and the Department of Transportation's Regulatory Policies and Procedures dated February 26, 1979. The rule is not considered to be "major," as defined by E.O. 12291, because it will not have an annual effect on the economy of \$100 million or more; it will not cause a major increase in costs or prices for consumers, individual industries, government agencies, or regions; and it will not have a significant adverse effect on competition or any other aspect of the economy. In fact, the economic impact is expected to be so minimal as not to warrant a full regulatory evaluation. The rule is considered to be significant under DOT's Regulatory Policies and Procedures because it concerns a matter in which there is substantial public interest. The rule should have no environmental impact.

It is certified that this rule will not have a significant economic impact on a substantial number of small entities. The rule merely adapts the CAB procedural rules to reflect the transfer of certain continuing CAB functions to appropriate offices within DOT. Small entities should be virtually unaffected.

The CAB "sunset" on January 1, 1985, and this final rule must become effective on that date to reflect the new organization and procedures of the Department. Therefore, good cause exists for making the rule effective less than 30 days after publication.

On December 28, 1984, the Civil Aeronautics Board issued a document entitled, "Transfer, Removal and Reissuance of Regulations to

Transportation Department," which was to be published in the **Federal Register** on January 4, 1985. This document contained a table of current rules of the Civil Aeronautics Board and gave the disposition of those rules upon transfer to the Department of Transportation. Within that document, in the table listing for Subchapter A regulations, the title for Part 248 should have read "Submission of audit reports," and the entries for Part 255—Carrier-owned computer reservation systems, Part 256—Display of joint operations in carrier-owned computer reservations systems, and Part 271—Guidelines for subsidizing air carriers providing essential air transportation were inadvertently omitted. Parts 255, 256, and 271 remain in effect and have been transferred to DOT.

List of Subjects in 14 CFR Chapter II, Subchapter B

Air carriers, Administrative practice and procedure.

Amendment

Accordingly, 14 CFR Chapter II, Subchapter B is revised to read as set forth below.

(Airline Deregulation Act of 1978 (Pub. L. 95-504, October 24, 1978); Civil Aeronautics Board Sunset Act of 1984 (Pub. L. 98-443, October 4, 1984); Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 *et seq.*), and 49 U.S.C. Subtitle I)

Issued in Washington, D.C., on December 31, 1984.

James Burnley IV,

Acting Secretary of Transportation.

SUBCHAPTER B—PROCEDURAL REGULATIONS

PART 300—RULES OF CONDUCT IN DOT PROCEEDINGS UNDER THIS CHAPTER

- Sec.
- 300.0 Applicability.
- 300.0a Applicability of 49 CFR Part 99.
- 300.1 Judicial standards of practice.
- 300.2 Prohibited communications.
- 300.3 Reporting of communications.
- 300.4 Separation of functions in hearing cases.
- 300.5 Prohibited conduct.
- 300.6 Practitioners' standards of conduct.
- 300.7 Conciseness.
- 300.8 Gifts and hospitality and other conduct affecting DOT employees.
- 300.9 Permanent disqualification of employees from matters in which they personally participated before joining DOT or the Civil Aeronautics Board.
- 300.10 Temporary disqualification of employees from matters in which they had official responsibility before joining DOT or the Civil Aeronautics Board.
- 300.10a Permanent and temporary disqualification of DOT employees.

- 300.11 Disqualification of Government officers and employees.
- 300.12 Practice of special Government employees permitted.
- 300.13 Permanent disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters in which they personally participated.
- 300.14 Temporary disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters formerly under their official responsibility.
- 300.15 Opinions or rulings by the General Counsel.
- 300.16 Waivers.
- 300.17 Disqualification of partners of DOT employees.
- 300.18 [Reserved].
- 300.19 Use of confidential information.
- 300.20 Violations.

Authority: Secs. 204, 401-419, 901, 903, 1001, 1002, and 1007, Pub. L. 85-726, as amended; 76 Stat. 743, 754, 757, 758, 760, 763, 766, 767, 768, 769, 770, 771, 783, 786, 788, 796; 76 Stat. 145; 91 Stat. 1264; 92 Stat. 1732; (49 U.S.C. 1324, 1371-1389, 1471, 1473, 1481, 1482, and 1487). [18 U.S.C. 20(b)(c); 49 U.S.C. Subtitle I, unless otherwise noted.]

§ 300.0 Applicability.

The rules of conduct set forth in this part except as otherwise provided in this or any other DOT regulation shall govern the conduct of the parties and their representatives, and the relationships between the Office of the Secretary of Transportation, the Office of the Assistant Secretary for Policy and International Affairs, and the Office of the General Counsel, including regular personnel, and officials, special Government employees, consultants, or experts under contract to the Department of Transportation (DOT) and administrative law judges (hereinafter referred to as "DOT employee(s)") and all other persons in all DOT matters resulting from the transfer of authority under Section 1801(b)(1) of the Federal Aviation Act of 1958, as amended by the Civil Aeronautics Board Sunset Act of 1984.

§ 300.0a Applicability of 49 CFR Part 99.

(a) Except as provided in paragraph (b) of this section, each DOT employee involved in matters covered by this chapter shall comply with the rules on "Employee Responsibilities and Conduct" in 49 CFR Part 99.

(b) The rules in this Part shall be construed as being consistent with those in 49 CFR Part 99. If a rule in this Part is more restrictive than a rule in 49 CFR Part 99, the more restrictive rule shall apply.

§ 300.1 Judicial standards of practice.

Under the transfer of authority under Section 1601(b)(1) of the Federal Aviation Act of 1958, certain of DOT's functions are similar to those of a court, and parties to cases before DOT and those who represent such parties are expected—in fact and in appearance—to conduct themselves with honor and dignity as they would before a court. By the same token, any DOT employee or administrative law judge carrying out DOT's quasi-judicial functions and any DOT employee making recommendations or advising them are expected to conduct themselves with the same fidelity to appropriate standards of propriety that characterize a court and its staff. The standing and effectiveness of DOT in carrying out its quasi-judicial functions are in direct relation to the observance by DOT, DOT employees, and the parties and attorneys appearing before DOT of the highest standards of judicial and professional ethics. The rules of conduct set forth in this part are to be interpreted in light of those standards.

§ 300.2 Prohibited communications.

(a) *Basic requirement.* Except as provided in paragraphs (c), (d) and (e) there shall be no substantive communication in either direction between any concerned DOT employee and any interested person outside DOT, concerning a public proceeding, until after final disposition of the proceeding, other than as provided by Federal statute or published DOT rule or order.

(b) *Definitions.* For purposes of this part:

(1) A "substantive communication" is any written or oral communication relevant to the merits of the proceeding.

(2) The "DOT decisionmaker" is defined in 14 CFR 302.22a.

(3) A "concerned DOT employee" is a DOT employee who is or may reasonably be expected to be directly involved in a decision which is subject to a public proceeding.

(4) A "public proceeding" is one of the following:

(i) A hearing proceeding (i.e., proceeding conducted on the record after notice and opportunity for an oral evidentiary hearing as provided in § 302.24)

(ii) A rulemaking proceeding involving a hearing as described in paragraph (b)(4)(i) of this section or an exemption proceeding covered by this chapter. (Other rulemaking proceedings are covered by the ex parte communication policies of DOT Order 2100.2.)

(iii) A tariff filing after DOT has ordered an investigation or a complaint has been filed or docketed.

(iv) A proceeding initiated by DOT show-cause order, after the filing in the docket of an identifiable written opposition to the order's tentative findings.

(v) Any other proceeding initiated by a docket filing, other than a petition for generally applicable rulemaking, after the filing in the docket of an identifiable written opposition to the initiating document.

(c) *General exceptions.* Paragraph (a) of this section shall not apply to the following:

(1) Informal communications between legal counsel, including discussions about stipulations and other communications considered proper in Federal court proceedings.

(2) Information given to a DOT employee who is participating in a hearing case on behalf of an office that is a party, to another DOT employee who is reviewing that work, or to his or her supervisors within that office.

(3) Communications made in the course of an investigation to determine whether formal enforcement action should be begun.

(4) Settlement discussions and mediation efforts.

(5) Information given at the request of a DOT employee acting upon a specific direction of DOT, in a case other than a hearing proceeding as described in paragraphs (b)(4)(i) and (ii) (a "nonhearing case"), where DOT has decided that emergency conditions exist and this rule would otherwise prevent the obtaining of needed information in a timely manner.

(6) Information given at the request of a DOT employee in a tariff matter after a complaint is filed but before an investigation is ordered.

(7) Nonhearing cases that are to be decided within 30 days after the filing of the initiating document.

(8) Nonhearing cases arising under section 419 of the Federal Aviation Act, 49 U.S.C. 1389.

(9) In nonhearing cases, communications with other Federal agencies not exempted by paragraph (e) of this section, provided the agencies have not participated as parties in the proceeding by making filings on-the-record.

(d) *Status and expedition requests.* Paragraph (a) of this section shall not apply to oral or written communications asking about the status, or requesting expeditious treatment, of a public proceeding. However, any request for expeditious treatment should be made in accordance with the Rules of Practice, particularly Rules 14 and 18, §§ 302.14 and 302.18 of this chapter.

(e) *National defense and foreign policy.* In nonhearing cases, paragraph (a) of this section shall not apply to communications concerning national defense or foreign policy matters, including international aviation matters. In hearing cases, any communications on those subjects to or from DOT employees involved in intergovernmental negotiations that would be barred by paragraph (a) are permitted if the communicator's position with respect to those negotiations cannot otherwise be fairly presented, but those communications shall not be considered as part of the record on which decisions must be made.

(f) *Communications not considered.* A communication in violation of this section shall not be considered part of a record, or included as available material, for decision in any proceeding.

§ 300.3 Reporting of communications.

(a) *General.* The following types of substantive communication shall be reported as specified in paragraph (b) of this section:

(1) Any communication in violation of § 300.2(a) of this chapter.

(2) Information given upon determination of an emergency under § 300.2(c)(5) of this chapter.

(3) Information given at the request of a DOT employee in a tariff matter under § 300.2(c)(6) of this chapter.

(4) Communications in nonhearing cases to be decided within 30 days under § 300.2(c)(7) of this chapter.

(5) Communications in nonhearing cases arising under section 419 of the Federal Aviation Act, 49 U.S.C. 1389, made under § 300.2(c)(8).

(b) *Public filing.* (1) A written communication shall be put into the correspondence or other appropriate file of the proceeding, which shall be available for inspection and copying during business hours in the Documentary Services Division.

(2) An oral communication shall be summarized by the DOT employee receiving it. One copy shall be put into a public file as described in paragraph (b) (1) of this section, and another copy shall be mailed to the communicator.

(3) In addition, copies of written communications and oral summaries shall be filed in chronological order in a "Part 300" file maintained in the Documentary Services Division.

(4) Copies of all filings under this part dealing with discontinuances or reductions of air transportation shall be mailed to the directly affected local communities, State agencies, and airport managers.

(c) *Status and expedition requests.* A DOT decisionmaker who receives a communication asking about the status or requesting expeditious treatment of a public proceeding, other than a communication concerning national defense or foreign policy (including international aviation), shall either:

- (1) Refer the communicator to the Documentary Services Division.
- (2) If the DOT decisionmaker responds by advising on the status, put a memorandum describing the exchange in the public file as described in paragraph (b)(1) of this section.

§ 300.4 Separation of functions in hearing cases.

(a) This section applies after the initiation of a hearing or enforcement case by the Department.

(b) A DOT employee who is participating in a hearing case on behalf of an office that is a party, another DOT employee who is in fact reviewing the position taken, or who has participated in developing the position taken in that case, or, in cases involving accusatory or disciplinary issues (including all enforcement cases) such employees' supervisors within that office, shall have no substantive communication with any DOT decisionmaker, administrative law judge in the case, or other DOT employee advising them, with respect to that or any factually related hearing case, except in accordance with a published DOT rule or order. In addition, each bureau or office supervisor of a DOT employee who is participating in a hearing case on behalf of that office when it is a party shall have no substantive communication with any administrative law judge in the case, or DOT employee advising the judge, in that or any factually related hearing case, except in accordance with a published DOT rule or order. For each hearing case, or office heads shall maintain a publicly available record of those employees who are participating or are in fact reviewing the position taken, or who have participated in developing the position taken in that case.

(c) In hearing cases involving fares or rates, or applications for a certificate or permit under sections 401 or 402 of the Act, or applications by a holder for a change in a certificate or permit, a supervisor who would not be permitted to advise the DOT decisionmaker under paragraph (a) may advise the DOT decisionmaker in the following manner: The supervisor's advice must either be made orally in an open DOT meeting or by a memorandum placed in the docket or other public file of such matter. Oral advice must be summarized in writing

by the supervisor and placed in the docket or file of the matter. A copy of such written memorandum or summary of oral advice must be served on each party to the proceeding within 3 business days after such advice is given to the concerned DOT decisionmaker. Each of the parties may comment in writing on such advice within 5 business days after service of the summary. In no event, however, may a supervisor advise the DOT decisionmaker if he or she acted as the office's counsel or witness in the matter.

(d) In enforcement cases, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, under the supervision of the Deputy General Counsel, will conduct all enforcement proceedings and related investigative functions, while the General Counsel will advise the DOT decisionmaker in the course of the decisional process. The Office of the Assistant General Counsel for Aviation Enforcement and Proceedings will report to the Deputy General Counsel. To ensure the independence of these functions, this Office and the Deputy General Counsel, for the purpose of this section, shall be considered an "office" as that term is used in paragraph (a), separate from the General Counsel and the rest of the Office of the General Counsel.

§ 300.5 Prohibited conduct.

No person shall: (a) Attempt to influence the judgment of a concerned DOT employee by any unlawful means such as deception or the payment of money or other consideration; or

(b) Disrupt or interfere with the fair and orderly disposition of a DOT proceeding.

§ 300.6 Practitioners' standards of conduct.

Every person representing a client in matters before DOT in all contacts with DOT employees, should:

(a) Strictly observe the standards of professional conduct;

(b) Refrain from statements or other actions designed to mislead DOT or to cause unwarranted delay;

(c) Avoid offensive or intemperate behavior;

(d) Advise all clients to avoid improprieties and to obey the law as the attorney believes it to be; and

(e) Terminate the professional relationship with any client who persists in improprieties in proceedings before DOT.

§ 300.7 Conciseness.

Every oral or written statement made in a DOT proceeding shall be as concise

as possible. Verbose or redundant presentations may be rejected.

§ 300.8 Gifts and hospitality and other conduct affecting DOT employees.

(a) No person, otherwise than as provided by law for the proper discharge of official duty, shall directly or indirectly give, offer, or promise anything of value to any DOT employee for or because of any official act performed or to be performed by such DOT employee (18 U.S.C. 201).

(b) Subject to 49 CFR Part 99, it is improper for persons interested in the business of DOT to provide hospitality, gifts, entertainment, or favors to any DOT employee.

(c) Persons interested in the business of DOT should familiarize themselves with (49 CFR Part 99), in order that they shall not encourage or cause any violation of the provisions of that Part by any DOT employee.

§ 300.9 Permanent disqualification of employees from matters in which they personally participated before joining DOT or the Civil Aeronautics Board.

Any DOT employee shall permanently disqualify himself or herself from participation in every matter before the Department in which he or she previously personally and substantially participated for an interested person or entity, including other agencies of the United States Government, before joining the DOT or the Civil Aeronautics Board. Such disqualification shall be applicable also if a person is closely related to is a DOT employee as partner, associate, employer, or the like, personally and substantially participated in a matter before DOT prior to the employee's employment by the Department or the Civil Aeronautics Board and the circumstances were such that the DOT

employee's subsequent participation in the matter as a DOT employee could fairly be said to create the appearance that his or her participation would be affected by his or her prior relationship. Notwithstanding the foregoing, the disqualification of any DOT employee, including any member of a DOT employee's personal staff or a special Government employee, whose prior personal and substantial participation in a DOT or Civil Aeronautics Board proceeding or whose relationship to one who so participated occurred on behalf of another agency of the United States Government shall only be applicable with respect to issues on which the prior governmental employer took a position in the proceeding unless participation could fairly be said to create the appearance that his or her participation

would be affected by his or her prior relationship.

§ 300.10 Temporary disqualification of employees from matters in which they had official responsibility before joining DOT or the Civil Aeronautics Board.

Any DOT employee shall temporarily disqualify himself or herself from participation in any matter before DOT if he or she represented, was associated with or was employed by an interested person or entity including other agencies of the United States Government before joining DOT or the Civil Aeronautics Board, and, although he or she did not personally and substantially participate in the matter, the matter was within his or her "official responsibility," as that term is defined in § 300.14 of this chapter except that the action referred to therein shall be private action as well as "Government" action. Such disqualification shall be applicable also if a person closely related to the DOT employee as partner, associate, employer, or the like, who, while not personally and substantially participating in the matter, had it within his or her "official responsibility" as that term is defined in § 300.14 of this chapter, and modified above, and the circumstances are such that the DOT employee's subsequent participation in the matter as a DOT employee could fairly be said to create the appearance that his or her participation would be affected by his or her prior relationship. Notwithstanding the foregoing, the disqualification of any DOT employee whose prior "official responsibility" or relationship to one with such responsibility occurred on behalf of another agency of the United States Government shall only be applicable with respect to issues on which the prior governmental employer took a position in the proceeding. The temporary disqualification shall run for a period of one year from the date of the termination of the representation, association, or employment with the interested person or entity.

§ 300.10a Permanent and temporary disqualification of DOT employees.

Due to the transfer of authority under 1601(b)(1) of the Federal Aviation Act of 1958, the terms of §§ 300.9 and 300.10 shall not be construed to apply to DOT employees who previously personally and substantially participated in matters before the Board, which have become the subject of DOT proceedings.

§ 300.11 Disqualification of Government officers and employees.

No officer or employee of the Federal Government, other than a "special government employee" as defined in 18

U.S.C. 202, shall represent anyone, otherwise than in the proper discharge of his or her official duties, in any DOT proceeding or matter in which the United States is a party or has a direct and substantial interest.

(18 U.S.C. 205)

§ 300.12 Practice of special Government employees permitted.

A special Government employee, who qualifies as such under the provisions of 18 U.S.C. 202(a), may participate in DOT proceedings only to the extent and in the manner specified in 18 U.S.C. 205.

§ 300.13 Permanent disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters in which they personally participated.

No former Board member or employee or DOT employee shall act as agent or attorney before DOT for anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or other particular matter, involving a specific party or parties, in which the United States is a party or has a direct and substantial interest and in which he or she participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise as a Board member or employee or DOT employee.

(18 U.S.C. 207(a))

§ 300.14 Temporary disqualification of former Civil Aeronautics Board members and employees and DOT employees from matters formerly under their official responsibility.

Within one year after termination of employment with the Board or DOT, no former Board member or Board employee or DOT employee shall appear personally before DOT on behalf of any person other than the United States in any DOT proceeding or matter in which the United States is a party or has a direct and substantial interest and which was under his or her official responsibility at any time within one year preceding termination of such responsibility. The term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

(18 U.S.C. 202(b), 207(b))

§ 300.15 Opinions or rulings by the General Counsel.

(a) The General Counsel is authorized to render opinions or rulings to the public on the application of the provisions of this part. When written request is made for such opinions and rulings, they shall be transmitted to DOT and shall be available to the public in the Documentary Services Division after any appeal to or review by the Secretary has been completed or after the time for review has expired. Identifying details shall normally be stricken from copies available to the public unless the public interest requires disclosure of such details.

(b) If any person is disqualified from a particular proceeding under the provisions of §§ 300.9, 300.10, 300.13, 300.14, and 300.17 of this chapter by a ruling of the General Counsel, or by such person's own action, such disqualification shall be memorialized in a writing filed in the appropriate file of the matter by the General Counsel or such person.

§ 300.15a Waivers.

(a) A former Board member, Board employee or DOT employee with outstanding scientific or technological qualifications who is disqualified from acting in a representative capacity under the provisions of § 300.13 or § 300.14 of this chapter may nevertheless participate in a proceeding in a scientific or technological field pursuant to the terms of a certificate issued in compliance with the proviso following 18 U.S.C. 207 (a) and (b).

(b) An employee who believes his or her prior employment relationships will not affect the integrity of his or her services may request that the prohibition of § 300.9 or § 300.10 of this chapter be waived by the appropriate Ethics Counselor under 49 CFR 99.735-71.

§ 300.17 Disqualification of partners of DOT employees.

No partner of a DOT employee shall act as agent or attorney for anyone other than the United States in any DOT proceeding or matter in which such employee participates or has participated personally and substantially through decision, approval, disapproval, recommendation, rendering advice, investigation, or otherwise, or which is the subject of his or her official responsibility.

§ 300.18 [Reserved]

§ 300.19 Use of confidential information.

No former CAB member or employee or DOT employee, or any person

associated with him or her, shall ever use or undertake to use in any DOT proceeding or matter any confidential facts or information which came into the possession of such Member or employee or to his or her attention by reason of his or her employment with the CAB or DOT without first applying for and obtaining the consent of the appropriate ethics counselor for the use of such facts or information.

§ 300.20 Violations.

(a) DOT may disqualify, and deny temporarily or permanently the privilege of appearing or practicing before it in any way to, any person who is found by DOT after written notice of charges and hearing to have engaged in unethical or improper professional conduct. Any violation of this part shall be deemed to be such conduct.

(b) When appropriate in the public interest, DOT may deny any application or other request of a party in a proceeding subject to this part where DOT finds after hearing that such party has, in connection with any DOT proceeding, violated any of the provisions of this part or any of the provisions of Chapter 11 of Title 18 of the United States Code. DOT may also condition its further consideration of such party's application or other request or the effectiveness of any order granting such application or other request upon such party's first taking such action as DOT may deem necessary or appropriate to remedy the violation of this part or Chapter 11 of Title 18 of the United States Code to prevent or deter any repetition of such violation. DOT may in addition issue a cease and desist order against any repetition of such or similar misconduct.

(c) The actions authorized by this section may take place within the framework of the matter during or concerning which the violations occur or in a separate matter, as the DOT decisionmaker or the presiding administrative law judge may direct. A complaint alleging that a violation has occurred in the course of a matter shall be filed in the docket or appropriate public file of such matter unless such complaint is made after DOT's decision of the matter has become final, in which event such complaint may be filed pursuant to Part 302, Subpart B of the rules of practice. A violation in the course of a matter which may be attributable to or affect the fitness of a party will ordinarily either be disposed of within the framework of such matter or be considered within the context of any subsequent matter involving the interests of such party. Other violations

will ordinarily be disposed of in a separate proceeding.

(d) In the case of any violation of the provisions of this part, the violator may be subject to civil penalties under the provisions of section 901 of the Act. The violator may also be subject to a proceeding brought under section 1002 before the Department and under sections 903 and 1007 of the Act before a U.S. district court to compel compliance with civil penalties which have been imposed.

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Appendix A—Index to Rules of Practice

Authority: Secs. 101, 203, 204, 401, 402, 403, 404, 408, 412, 901, 1001, 1002, 1005, Pub. L. 85-726, as amended, 72 Stat. 737, 742, 743, 754, 757, 758, 760, 763, 770, 783, 788, 794; 49 U.S.C. 1301, 1323, 1324, 1371, 1372, 1373, 1374, 1376, 1382, 1471, 1481, 1482, 1485; Reorganization Plan No. 3, 75 Stat. 837, 26 FR 5989; E.O.

11514, Pub. L. 91-90 [42 U.S.C. 4321]; 84 Stat. 772, 39 U.S.C. 5402, unless otherwise noted; 49 U.S.C. Subtitle I; Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

§ 302.1 Applicability and description of part.

(a) *Applicability.* This part governs the conduct of all economic proceedings before DOT whether instituted by order of DOT or by the filing with DOT of an application, complaint, petition, or a section 412 contract or agreement. This part also contains delegations to administrative law judges and to the DOT decisionmaker of DOT's function to render the agency decision in certain cases. The decision of administrative law judges is subject to review by the DOT decisionmaker, pursuant to authority delegated by the Secretary. Decisions of the DOT decisionmaker are subject to review at the discretion of the Assistant Secretary for Policy and International Affairs. In appropriate cases, the Secretary may exercise the discretionary review authority. The provisions of Part 263 of this chapter of the Economic Regulations are applicable to participation of air carrier associations in proceedings under this part. Proceedings involving "Alaskan air carriers" are governed by the rules in this part, except as modified by Part 292 of this chapter.

(b) *Description.* Subpart A of this part sets forth general rules applicable to all types of proceedings. Each of the other subparts of this part sets forth special rules applicable to the type of proceedings described in the title of the subpart. Therefore, for information as to applicable rules, reference should be made to Subpart A and to the rules in the subpart relating to the particular type of proceeding, if any. In addition, reference should be made to the Federal Aviation Act, and to the substantive rules, regulations and orders of DOT relating to the proceeding.¹ Wherever there is any conflict between one of the general rules in Subpart A and a special rule in another subpart applicable to a particular type of proceeding, the special rule will govern.

§ 302.2 Reference to part and method of citing rules.

This part shall be referred to as the "Rules of Practice". Each section, and any paragraph or subparagraph thereof, shall be referred to as a "Rule". The number of each rule shall include only

¹ The Federal Aviation Act of 1958 may be found at 72 Stat. 731, and at 49 U.S.C. 1301 *et seq.* The Department's substantive rules may be found in its Economic Regulations and Special Regulations (Subchapters A and D of this chapter, respectively).

the numbers and letters at the right of the decimal point. For example, "302.8 Service of documents", shall be referred to as "Rule 8". Paragraph (a)(2) of that rule, relating to service documents by the parties, shall be referred to as "Rule 8 (a)(2)".

Subpart A—Rules of General Applicability

§ 302.3 Filing of documents.

(a) *Filing address, date of filing, hours.* Documents required by any section of this part to be filed with DOT shall be filed with the Documentary Services Division of Transportation, Washington, D.C. 20590. Such documents shall be deemed to be filed on the date on which they are actually received by DOT. The hours of DOT for the receipt of filings are from 9:00 a.m. to 5:30 p.m., eastern standard or daylight saving time, whichever is in effect in the District of Columbia at the time, Monday to Friday, inclusive, except on legal holidays.

(b) *Formal specifications of documents—(1) Typewritten documents.* All typewritten documents, except briefs before DOT, filed under this part shall be on strong, durable paper not larger than 8½ by 14 inches, except that tables, charts and other documents may be larger if folded to the size of the document to which they are physically attached. Typewritten briefs before DOT shall be on paper not larger than 8½ by 11 inches except that tables, charts, and maps physically attached to the brief may be on paper not larger than 8½ by 14 inches and folded to the size of the brief. Requirements as to contents and style of briefs are contained in § 302.31. Text shall be double-spaced except for footnotes and long quotations which may be single-spaced. Type not smaller than elite shall be used. The left margin shall be at least 1½ inches; all other margins shall be at least 1 inch. If the document is bound, it shall be bound on the left side.

(2) *Printed documents.* Printed (typeset) documents that are limited as to number of pages under these rules shall be on paper not larger than 6½ inches by 9¼ inches, with all margins of at least 1 inch. The text, footnotes, and all physical attachments to any printed document shall be printed in clear and readable type, not smaller than 11 point, adequately leaded.

(3) *Reproduction of documents.* Papers may be reproduced by any duplicating process, provided all copies are clear and legible. Appropriate notes or other indications shall be used, so that the existence of any matters shown in color

on the original will be accurately indicated on all copies.

(c) *Number of copies.* Unless otherwise specified, an executed original and twelve (12) true copies of each document required or permitted to be filed under these rules shall be filed with the Documentary Services Division, except that an original and five (5) copies of third party complaints, answers, documents dealing with discovery, and motions addressed to an administrative law judge may be filed in proceedings under Subpart B—Rules Applicable to Enforcement Proceedings. In any route proceeding that affects a point in Alaska, the person filing shall send an additional copy to: Department of Transportation, 701 C Street, Box 27, Anchorage, Alaska 99513. The copies need not be signed but the name of the person signing the document, as distinguished from the firm or organization he or she represents, shall also be typed or printed on all copies below the space provided for signature.

(d) *Table of contents.* All documents filed under this part consisting of twenty or more pages must contain a subject-index of the matter in such document, with page references.

§ 302.4 General requirements as to documents.

(a) *Contents.* In case there is no rule, regulation, or order of DOT which prescribes the contents of a formal application, petition, complaint, motion or other authorized or required document, such document shall contain a proper identification of the parties concerned, a concise but complete statement of the facts relied upon and the relief sought, and, where required by § 312.12 or § 312.14 of this subchapter, such document shall, at the appropriate time, be accompanied by an Environmental Evaluation, a representation and explanation with respect to § 312.9(a)(2) of Part 312, or an Environmental assessment, in conformity with those sections or orders issued thereunder.

(b) *Subscription.* Every application, petition, complaint, motion or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or the attorney-at-law of record of such party, or by any other person; *Provided*, That, if signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person signing the document constitutes a certification that he or she has read the document; that to the best of his or

her knowledge, information and belief every statement contained in the instrument is true and no such statements are misleading; and that it is not interposed for delay.

(c) *Designation of person to receive service.* The initial document filed by a person shall state on its first page the name and post office address of the person or persons who may be served with any documents filed in the proceeding. It is requested, but not required, that the telephone number of that person also be included.

(d) *Prohibition of certain documents.* No document which is subject to the general requirements of this subpart concerning form, filing, subscription, service or similar matters shall be filed with DOT unless:

(1) Such document and its filing by the person submitting it has been expressly authorized or required in the Federal Aviation Act of 1958, any other law, this part, other Department regulations, or any order or other document issued by the DOT decisionmaker, the chief administrative law judge or an administrative law judge assigned to the proceeding, and

(2) Such document complies with each of the requirements of §§ 302.3 and 302.8, and is submitted as a formal application, complaint, petition, motion, answer, pleading, or similar paper rather than as a letter, telegram, or other informal written communication: *Provided, however*, That for good cause shown, pleadings of any public body or civic organization may be submitted in the form of a letter: *Provided further*, That comments concerning tariff agreements, which have not been docketed, may be submitted in the form of a letter.*

(e) *Documents improperly filed.* A document which is filed in violation of the prohibition imposed by paragraph (d) of this section, or in violation of a requirement imposed by any other provision of this part, will not be accepted for filing by DOT and will not be physically incorporated in the docket of the proceeding. The sender of such document and all persons who have been served therewith will be notified informally of DOT's action thereon.

(f) *Motions for leave to file otherwise unauthorized documents.* (1) DOT will accept otherwise unauthorized documents for filing only if leave has previously been obtained, from the administrative law judge or the DOT decisionmaker, on written motion and

* See Subpart L, § 302.1206 providing for the filing of comments with respect to undocketed agreements.

for good cause shown. The written motion may be incorporated into the otherwise unauthorized document for which admission is sought. In such event, the document filed shall be titled to describe both the motion and the underlying documents.

(2) After the assignment of an administrative law judge to a proceeding and before the issuance of a recommended or initial decision, or the certification of the record to the DOT decisionmaker, these motions shall be addressed to the administrative law judge. At all other times, such motions shall be addressed to the DOT decisionmaker. The administrative law judge or DOT decisionmaker will promptly pass upon such motions.

(3) Such motions shall be filed within seven days after service of any document or order or ruling to which the proposed filing is responsive, and shall be served on all parties to the proceeding. Answers thereto may not be filed.

(4) Such motions shall contain a concise statement of the matters relied upon as good cause and there shall be attached thereto the pleading or other document for which leave to file is sought.

§ 302.5 Amendment of documents and dismissal.

If any document initiating, or filed in, a proceeding is not in substantial conformity with the applicable rules or regulations of DOT as to the contents thereof, or is otherwise insufficient but not subject to rejection under § 302.4(e), DOT, on its own initiative, or on motion of any party, may strike or dismiss such document, or require its amendment. An application may be amended prior to the filing of answers thereto, or, if no answer is filed, prior to its designation for hearing. Thereafter, applications may be amended only if leave is granted pursuant to the procedures set forth in § 302.18. If properly amended, a document and any statutory deadline shall be made effective as of the date of original filing but the time prescribed for the filing of an answer or any further responsive document directed towards the amended document shall be computed from the date of the filing of the amendment.

§ 302.6 Responsive documents.

(a) Answers to applications, complaints, petitions, motions or other documents or orders instituting proceedings may be filed by any party to such proceedings or any person who has a petition for intervention pending. Except as otherwise provided, answers are not required. Protests or memoranda

of opposition or support, permitted by statute, shall be filed in lieu of answers or shall be combined with answers.

Note: DOT does not grant formal intervention in nonhearing matters, such as applications for exemption under section 416(b) of the Act, and any interested person may file documents authorized under this part without first obtaining leave.

(b) *Further responsive documents:* Except as otherwise provided, no reply to an answer, reply to a reply, or any further responsive document shall be filed. Where a reply to an answer or any further responsive document is not fileable, all new matter contained in such answer shall be deemed controverted. A party to a proceeding whose application has been the subject of a protest or memorandum of opposition or support, permitted by statute, may respond thereto before the close of the hearing in the case to which such documents relate, orally, in writing, or by introducing evidence, subject to appropriate rulings by the administrative law judge. Once such response has been made, such party may also discuss the protest or memorandum in his brief to the administrative law judge or the DOT decisionmaker or in his or her oral argument.

(c) *Time for filing.* Except as otherwise provided, an answer or any further responsive document shall be filed within seven days after service of the document to which such responsive filing is directed. Protests or memoranda of opposition or support, permitted by statute, shall be filed before the close of the hearing in the case to which they relate.

§ 302.7 Retention of documents by DOT.

All documents filed with or presented to DOT may be retained in the files of the Documentary Services Division. However, DOT may permit the withdrawal of original documents upon the submission of properly authenticated copies to replace such documents.

§ 302.8 Service of documents.

(a) *Who makes service—(1) DOT.* Formal complaints, notices, orders to show cause, other orders, and similar documents issued by DOT will be served by DOT upon all parties to the proceeding.

(2) *The parties.* Answers, petitions, motions, briefs, exceptions, notices, protests, or memoranda, or any other documents filed by any party or other person with DOT shall be served by such party or other person upon all parties to the proceeding in which it is filed: *Provided,* That motions to expedite

filed in any proceeding conducted pursuant to sections 401 and 402 of the Act, shall, in addition, be served on all persons who have petitioned for intervention in, or consolidation of applications with, such proceeding. Proof of service shall accompany all documents when they are tendered for filing.

(b) *How service may be made.* Service may be made by express mail, first class mail or priority mail, or by personal delivery. The means of service selected must be such as to permit compliance with section 1005(c) of the Act, which provides for service of notices, processes, orders, rules, and regulations by personal service or registered or certified mail.

(c) *Who may be served.* Service upon a party or person may be made upon an individual, or upon a member of a partnership, or firm to be served, or upon the president or other officer of the corporation, company, firm, or association to be served, or upon the assignee or legal successor of any of the foregoing, or upon any attorney of record for the party, or upon the agent designated by an air carrier under section 1005(b) of the Act, but it shall be served upon a person designated by a party to receive service of documents in a particular proceeding in accordance with § 302.4(c) once a proceeding has been commenced.

(d) *Where service may be made.* Personal service may be made on any of the persons described in paragraph (c) of this section wherever they may be found, except that an agent designated by an air carrier under section 1005(b) of the Act may be served only at his or her office or usual place of residence. Service by regular or registered or certified mail shall be made at the principal place of business of the party to be served, or at his or her usual residence if he or she is an individual, or at the office of the party's attorney of record, or at the office or usual residence of the agent designated by air carrier under section 1005(b) of the Act, or at the post office address stated for a person designated to receive service pursuant to § 302.4(c).

(e) *Proof of service.* Proof of service of any document shall consist of one of the following:

(1) A certificate of mailing executed by the person mailing the document.

(2) An acknowledgment of service signed by a person receiving service personally, or a certificate of the person making personal service.

(f) *Date of service.* Whenever proof of service by mail is made, the date of mailing shall be the date of service.

Whenever proof of service by personal delivery is made, the date of such delivery shall be the date of service.

§ 302.9 Parties.

The term "party" wherever used in this part shall include any individual, firm, partnership, corporation, company, association, joint stock association, or body politic, and any trustee, receiver, assignee or legal successor thereof, and shall include the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings.

§ 302.10 Substitution of parties.

Upon motion and for good cause shown, DOT may order a substitution of parties, except that in case of death of a party, substitution may be ordered without the filing of a motion.

§ 302.11 Appearances; rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person or by attorney. No register of persons who may practice before DOT is maintained and no application for admission to practice is required. Any person practicing or desiring to practice before DOT may, upon hearing and good cause shown, be suspended or barred from practicing.

(b) Any person appearing in person in any proceeding governed by this part, whether in response to a subpoena or by request or permission of DOT, may be accompanied, represented and advised by counsel and may be examined by his own counsel after other questioning.

(c) Any person who submits data or evidence in a proceeding governed by this part, whether in response to a subpoena or by request or permission of DOT, may retain or, on payment of lawfully prescribed costs, procure a copy of any document submitted by him or a copy of any transcript made of his testimony.

§ 302.12 Consolidation of proceedings.

(a) *Initiation of consolidations.* DOT upon its own initiative or upon motion, may consolidate for hearing or for other purposes or may contemporaneously consider two or more proceedings which involve substantially the same parties, or issues which are the same or closely related, if it finds that such consolidation or contemporaneous hearing will be conducive to the proper dispatch of its business and to the ends of justice and will not unduly delay the proceedings. Although DOT may, in any particular case, consolidate or contemporaneously consider two or more proceedings on its own motion, the burden of seeking consolidation or

contemporaneous consideration of a particular application shall rest upon the applicant and DOT will not undertake to search its docket for all applications which might be consolidated or contemporaneously considered.

(b) *Time for filing.* Unless DOT has provided otherwise in a particular proceeding, a motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested. If made at such conference, the motion may be oral. All motions for consolidation or considerations of issues which enlarge, expand and change the nature of the proceeding shall be addressed to the DOT decisionmaker, unless made orally at the prehearing conference, in which event the presiding administrative law judge shall present such motion to the DOT decisionmaker for his or her decision. A motion which is not filed at or prior to the prehearing conference, or within the time prescribed by the DOT decisionmaker in a particular proceeding, as the case may be, shall be dismissed unless the movant shall clearly show good cause for his or her failure to file such motion on time. A motion which does not relate to an application pending at the time of the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, or on the date specifically prescribed by the DOT decisionmaker in a particular proceeding for filing of motions for consolidation or contemporaneous consideration, shall likewise be dismissed unless the movant shall clearly show good cause for his or her failure to file the application within the prescribed period.

(c) *Answer.* If a motion to consolidate two or more proceedings is filed with DOT, any party to any of such proceedings, or any person who has a petition for intervention pending, may file an answer to such motion within such period as the DOT decisionmaker may permit. The administrative law judge may require that answers to such motions be stated orally at the prehearing conference in the proceeding with which the consolidation is proposed.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95-504, 72 Stat. 743, 754, 757, 788, 92 Stat. 1973, 49 U.S.C. 1324, 1371, 1372, 1481, Administrative Procedure Act (5 U.S.C. 551 *et seq.*))

§ 302.13 Joinder of complaints or complainants.

Two or more grounds of complaints involving substantially the same purposes, subject or state of facts may be included in one complaint even though they involve more than one respondent. Two or more complainants may join in one complaint if their respective causes of complaint are against the same party or parties and involve substantially the same purposes, subject or state of facts. The DOT decisionmaker he or she may separate or split complaints if it finds that the joinder of complaints, complainants, or respondents will not be conducive to the proper dispatch of DOT's business or the ends of justice.

§ 302.14 Participation in hearing cases by persons not parties.

(a) *Requests for expedition.* In any case to which the DOT's principles of practice, Part 300, are applicable, any interested person, including any State, subdivision thereof, State aviation commission, or other public body, may by motion request expedition of such case or file an answer in support of or in opposition to such motions. Such motions and answers shall be served as provided in § 302.8 of this part.

(b) *Participation in hearings.* Any person, including any State, subdivision thereof, State aviation commission, or other public body, may appear at any hearing, other than in an enforcement proceeding, and present any evidence which is relevant to the issues. With the consent of the administrative law judge or the DOT decisionmaker, such person may also cross-examine witnesses directly. Such persons may also present to the administrative law judge a written statement on the issues involved in the proceeding. Such written statements, or protests or memoranda in opposition or support where permitted by statute, shall be filed and served on all parties prior to the close of the hearing.

§ 302.15 Formal intervention in hearing cases.

(a) *Who may intervene.* Petitions for leave to intervene as a party will be entertained only in those cases that are to be decided upon an evidentiary record after notice and hearing. Any person who has a statutory right to be made a party to such proceeding shall be permitted to intervene. Any person whose intervention will be conducive to the ends of justice and will not unduly delay the conduct of such proceeding may be permitted to intervene. DOT does not grant formal intervention, as such, in nonhearing matters, and any

interested person may file documents authorized under this part without first obtaining leave.

(b) *Considerations relevant to determination of petition to intervene.* In passing upon a petition to intervene, the following factors, among other things, will be considered:

(1) The nature of the petitioner's right under the statute to be made a party to the proceeding;

(2) The nature and extent of the property, financial or other interest of the petitioner;

(3) The effect of the order which may be entered in the proceeding on petitioner's interest;

(4) The availability of other means whereby the petitioner's interest may be protected;

(5) The extent to which petitioner's interest will be represented by existing parties;

(6) The extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record; and

(7) The extent to which participation of the petitioner will broaden the issue or delay the proceeding.

These criteria will be liberally interpreted to facilitate the effective participation by members of the public in DOT proceedings.

(c) *Petition to intervene—(1) Contents.* Any person desiring to intervene in a proceeding shall file a petition in conformity with this part setting forth the facts and reasons why he or she thinks he or she should be permitted to intervene. The petition should make specific reference to the factors set forth in paragraph (b) of this section.

(2) *Time for filing.* Unless otherwise ordered by DOT, any petition for leave to intervene shall be filed within the following time limits:

(i) In a proceeding where DOT issues a show cause order proposing fair and reasonable mail rates, such petition shall be filed within the time specified for filing notice of objection.

(ii) In all other proceedings, including mail rate proceedings where no show cause order is issued, the petition shall be filed with DOT prior to the first prehearing conference, or, in the event that no such conference is to be held, not later than fifteen (15) days prior to the hearing.

(iii) A petition to intervene in any Board proceeding filed by a city, other public body, or a chamber of commerce shall be filed with DOT not later than the last day prior to the beginning of the hearing thereon.

A petition for leave to intervene which is not timely filed shall be dismissed

unless the petitioner shall clearly show good cause for his or her failure to file such petition on time.

(3) *Answer.* Any party to a proceeding may file an answer to a petition to intervene, making specific reference to the factors set forth in paragraph (b) of this section, within seven (7) days after the petition is filed.

(4) *Disposition.* The decision granting, denying or otherwise ruling on any petition to intervene may be issued without receiving testimony or oral argument either from the petitioner or other parties to the proceeding.

(d) *Effect of granting intervention.* A person permitted to intervene in a proceeding thereby becomes a party to the proceeding. However, interventions provided for in this section are for administrative purposes only, and no decision granting leave to intervene shall be deemed to constitute an expression by DOT that the intervening party has such a substantial interest in the order that is to be entered in the proceeding as will entitle it to judicial review of such order.

§ 302.16 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice, order or regulation of the DOT or DOT decisionmaker the chief administrative law judge or an administrative law judge, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday for DOT, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor holiday. When the period of time prescribed is seven (7) days or less, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation.

§ 302.17 Continuances and extensions of time.

(a) *Generally.* Whenever a party has the right or is required to take action within a period prescribed by this part, by a notice given thereunder, or by an order or regulation, the DOT decisionmaker, the head of the Documenting Services Division or the administrative law judge assigned to the proceeding may: (1) Before the expiration of the prescribed period, with or without notice, extend such period; or (2) upon motion, permit the act to be done after the expiration of the specified period, where the failure to act is clearly shown to have been the result of excusable neglect.

(b) *Procedures.* Except where an administrative law judge has been assigned to a proceeding, requests for continuance or extensions of time, as described in paragraph (a)(1) or (2) of this section, shall be directed to the DOT decisionmaker. Requests for continuances and extensions of time may be directed to the Chief Administrative Law Judge in the absence of the administrative law judge assigned to the proceeding.

§ 302.18 Motions.

(a) *Generally.* An application to the DOT decisionmaker or an administrative law judge for an order or ruling not otherwise specifically provided for in this part shall be by motion. After the assignment of an administrative law judge to a proceeding and before the issuance of a recommended or initial decision, or the certification of the record to the DOT decisionmaker, all motions shall be addressed to the administrative law judge. At all other times motions shall be addressed to the DOT decisionmaker. All motions shall be made at an appropriate time depending upon the nature thereof and the relief requested therein.

Note.—This paragraph is not construed as authorizing motions in the nature of petitions for reconsideration.

(a-1) *Motions to disqualify DOT employee in review of hearing matters.* In cases to be determined on an evidentiary record, a party desiring that a concerned DOT employee disqualify himself or herself from participating in a DOT decision shall file a motion supported by an affidavit setting forth the grounds for such disqualification within the periods hereinafter prescribed. Where review of the administrative law judge's decision can be obtained only upon the filing of a petition for discretionary review, such motions shall be filed on or before the date answers are due pursuant to § 302.28. In cases where exceptions are filed to recommended, initial, or tentative decisions or where the DOT decisionmaker orders review of an initial or recommended decision on his or her own initiative, such motions shall be filed on or before the date briefs are due pursuant to § 302.31 or § 302.1755, as applicable. Failure to file a timely motion shall be deemed a waiver of disqualification. Applications for leave to file an untimely motion seeking disqualification of a concerned DOT employee shall be accompanied by an affidavit setting forth in detail why the facts relied upon as grounds for

disqualification were not known and could not have been discovered with reasonable diligence within the prescribed time.

(b) *Form and contents.* Unless made during a hearing, motions shall be made in writing in conformity with §§ 302.3 and 302.4, shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon. Motions made during hearings, answers thereto, and rulings thereon, may be made orally on the record unless the administrative law judge directs otherwise. Written motions shall be filed as separate documents, and shall not be incorporated in any other documents, except (1) where incorporation of a motion in another document is specifically authorized by a rule or order of DOT, or (2) where a document is filed which requests alternative forms of relief and one of these alternative requests is properly to be made by motion. In these instances the document filed shall be appropriately entitled and identified to indicate that it incorporates a motion, otherwise the motion will be disregarded.

(c) *Answers to motions.* Within seven days after a motion is served, or such other period as the DOT decisionmaker or the administrative law judge may fix, any party to the proceeding may file an answer in support of or in opposition to the motion, accompanied by such affidavits or other evidence as it desires to rely upon. Unless the DOT decisionmaker or the administrative law judge provides otherwise, no reply to an answer, reply to a reply, or any further responsive document shall be filed. Where a reply to an answer or any other responsive document is not fileable, all new matter contained in such answer shall be deemed controverted.

(d) *Oral arguments; briefs.* No oral argument will be heard on motions unless the DOT decisionmaker or the administrative law judge otherwise directs. Written memoranda or briefs may be filed with motions or answers to motions, stating the points and authorities relied upon in support of the position taken.

(e) *Disposition of motions.* The administrative law judge shall pass upon all motions properly addressed to him or her, except that, if he or she finds that a prompt decision by the DOT decisionmaker on a motion is essential to the proper conduct of the proceeding, he or she may refer such motion to that person for decision. The DOT decisionmaker shall pass upon all motions properly submitted to him or her for decision.

(f) *Appeals to the DOT decisionmaker from rulings of administrative law judges.* Rulings of administrative law judges on motions may not be appealed to the DOT decisionmaker prior to his or her consideration of the entire proceeding except in extraordinary circumstances and with the consent of the administrative law judge. An appeal shall be disallowed unless the administrative law judge finds, either on the record or in writing, that the allowance of such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to any party. If an appeal is allowed, any party may file a brief with the DOT decisionmaker within such period as the administrative law judge directs. No oral argument will be heard unless the DOT decisionmaker directs otherwise. The rulings of the administrative law judge on motion may be reviewed by the DOT decisionmaker in connection with his or her final action in the proceeding irrespective of the filing of an appeal or any action taken on it.

(g) *Effect of pendency of motions.* The filing or pendency of a motion shall not automatically alter or extend the time fixed by this part (or any extension granted thereunder) to take action.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95-504, 72 Stat. 743, 754, 757, 788, 82 Stat. 1973 (49 U.S.C. 1324, 1371, 1372, 1461) Administrative Procedure Act, 5 U.S.C. 551 et seq.)

§ 302.19 Subpenas.

(a) An application for a subpoena requiring the attendance of a witness or the production of documentary evidence at a hearing may be made without notice by any party to the administrative law judge designated to preside at the reception of evidence or, in the event that an administrative law judge has not been assigned to a proceeding or the administrative law judge is not available, to the chief administrative law judge, for action by himself or herself or by the DOT decisionmaker.

(b) A subpoena for the attendance of a witness shall be issued on oral application at any time.

(c) An application for a subpoena for documentary or tangible evidence shall be in duplicate except that if it is made during the course of a hearing, it may be made orally on the record with the consent of the administrative law judge. All such applications, whether written or oral, shall contain a statement or showing of general relevance and reasonable scope of the evidence sought, and shall be accompanied by two copies of a draft of the subpoena

sought which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible.

(d) The administrative law judge or DOT decisionmaker considering any application for a subpoena shall issue the subpoena requested if the application complies with this section. No attempt shall be made to determine the admissibility of evidence in passing upon an application for a subpoena, and no detailed or burdensome showing shall be required as a condition to the issuance of a subpoena. It is the purpose of this section, on the one hand, to make subpoenas readily available to parties, and, on the other hand, to prevent the improvident issuance of subpoenas to secure evidence which is unrelated to the issues of the proceeding or wholly unreasonable in its scope.

(e) Where it appears at a hearing that the testimony of a witness or documentary evidence is relevant to the issues in a proceeding, the administrative law judge or chief administrative law judge may issue on his or her own motion a subpoena requiring such witness to attend and testify or requiring the production of such documentary evidence.

(f) Subpenas issued under this section shall be served upon the person to whom directed in accordance with § 302.8(b). Any person upon whom a subpoena is served may within seven (7) days after service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify the subpoena with the administrative law judge designated to preside at the reception of evidence or, in the event an administrative law judge has not been assigned to a proceeding or the administrative law judge is not available, to the chief administrative law judge for action by himself or herself or by the DOT decisionmaker. If the person to whom the motion to modify or quash the subpoena has been addressed or directed, has not acted upon such a motion by the return date, such date shall be stayed pending his or her final action thereon. The DOT decisionmaker may at any time review, upon his or her own initiative, the ruling of an administrative law judge or the chief administrative law judge denying a motion to quash a subpoena. In such cases, the DOT decisionmaker may at any time order that the return date of a subpoena which he or she has elected to review be stayed pending action thereon.

(g) The provisions of this section are not applicable to the attendance of DOT employees or the production of

documentary evidence in the custody thereof at a hearing. Applications therefor shall be addressed to the administrative law judge in writing and shall set forth the need of the moving party for such evidence and the relevancy to the issues of the proceeding. Such applications shall be processed as motions in accordance with § 302.18 except that a grant of such motion by an administrative law judge, in whole or in part, shall be immediately reviewed by the DOT decisionmaker on his or her own initiative and shall be subject to his or her final action. No application will be required for the attendance of DOT personnel or the production of records in their custody when requested by an enforcement attorney. Where a DOT employee has testified in an enforcement proceeding that he or she used documents in his or her custody, or parts thereof, to refresh his or her recollection, a ruling by the administrative law judge for their production shall be final in the absence of an objection by the enforcement attorney. In the event of such objection, the DOT decisionmaker's review will be limited to the documents, or portions thereof, to which objection is taken by the enforcement attorney.

§ 302.20 Depositions.

(a) For good cause shown, the DOT decisionmaker or administrative law judge assigned as a hearing officer in a proceeding may order that the testimony of a witness be taken by deposition and that the witness produce documentary evidence in connection with such testimony. Ordinarily an order to take the deposition of a witness will be entered only if (1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a party and will not result in an undue burden to other parties or in undue delay.

(b) Any party desiring to take the deposition of a witness shall make application therefor in duplicate to an administrative law judge designated to preside at the reception of evidence or, in the event that a hearing officer has not been assigned to a proceeding or is not available, to the DOT decisionmaker setting forth the reasons why such deposition should be taken, the name and residence of the witness, the time and place proposed for the taking of the deposition, and a general description of the matters concerning which the witness will be asked to testify. If good cause be shown, the DOT

decisionmaker or the administrative law judge may, in his or her discretion, issue an order authorizing such deposition and specifying the witness whose deposition is to be taken, the general scope of the testimony to be taken, the time when, the place where, and the designated officer (authorized to take oaths) before whom the witness is to testify, and the number of copies of the deposition to be supplied. Such order shall be served upon all parties by the person proposing to take the deposition a reasonable period in advance of the time fixed for taking testimony.

(c) Witnesses whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to them. Each question propounded shall be recorded and the answers shall be taken down in the words of the witness.

(d) Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon, but no transcript filed by the officer shall include argument or debate. Objections to questions or evidence shall be noted by the officer upon the deposition, but he or she shall not have power to decide on the competency or materiality or relevance of evidence, and he or she shall record the evidence subject to objection. Objections to questions or evidence not made before the officer shall not be deemed waived unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(e) The testimony shall be reduced to writing by the officer, or under his or her direction, after which the deposition shall be subscribed by the witness unless the parties by stipulation waived the signing or the witness is ill or cannot be found or refuses to sign, and certified in usual form by the officer. If the deposition is not subscribed to by the witness, the officer shall state on the record this fact and the reason therefor. The original deposition and exhibits shall be forwarded to the Documentary Services Division and shall be filed in the proceedings.

(f) Depositions may also be taken and submitted on written interrogatories in substantially the same manner as depositions taken by oral examination. Ordinarily such procedure will only be authorized if necessary to achieve the purposes of an oral deposition and to serve the balance of convenience of the parties. The interrogatories shall be filed in quadruplicate with two copies of the application and a copy of each shall be served on each party. Within seven (7) days after service any party may file with the person to whom application was made two copies of his or her

objections, if any, to such interrogatories and may file such cross-interrogatories as he or she desires to submit. Cross-interrogatories shall be filed in quadruplicate, and a copy thereof together with a copy of any objections to interrogatories, shall be served on each party, who shall have five (5) days thereafter to file and serve his or her objections, if any, to such cross-interrogatories. Objections to interrogatories or cross-interrogatories, shall be served on the DOT decisionmaker or the administrative law judge considering the application. Objections to interrogatories shall be made before the order for taking the deposition issues and if not so made shall be deemed waived. When a deposition is taken upon written interrogatories, and cross-interrogatories, no party shall be present or represented, and no person other than the witness, a stenographic reporter, and the officer shall be present at the examination of the witness, which fact shall be certified by the officer, who shall propound the interrogatories and cross-interrogatories to the witness in their order and reduce the testimony to writing in the witness' own words. The provisions of paragraph (e) of this section shall be applicable to depositions taken in accordance with this paragraph.

(g) All depositions shall conform to the specifications of § 302.3 except that the filing of three copies thereof shall be sufficient. Any fees of a witness, the stenographer, or the officer designated to take the deposition shall be paid by the person at whose instance the deposition is taken.

(h) The fact that a deposition is taken and filed in a proceeding as provided in this section does not constitute a determination that it is admissible in evidence or that it may be used in the proceeding. Only such part or the whole of a deposition as is received in evidence at a hearing shall constitute a part of the record in such proceeding upon which a decision may be based.

§ 302.21 Attendance fees and mileage.

(a) *Where tender of attendance fees and mileage is a condition of compliance with subpoena.* No person whose attendance at a hearing or whose deposition is to be taken shall be obliged to respond to a subpoena unless upon a service of the subpoena he or she is tendered attendance fees and mileage by the party at whose instance he or she is called in accordance with the requirements of paragraph (b) of this section: *Provided*, That a witness summoned at the instance of DOT or

one of its employees, or a salaried employee of the United States summoned to testify as to matters related to his or her public employment, need not be tendered such fees or mileage at that time.

(b) *Amount of mileage and attendance fees to be paid.* (1) Witnesses who are not salaried employees of the United States, or such employees summoned to testify on matters not related to their public employment, shall be paid the same fees and mileage paid to witnesses for like service in the courts of the United States, as provided in paragraphs (b)(1) (i) through (iii) of this section: *Provided*, That no employee, officer, or attorney of an air carrier who travels under the free or reduced rate provisions of section 403(b) of the Act shall be entitled to any fees or mileage: *And provided further*, That the amounts hereinafter set forth for fees and mileage shall not be applicable for witnesses summoned to testify in Alaska.

(i) *Per diem for attendance.* There shall be tendered \$20 for each day of expected attendance at a hearing or place where deposition is to be taken, and for the time necessarily occupied in going to and returning from the place of attendance.

(ii) *Allowance for subsistence.* In addition to per diem for attendance, when attendance is required at a point so far removed from the witness' residence as to prohibit daily return thereto, there shall be tendered an additional sum of \$16 per day for expenses of subsistence for each day of expected attendance and including the time necessarily occupied in going to and returning from the place of attendance.

(iii) *Mileage.* There shall be tendered an amount equal to 10 cents per mile for the round trip distance between the witness' place of residence and the place where attendance is required. Regardless of the mode of travel employed, computation of mileage shall be made on the basis of a uniform table of distances adopted by the Attorney General where the travel is covered by such table: *Provided*, That in lieu of this mileage allowance witnesses who are required to travel between the territories and possessions, or to and from the continental United States or between two foreign points shall be tendered a ticket for such transportation at the coach rate available at the time of reservation plus the required per diem attendance fees: *And provided further*, That in Alaska where permitted by section 403(b) of the Federal Aviation Act of 1958, as amended, the witness may, at his option, accept a pass for travel by air.

(2) Witnesses who are not salaried employees of the United States, or such employees summoned to testify on matters not related to their public employment, who are summoned to testify at the instance of DOT or one of its employees or the United States or one of its agencies shall be paid in accordance with the provisions of paragraph (b)(1) of this section. Such witnesses shall be furnished appropriate forms and instructions for the submission of claims for attendance fees, subsistence and mileage from the Government before the close of the proceedings which they are required to attend. Only persons summoned by subpoena shall be entitled to claim attendance fees, subsistence or mileage from the Government.

(3) Witnesses who are salaried employees of the United States and who are summoned to testify on matters relating to their public employment, irrespective of at whose instance they are summoned, shall be paid in accordance with applicable Government regulations.

(4) Whenever the sums tendered to a witness are inadequate for reimbursement under the requirements of this section, and such witness has complied with the summons, he or she shall upon request within a reasonable period of time be entitled to such additional sums as may be due him or her under the provisions of this section. Whenever the sums tendered and paid to a witness are excessive under the above requirements, either because the witness traveled under the free or reduced rate provisions of section 403(b) of the Act, or for any other reasons, the witness shall upon request within a reasonable period of time refund such sums as may be excessive under the provisions of this section.

§ 302.22 Administrative law judges.

(a) *Defined.* The term "administrative law judge" as used in this part includes presiding officers, administrative law judges, or any other DOT employee assigned to hold a hearing in a proceeding.

(b) *Disqualification.* An administrative law judge shall withdraw from the case if at any time he or she deems himself or herself disqualified. If, prior to the initial or recommended decision in the case, there is filed with the administrative law judge, in good faith, an affidavit of personal bias or disqualification with substantiating facts and the administrative law judge does not withdraw, the DOT decisionmaker shall determine the matter, if properly presented by exception or brief, as a part of the

record and decision in the case. The DOT decisionmaker shall not otherwise consider any claim of bias or disqualification. The DOT decisionmaker, in his or her discretion, may order a hearing on a charge of bias or disqualification.

(c) *Powers.* An administrative law judge shall have the following powers, in addition to any others specified in this part:

- (1) To give notice concerning and to hold hearings;
- (2) To administer oaths and affirmations;
- (3) To examine witnesses;
- (4) To issue subpoenas and to take or cause depositions to be taken;
- (5) To rule upon offers of proof and to receive relevant evidence;
- (6) To regulate the course and conduct of the hearing;
- (7) To hold conferences before or during the hearing, for the settlement or simplification of issues;
- (8) To rule on motions and to dispose of procedural requests or similar matters;
- (9) To make initial or recommended decisions as provided in § 302.27;
- (10) To take any other action authorized by this part, by the Administrative Procedure Act, or by the Federal Aviation Act.

The administrative law judge's authority in each case will terminate either upon the certification of the record in the proceeding to the DOT decisionmaker, or upon the issuance of an initial or recommended decision, or when he or she shall have withdrawn from the case upon considering himself or herself disqualified.

(d) *Certification to the DOT decisionmaker for decision.* At any time prior to the close of the hearing, the DOT decisionmaker may direct the administrative law judge to certify any question or the entire record in the proceeding to the DOT decisionmaker for decision. In cases where the record is thus certified, the administrative law judge shall not render an initial decision but shall recommend a decision to the DOT decisionmaker as required by section 8(a) of the Administrative Procedure Act unless, in rulemaking or determining applications for initial licenses, the office advises him or her that it intends to issue a tentative decision.

§ 302.22a DOT decisionmaker.

(a) *Definition.* As used in this Subchapter, the DOT decisionmaker is the official authorized to issue final decisions of the Department.

(b) *Hearing cases assigned to the senior career official.* In hearing cases assigned to the senior career official in the Office of the Assistant Secretary for Policy and International Affairs, that official is the DOT decisionmaker. In all such cases, the Administrative Law Judge shall render a recommended decision to the senior career official, who shall have all the powers of an administrative law judge and those additional powers delegated by the Secretary.

(1) Decisions of the senior career official are subject to review by, and at the discretion of, the Assistant Secretary for Policy and International Affairs. A notice of review by the Assistant Secretary will establish the procedures for review. Unless a notice of review is issued, a decision of the senior career official will be issued as a final order of the Department and be served 14 days after it is adopted by the senior career official. Petitions for discretionary review of decisions of the senior career official will not be entertained.

(2) Final decisions of the senior career official may be reviewed upon a petition for reconsideration filed pursuant to § 302.37. Such a petition shall state clearly the basis for requesting reconsideration and shall specify any questions of national transportation policy that may be involved. The Assistant Secretary will either grant or deny the petition.

(3) Upon review or reconsideration, the Assistant Secretary may either affirm the decision or remand the decision to the senior career official for further action consistent with such order of remand.

(4) Carrier selection proceedings for international route authority and such other hearing cases as the Secretary deems appropriate will be assigned to the senior career official.

(c) *Other Hearing Cases.* In other hearing cases, the Assistant Secretary for Policy and International Affairs is the DOT decisionmaker. The Assistant Secretary shall have all the powers of an Administrative Law Judge and those additional powers delegated by the Secretary.

(d) *Nonhearing cases.* In all other proceedings, the Assistant Secretary for Policy and International Affairs or, in consumer protection matters, the Assistant Secretary for Governmental Affairs is the DOT decisionmaker. The Assistant Secretaries may delegate this authority in appropriate cases to subordinate officials.

(e) *Secretary and Deputy Secretary.* The Secretary or Deputy Secretary may exercise the authority of the Assistant Secretary whenever he or she believes a

decision involves important questions of national transportation policy.

§ 302.23 Prehearing conference.

(a) *Purpose and scope of conference.* Prior to any hearings there will ordinarily be a prehearing conference before an administrative law judge, although in economic enforcement proceedings where the issues are drawn by the pleadings such conference will usually be omitted. Written notice of the prehearing conference shall be sent by the chief administrative law judge to all parties to a proceeding and to other persons who appear to have an interest in such proceeding. The purpose of such a conference is to define and simplify the issues and the scope of the proceeding, to secure statements of the positions of the parties with respect thereto and amendments to the pleadings in conformity therewith, to schedule the exchange of exhibits before the date set for hearing, and to arrive at such agreements as will aid in the conduct and disposition of the proceeding. For example, consideration will be given to:

(1) Matters which the DOT decisionmaker can consider without the necessity of proof;

(2) Admissions of fact and of the genuineness of documents;

(3) Requests for documents;

(4) Admissibility of evidence;

(5) Limitation of the number of witnesses;

(6) Reducing of oral testimony to exhibit form;

(7) Procedure at the hearing, etc.

The administrative law judge may require further conference, or responsive pleadings, or both. If a party refuses to produce documents requested by another party at the conference, the administrative law judge may compel the production of such documents prior to a hearing by subpoena issued in accordance with the provisions of § 302.19 as though at a hearing. Applications for the production prior to hearing of documents in DOT's possession shall be addressed to the administrative law judge, in accordance with the provisions of § 302.19(g), in the same manner as provided therein for production of documents at a hearing. The administrative law judge may also on his or her own motion or on motion of any party, direct any party to the proceeding (air carrier or non-air carrier) to prepare and submit exhibits setting forth studies, forecasts, or estimates on matters relevant to the issues in the proceeding.

(b) *Report of prehearing conference.* The administrative law judge shall issue a report of prehearing conference,

defining the issues, giving an account of the results of the conference, specifying a schedule for the exchange of exhibits and rebuttal exhibits, the date of hearing, and specifying a time for the filing of objections to such report. The report shall be served upon all parties to the proceeding and any person who appeared at the conference. Objections to the report may be filed by any interested person within the time specified therein. The administrative law judge may revise his or her report in the light of the objections presented. The revised report, if any, shall be served upon the same persons as was the original report. Exceptions may be taken on the basis of any timely written objection which has not been met by a revision of the report if they are filed within the time specified in the revised report. Such report shall constitute the official account of the conference and shall control the subsequent course of the proceeding, but it may be reconsidered and modified at any time to protect the public interest or to prevent injustice.

§ 302.24 Hearing cases.

(a) *Definition.* A hearing case means any proceeding (including an enforcement case) that the Department has noticed will be conducted on the record after oral evidentiary hearing subject to 5 U.S.C. 556 and 557.

(b) *Notice.* The administrative law judge to whom the case is assigned or the DOT decisionmaker shall give the parties reasonable notice of a hearing or of the change in the date and place of a hearing and the nature of such hearing.

(c) *Evidence.* Evidence presented at the hearing shall be limited to material evidence relevant to the issues as drawn by the pleadings or as defined in the report of prehearing conference, subject to such later modifications of the issues as may be necessary to protect the public interest or to prevent injustice and shall not be unduly repetitious. Evidence shall be presented in written form by all parties wherever feasible, as the administrative law judge may direct.

(d) *Objections to evidence.* Objections to the admission or exclusion of evidence shall be in short form, stating the grounds of objections relied upon, and the transcript shall not include argument or debate thereon except as ordered by the administrative law judge. Rulings on such objections shall be a part of the transcript.

(e) *Exceptions.* Formal exceptions to the rulings of the administrative law judge made during the course of the hearing are unnecessary. For all purposes for which an exception

otherwise would be taken, it is sufficient that a party, at the time the ruling of the administrative law judge is made or sought, makes known the action he or she desires the administrative law judge to take or his or her objection to an action taken, and his or her grounds therefor.

(f) *Offers of proof.* Any offer of proof made in connection with an objection taken to any ruling of the administrative law judge rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony, and if the excluded evidence consists of evidence in documentary or written form or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(g) *Exhibits.* When written exhibits are offered in evidence, one copy must be furnished to each of the parties at the hearing, and two copies to the administrative law judge, unless the parties previously have been furnished with copies or the administrative law judge directs otherwise. If the administrative law judge has not fixed a time for the exchange of exhibits, the parties shall exchange copies of exhibits at the earliest practicable time, preferably before the hearing or, at the latest, at the commencement of the hearing.

(h) *Substitution of copies for original exhibits.* In his or her discretion, the administrative law judge may permit a party to withdraw original documents offered in evidence and substitute true copies in lieu thereof.

(i) *Designation of parts of documents.* When relevant and material matter offered in evidence by any party is embraced in a book, paper, or document containing other matter not material or relevant, the party offering the same shall plainly designate the matter so offered. The immaterial and irrelevant parts shall be excluded and shall be segregated insofar as practicable. If the volume of immaterial or irrelevant matter would unduly encumber the record, such book, paper, or document will not be received in evidence, but may be marked for identification, and, if properly authenticated, the relevant or material matter may be read into the record, or, if the administrative law judge so directs, a true copy, of such matter, in proper form, shall be received as an exhibit, and like copies delivered by the party offering the same to opposing parties or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the book, paper, or document, and to offer in

evidence in like manner other portions thereof.

(j) *Records in other proceedings.* In case any portion of the record in any other proceeding or civil or criminal action is offered in evidence, a true copy of such portion shall be presented for the record in the form of an exhibit unless:

(1) The portion is specified with particularity in such manner as to be readily identified; and

(2) The party offering the same agrees unconditionally to supply such copies later, or when required by the DOT decisionmaker; and

(3) The parties represented at the hearing stipulate upon the record that such portion may be incorporated by reference, and that any portion offered by any other party may be incorporated by like reference upon compliance with paragraphs (i) (1) and (2) of this section; and

(4) The administrative law judge directs such incorporation or waives the above requirement with the consent of the parties.

(k) *Receipt of documents after hearing.* No document or other writings shall be accepted for the record after the close of the hearing except in accordance with an agreement of the parties and the consent of the administrative law judge.

(l) *Transcripts of hearings.* (1) Hearings shall be recorded and transcribed, under supervision of the administrative law judge, by the reporting firm under contract with DOT. Copies of the transcript shall be supplied to the parties to the proceeding by said reporting firm, at the contract price for copies.

(2) The administrative law judge shall determine whether "ordinary transcript" or "daily transcript" (as those terms are defined in the contract) will be necessary and required for the proper conduct of the proceeding and DOT will pay the reporting firm the full cost of reporting its proceedings at the contract price for such type of transcript. If the administrative law judge has determined that ordinary transcript is adequate, and has notified the parties of such determination (in the notice of hearings, or otherwise), then any party may request reconsideration of such determination and that daily transcript be required. In determining what is necessary and required for the proper conduct of the proceeding, the administrative law judge shall consider, among other things:

(i) The nature of the proceeding itself;

(ii) the DOT decisionmaker's needs as

as well as the reasonable needs of the parties; and (iii) the requirements of a fair hearing.

(3) If the administrative law judge has determined that ordinary transcript is adequate, or, upon reconsideration, has adhered to such determination, then any party may request the reporting firm to provide daily transcript. In that case, pursuant to its contract with DOT, the reporting firm will be obligated to furnish to the DOT daily transcript upon the agreement by the requesting party to pay to the reporting firm an amount equal to the difference between the contract prices for ordinary transcript and daily transcript, provided that the requesting party makes such agreement with the reporting firm at least twenty-four (24) hours in advance of the date for which such transcript is requested.

(4) Any party may obtain from the Office of the Assistant Secretary for Administration, the name and address of the private reporting company with which DOT currently has a contract for transcripts and copies, as well as the contract prices then in effect for such services.

(5) Copies of transcripts ordered by parties other than DOT shall be prepared for delivery to the requesting person at the reporting firm's place of business, within the stated time for the type of transcript ordered. The requesting party and the reporting firm may agree upon some other form or means of delivery (mail, messenger, etc.) and the reporting firm may charge for such special service, provided that such charge shall not exceed the reasonable cost of such service.

(m) *Corrections to transcript.* Changes in the official transcript may be made only when they involve errors affecting substance. A motion to correct a transcript shall be filed with the Documentary Services Division, within ten (10) days after receipt of the completed transcript by DOT. If no objections to the motion are filed within ten (10) days thereafter, the transcript may, upon the approval of the administrative law judge, be changed to reflect such corrections. If objections are received, the motion and objections shall be submitted to the official reporter by the administrative law judge together with a request for a comparison of the transcript with the stenographic record of the hearing. After receipt of the report of the official reporter an order shall be entered by the administrative law judge settling the record and ruling on the motion.

(n) *Official notice of facts contained in certain documents.* (1) Without limiting, in any manner or to any extent,

the discretionary powers of the DOT decisionmaker and its administrative law judges to notice other matters or documents properly the subject of official notice, facts contained in any document within the categories enumerated in this subdivision are officially noticed in all formal economic proceedings except those subject to Subpart B of this part. Each such category shall include any document antedating final DOT decision in the proceeding where such notice is taken. The matters officially noticed under the provisions of this paragraph are:

1. Official Guide of the Airways for each month prior to and including April 1943; Universal Airline Schedules for each month from May 1943 to September 1944, inclusive; American Aviation Air Traffic Guide for each month from October 1944 to August 1948, inclusive; and Official Airline Guide.

2. Official Guide of the Railways and Russell's Official National Motor Coach Guide.

3. Book of Official CAB Airline Route Maps and Airport to Airport Mileages published by Air Transport Association of America.

4. Shuler Guide and Official Airline Guide Quick Reference Edition.

5. All schedules and amendments thereof, and all tariffs and amendments thereof, of all carriers, on file with DOT.

6. Air Carrier operating certificates or applications therefor, of all carriers, together with any requests for amendment thereof.

7. Monthly reports, Forms 2360 and 2780, for each month through December 1946, and monthly and quarterly reports, Forms 41 and 41(a) (including monthly and annual reports required to be filed by all carriers in connection therewith), filed with DOT.

8. Recurrent Reports of Mileage and Traffic Data of all Domestic Airline Carriers from 1945 and all similar reports issued by the Civil Aeronautics Board, or DOT.

9. Certified Air Carrier Traffic Statistics from 1955, prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other similar compilations of statistics issued by the Civil Aeronautics Board, or DOT.

10. Recurrent Reports of Financial Data of all Domestic Airline Carriers from 1947 through the quarter ended September 30, 1953; issued by the Civil Aeronautics Board, and all such other similar recurrent reports issued by the Civil Aeronautics Board, or DOT.

11. Certificated Air Carrier Financial Data from the quarter ended December 31, 1953; prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other similar compilations of data issued by the Civil Aeronautics Board, or DOT.

12. Annual Airline Statistics, Domestic Carriers, fiscal years 1938-1941; Annual Airline Statistics, Domestic Carriers, calendar years 1938-1947; prepared by the Bureau of Pricing and Domestic Aviation, Civil Aeronautics Board; and all such other similar compilations of statistics issued by the Civil Aeronautics Board, or DOT.

13. Quarterly Report of Air Carrier Operating Factors, for the quarter ended September 30, 1953; prepared by the Office of Carrier Accounts and Statistics, Civil Aeronautics Board, and all such other reports for quarterly periods as may be made available to the public by the Civil Aeronautics Board or DOT.

14. Passenger, mail, express, and freight data submitted to the Board on Form 2787 by all carriers for any months subsequent to March 1955 and any similar data submitted to DOT.

15. Airline Traffic Surveys, compiled by the Civil Aeronautics Board, from September 1946, and any other such surveys made available to the public by the Civil Aeronautics Board or DOT.

16. The publication Competition Among Domestic Air Carriers, March 1-14, 1955, compiled by the Civil Aeronautics Board and published by the Air Transport Association of America, and any other compilations of similar data made available to the public by the Civil Aeronautics Board or DOT.

17. Service Mail Pay and Subsidy for United States Certificated Air Carriers from 1955, published by the Civil Aeronautics Board, and any supplemental data and subsequent issues published by the Civil Aeronautics Board or DOT.

18. Airport Activity Statistics of Certificated Air Carriers, from December 31, 1955; compiled by the Civil Aeronautics Board, and published by Air Transport Association of America, and any subsequent issues thereof published by DOT.

19. Enplaned Airline Traffic, by community, by year, 1948-1951; Air Commerce Traffic Pattern, fiscal years 1953-1955 and calendar years 1952-1955, published by the Civil Aeronautics Administration, U.S. Department of Commerce, and any subsequent editions thereof published by the Federal Aviation Administration.

20. Population Volumes I and II of the Eighteenth (1960) Census of the United States, issued by the Census Bureau, Department of Commerce; and similar publications of the Census Bureau relating to the Seventeenth (1950) Census.

21. The Rand McNally Commercial Atlas and Marketing Guide, from 1958, and the Rand McNally Road Atlas, United States, Canada, and Mexico, from 1958.

22. Survey of Buying Power, from 1955, published by Sales Management Magazine.

23. Volumes II and III of the Census of Manufacturers, 1954, issued by the Bureau of Census of the U.S. Department of Commerce; and similar publications of the Bureau of the Census relating to the 1947 and 1958 Census of Manufacturers.

24. Volumes II, IV and VI of the Census of Business, 1954, issued by the Bureau of the Census of the U.S. Department of Commerce; and similar publications of the Bureau of the Census relating to the 1948 and 1958 Census of Business.

25. Federal Airways Air Traffic Activity, from 1953-1958 (fiscal year) issued by the Civil Aeronautics Administration, U.S. Department of Commerce, and subsequent editions thereof issued by the Federal Aviation Administration.

26. National Airport Plan, from 1956, Civil Aeronautics Administration, U.S. Department

of Commerce and subsequent editions thereof issued by the Federal Aviation Administration.

27. Record of Airport Facilities, Form ACA-29A, issued by the Civil Aeronautics Administration, U.S. Department of Commerce and by the Federal Aviation Administration.

28. International Section, Airline Traffic Surveys prepared by the Civil Aeronautics Board from March and September 1959, and any such surveys issued or otherwise made available to the parties by the Civil Aeronautics Board or published privately.

29. The ABC World Airways Guide, Thomas Skinner and Co., Ltd., from June 1950.

30. ICAO Statistical Summary, Preliminary Issue and Nos. 1 through 14, and Digest of Statistics, Nos. 15 through 71, prepared by the International Civil Aviation Organization, Montreal, Canada, with all changes and additions.

31. Foreign-Commerce Yearbook, from 1951, U.S. Department of Commerce, office of International Trade.

32. Statistical Abstract of the United States, from 1953, U.S. Department of Commerce, Bureau of Census.

33. Yearbook of International Trade Statistics, from 1950.

34. Annual Reports of the Immigration and Naturalization Service, U.S. Department of Justice, from fiscal year ended June 30, 1945.

35. Official Steamship and Airways Guide International Transportation Guides, Inc., from June 1945.

36. The Airman's Guide, from 1950, issued by the Civil Aeronautics Administration, U.S. Department of Commerce, and any subsequent editions thereto, issued by the Federal Aviation Administration.

37. Plant and Product Directory of the 500 Largest U.S. Industrial Corporations, from 1961, published by Time Inc.

38. Thomas' Register of American Manufacturers, from 1955, published by Thomas Publishing Company.

39. First and Second Class Post Offices, July 1, 1939-July 1, 1946 and Receipts and Classes of Post Offices, from July 1, 1947, issued by the U.S. Post Office Department.

40. Quarterly Report on Federal Aid to Highways, from March 1960, issued by the Bureau of Public Roads of the U.S. Department of Commerce.

41. All forms and reports required by the Post Office Department to be filed by air carriers certificated to transport mail.

42. All orders of the Postmaster General designating schedules for the transportation of mail.

43. Handbook of Airline Statistics from 1961, prepared by the Bureau of Accounts and Statistics, Civil Aeronautics Board or DOT.

44. CAB Forms 242, 243, 244, and 244A (including all monthly, quarterly, semiannual, and annual reports required to be filed by carriers in connection therewith), filed with the Board or DOT.

(2) Any fact contained in a document belonging to a category enumerated in

paragraph (m)(1) of this section shall be deemed to have been physically incorporated into and made part of the record in such proceedings. However, such taking of official notice shall be subject to the rights granted to any party or intervenor to the proceeding under section 7(d) of the Administrative Procedure Act.

(3) The decisions of the Department and its administrative law judges may officially notice any appropriate matter without regard to whether or not such items are contained in a document belonging to the categories enumerated in paragraph (m)(1) of this section. However, where the decision rests on official notice of a material fact or facts, it will set forth such items with sufficient particularity to advise interested persons of the matters which have been noticed.

§ 302.25 Argument before the administrative law judge.

(a) The administrative law judge shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the administrative law judge.

(b) When, in the opinion of the administrative law judge, the volume of the evidence or the importance or complexity of the issues involved warrants, he or she may, either of his or her own motion, or at the request of a party, permit the presentation of oral argument. He or she may impose such time limits on the argument as he or she may determine, having regard for other assignments for hearing before him or her. Such argument shall be transcribed and bound with the transcript of testimony and will be available to the DOT decisionmaker for consideration in deciding the case.

§ 302.26 Proposed findings and conclusions before the administrative law judge or the DOT decisionmaker.

Within such limited time after the close of the reception of evidence fixed by the administrative law judge, any party may, upon request and under such conditions as the administrative law judge may prescribe, file for his or her consideration briefs to include proposed findings and conclusions of law which shall contain exact references to the record and authorities relied upon. The provisions of this section shall be applicable to proceedings in which the record is certified to the DOT decisionmaker without the preparation of an initial or recommended decision by the administrative law judge.

§ 302.27 Delegation to administrative law judges and action by administrative law judges after hearing.

(a) *Delegation of authority to make the agency decision subject to discretionary review.* Pursuant to the authority conferred on DOT under Section 1601(b)(1) of the Federal Aviation Act of 1958, as amended, there is hereby delegated to each administrative law judge assigned to a particular case subject to this part the DOT decisionmaker's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing in such case, except that this delegation does not apply in cases where the record is certified to the DOT decisionmaker, with or without a recommended decision by the administrative law judge, or in cases requiring Presidential approval under section 801 of the Act. This delegation does not apply to the review of rulings by the administrative law judge on interlocutory matters which have been appealed to the DOT decisionmaker in accordance with the requirements of § 302.18. The term "initial decision," as used in this part, shall encompass the administrative law judge's decision pursuant to this delegation of authority on the merits of the proceeding and on all ancillary procedural issues remaining for disposition at the close of the hearing.

(b) *Action by administrative law judge after hearing.* (1) Every initial or recommended decision issued shall state the names of the persons who are to be served with copies of it, the time within which exceptions to, or petitions for review of, such decision may be filed, and the time within which briefs in support of the exceptions may be filed. In addition, every initial decision shall recite that it is made under delegated authority, and contain notice of the provisions of paragraph (c) of this section. In the event the administrative law judge certifies the record to the DOT decisionmaker without an initial or recommended decision, he or she shall notify the parties of the time within which to file proposed findings and conclusions with the DOT decisionmaker and supporting briefs.

(2) Except where the DOT decisionmaker directs otherwise, after the taking of evidence and the receipt of proposed findings and conclusions, if any, the administrative law judge shall take the following action:

(i) *Cases subject to section 801 of the Act.* In cases where the action of the Department is subject to the approval of the President pursuant to section 801 of

the Act, the administrative law judge shall render a recommended decision orally on the record or in writing.

(ii) *Other matters.* If the proceeding relates to any matter not provided for in paragraph (b)(2)(i) of this section, the administrative law judge shall render an initial decision in writing.

(c) *Effect of initial decision.* Unless a petition for discretionary review is filed pursuant to § 302.28, exceptions are filed pursuant to § 302.1754, or the DOT decisionmaker issues an order to review upon his or her own initiative, the initial decision shall become effective as the final order of the Department 30 days after service thereof. If a petition for discretionary review or exceptions are timely filed or action to review is taken by the DOT decisionmaker upon his or her own initiative, the effectiveness of the initial decision is stayed until the further order of the DOT decisionmaker.

§ 302.28 Petitions for discretionary review of initial decisions or recommended decisions; review proceedings.

(a) *Petitions for discretionary review.* (1) Review by the DOT decisionmaker pursuant to this section is not a matter of right but of the sound discretion of the DOT decisionmaker. Any party may file and serve a petition for discretionary review by the DOT decisionmaker of an initial decision or recommended decision within 21 days after service thereof, except that the DOT decisionmaker may fix a different period in any decision involving a foreign air carrier where the action of DOT is subject to the approval of the President pursuant to section 801 of the Act. Such petitions shall be accompanied by proof of service on all parties.

(2) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

(i) A finding of a material fact is erroneous;

(ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law, DOT rules, or precedent;

(iii) A substantial and important question of law, policy or discretion is involved; or

(iv) A prejudicial procedural error has occurred.

(3) Each issue shall be separately numbered and plainly and concisely stated. Petitioners shall not restate the same point in repetitive discussions of an issue. Each issue shall be supported by detailed citations of the record when objections are based on the record, and by statutes, regulations or principal authorities relied upon. Any matters of fact or law not argued before the

administrative law judge, but which the petitioner proposes to argue on brief to the DOT decisionmaker, shall be stated.

(4) Petitions for discretionary review shall be self-contained and shall not incorporate by reference any part of another document. Except by permission of the DOT decisionmaker or the Chief Administrative Law Judge, petitions shall not exceed 20 pages including appendices and other papers physically attached to the petition. Petitions of more than 10 pages shall contain a subject index with page references.

(5) Requests for oral argument on petitions for discretionary review will not be entertained by the DOT decisionmaker.

(b) *Answer.* Within 15 days after service of a petition for discretionary review, any party may file and serve an answer of not more than 15 pages in support of or in opposition to the petition. If any party desires to answer more than one petition for discretionary review in the same proceeding, he or she shall do so in a single document of not more than 20 pages.

(c) *Orders declining review.* DOT orders declining to exercise the discretionary right of review will specify the date upon which the administrative law judge's decision shall become effective as the final decision of DOT. A petition for reconsideration of a DOT order declining review will be entertained only when the order exercises, in part, the DOT decisionmaker's discretionary right of review, and such petition shall be limited to the single question of whether any issue designated for review and any issue not so designated are so inseparably interrelated that the former cannot be reviewed independently or that the latter cannot be made effective before the final decision of DOT in the review proceeding.

(d) *Review proceedings.* (1) The DOT decisionmaker may exercise his or her right of review upon petition for review or on his or her own initiative. The DOT decisionmaker will issue a final order upon such review without further proceedings on any or all the issues where he or she finds that matters raised do not warrant further proceedings.

(2) Where the DOT decisionmaker desires further proceedings, he or she will issue an order for review which will:

(i) Specify the issues to which review will be limited. Such issues shall constitute one or more of the issues raised in a petition for discretionary review, and/or matters which the DOT decisionmaker desires to review on his

or her own initiative. Only those issues specified in the order shall be argued on brief to the DOT decisionmaker, pursuant to § 302.31, and considered by the DOT decisionmaker.

(ii) Specify the portions of the administrative law judge's decision, if any, which are to be stayed as well as the effective date of the remaining portions thereof.

(iii) Designate the parties to the review proceeding.

§ 302.29 Tentative decision of DOT.

(a) Except as provided in paragraph (b) of this section, whenever the administrative law judge certifies the record in a proceeding directly to the DOT decisionmaker without issuing an initial or recommended decision in the matter, the DOT decisionmaker shall, after consideration of any proposed findings and conclusions submitted by the parties, prepare a tentative decision and serve it upon the parties. Every tentative decision of the DOT decisionmaker shall state the names of the persons who are to receive copies of it, the time within which exceptions to such decision may be filed, the time within which briefs in support of the exceptions may be filed, and the date when such decision will become final in the absence of exceptions thereto. If no exceptions are filed to the tentative decision of the DOT decisionmaker within the period fixed (which in no event shall be less than 10 days), it shall become final at the expiration of such period unless the DOT decisionmaker orders otherwise.

(b) Notwithstanding the provisions of paragraph (a) of this section, in rule making proceedings or proceedings determining applications for initial licenses, the DOT decisionmaker may omit a tentative decision in any case in which he or she finds upon the record that due and timely execution of DOT's functions imperatively and unavoidably so requires. The DOT decisionmaker may also, in his or her discretion, omit a tentative decision in proceedings under Subpart Q. Final decisions of the DOT decisionmaker are subject to review as provided in § 302.22a.

(Secs. 204, 401, 402, 1001, Federal Aviation Act of 1958, as amended by Pub. L. 95-504, 72 Stat. 743, 754, 757, 788, 82 Stat. 1973 (49 U.S.C. 1324, 1371, 1372, 1481 (Administrative Procedure Act) 5 U.S.C. 551 et seq.))

§ 302.30 Exceptions to tentative decisions of DOT.

(a) *Time for filing.* Within ten (10) days after service of any tentative decision of the DOT decisionmaker, any party to a proceeding may file

exceptions to such decision with the DOT decisionmaker.

(b) *Form and contents of exceptions.* Each exception shall be separately numbered and shall be stated as a separate point, and appellants shall not restate the same point in several repetitive exceptions. Each exception shall state, sufficiently identify, and be limited to, an ultimate conclusion in the decision to which exception is taken (such as, selection of one carrier rather than another to serve any point or points; points included in or excluded from a new route; imposition or failure to impose a given restriction; determination of a rate at a given amount rather than another). No specific exception shall be taken with respect to underlying findings or statements, but exceptions to an ultimate conclusion shall be deemed to include exceptions to all underlying findings and statements pertaining thereto. *Provided, however,* That exceptions shall specify any matters of law, fact or policy which were not argued before the administrative law judge but will be set forth for the first time on brief to the DOT decisionmaker.

(c) *Effect of failure to file timely and adequate exceptions.* No objection may be made on brief or at a later time to an ultimate conclusion which is not expressly made the subject of an exception in compliance with the provisions of this section. *Provided, however,* That any party may file a brief in support of the decision and in opposition to the exceptions filed by any other party.

§ 302.31 Briefs before decisionmaker.

(a) *Time for filing.* Within such period after the date of service of any tentative decision by the DOT decisionmaker as may be fixed therein, any party may file a brief addressed to the DOT decisionmaker in support of his or her exceptions to such decision or in opposition to the exceptions filed by any other party. Briefs to the DOT decisionmaker on initial decisions or recommended decisions of administrative law judges shall be filed only in those cases where the DOT decisionmaker grants discretionary review and orders further proceedings, pursuant to § 302.28(d)(2), and only upon those issues specified in the order. Such briefs shall be filed within 30 days after date of service of the order granting discretionary review. In cases where, because of the limited number of parties and the nature of the issues, the filing of opening, answering, and reply briefs will not unduly delay the proceeding and will assist in its proper disposition, the

DOT decisionmaker or the administrative law judge (where the administrative law judge's decision was not made under delegated authority) may direct that the parties file briefs at different times rather than at the same time.

(b) *Effect of failure to restate objections in briefs.* In determining the merits of an appeal, the DOT decisionmaker will not consider the exceptions or the petition for discretionary review but will consider only the brief. Each objection contained in the exceptions or each issue specified in the DOT decisionmaker's order exercising discretionary review must be restated and supported by a statement and adequate discussion of all matters relied upon, in a brief filed pursuant to and in compliance with the requirements of this section.

(c) *Formal specifications of briefs—(1) Contents.* Each brief shall discuss every point of law, fact or precedent which the party submitting it is entitled to raise and which it wishes the DOT decisionmaker to consider. Each brief shall include a summary of the argument not to exceed 5 pages. Support and justification for every point raised shall include itemized references to the pages of the transcript of hearing, exhibit or other matter of record, and citations of the statutes, regulations or principal authorities relied upon. If a brief or any point discussed in the brief is not in substantial conformity with the requirement for such support and justification, no motion to strike or dismiss such document shall be made but the DOT decisionmaker may disregard the points involved.

(2) *Incorporation by reference.* Briefs to the DOT decisionmaker shall be completely self-contained and shall not incorporate by reference any portion of any other brief or pleading: *Provided, however,* That instead of submitting a brief to the DOT decisionmaker a party may adopt by reference specifically identified pages or the whole of his or her prior brief to the administrative law judge if the latter complies with all requirements of this section. In such cases, the party shall file with the Documentary Services Division a letter exercising this privilege and serve all parties in the same manner as a brief to the DOT decisionmaker.

(3) *Length and index.* Briefs shall comply with the formal specifications set forth in § 302.3(b). Except by permission or direction of the DOT decisionmaker, briefs shall not exceed 50 pages including pages contained in any appendix, table, chart, or other document physically attached to the brief, but excluding maps and the

summary of the argument. In this case "map" means only those pictorial representations of routes, flight paths, mileage, and similar ancillary data that are superimposed on geographic drawings and contain only such text as is needed to explain the pictorial representation. Any brief that exceeds 10 pages shall contain a subject index of its contents, including page references.

§ 302.32 Oral argument before the DOT decisionmaker.

(a) If any party desires to argue a case orally before the DOT decisionmaker, he shall request leave to make such argument in his exceptions or brief. Such request shall be filed no later than the date when briefs before the DOT decisionmaker are due in the proceeding. The DOT decisionmaker will rule on such request, and if oral argument is to be allowed, all parties to the proceeding will be advised of the date and hour set for such argument and the amount of time allowed to each party. Requests for oral argument on petitions for discretionary review will not be entertained.

(b) Pamphlets, charts, and other written data may be presented to the DOT decisionmaker at oral argument only in accordance with the following rules: All such material shall be limited to facts in the record of the case being argued. All such material shall be served on all parties to the proceeding and eight copies transmitted to the Documentary Services Division at least five (5) calendar days in advance of the argument. As used herein "material" includes, but is not limited to, maps, charts included in briefs, and exhibits which are enlarged and used for demonstration purposes at the argument, but does not include the enlargements of such exhibits.

§ 302.33 Waiver of procedural steps after hearing.

The parties of any proceeding may agree to waive any one or more of the following procedural steps provided in §§ 302.25 through 302.32: Oral argument before the administrative law judge, the filing of proposed findings and conclusions for the administrative law judge or for the DOT decisionmaker, a recommended decision of the administrative law judge, a tentative decision of the DOT decisionmaker, a petition for discretionary review of or exceptions to an initial decision or recommended decision, and the filing of briefs with the DOT decisionmaker, or oral argument before the DOT decisionmaker.

§ 302.35 Shortened procedure.

In cases where a hearing is not required by law, §§ 302.23 through 302.33, relating to prehearing, hearing, and post-hearing procedures, shall not be applicable except to the extent that DOT shall determine that the application of some or all of such rules in the particular case will be conducive to the proper dispatch of its business and to the ends of justice.

§ 302.36 Final decision of DOT.

When a case stands submitted to the DOT decisionmaker for final decision on the merits, he or she will dispose of the issues presented by entering an appropriate order which will include a statement of the reasons for his or her findings and conclusions. Such orders shall be deemed "final orders" within the purview of § 302.37(a), in the manner provided by § 302.22a.

§ 302.37 Petitions for reconsideration or review by the DOT decisionmaker.

(a) *DOT orders subject to reconsideration; time for filing.* Unless an order or a rule of the Department specifically provides otherwise, any interested person may file a petition for reconsideration, of any interlocutory order issued by the Department which institutes a proceeding. Any party to a proceeding, unless an order or rule of the Department specifically provides otherwise, may file a petition for reconsideration, rehearing, or reargument of (1) final orders issued by the Department, or (2) an interlocutory order which defines the scope and issues of a proceeding or suspends a provision of a tariff on file with the Department. Unless the time is shortened or enlarged by the Department, petitions for reconsideration shall be filed, in the case of a final order, within twenty (20) days after service thereof, and, in the case of an interlocutory order, or a final decision described in § 302.1757 within ten (10) days after service. However, neither the filing nor the granting of such a petition shall operate as a stay of such final or interlocutory order unless specifically so ordered by the DOT decisionmaker. Within ten (10) days after a petition for reconsideration, rehearing, or reargument is filed, any party to the proceeding may file an answer in support of or in opposition. Motions for extension of time to file a petition or answer, and for leave to file a petition or answer after the time for the filing has expired, will not be granted except on a showing of unusual and exceptional circumstances, constituting

good cause for movant's inability to meet the established procedural dates.

(b) *Contents of petition.* A petition for reconsideration, rehearing, or reargument shall state, briefly and specifically, the matters of record alleged to have been erroneously decided, the ground relied upon, and the relief sought. If a decision by the Secretary or Deputy Secretary is requested, the petition should describe in detail the reasons for such request and specify any important national transportation policy issues that are presented. If the petition is based, in whole or in part, on allegations as to the consequences which would result from the final order, the basis of such allegations shall be set forth. If the petition is based, in whole or in part, on new matter, such new matter shall be set forth, accompanied by a statement to the effect that petitioner, with due diligence, could not have known or discovered such new matter prior to the date the case was submitted for decision. Unless otherwise directed by the DOT decisionmaker upon a showing of unusual or exceptional circumstances, petitions for reconsideration, rehearing or reargument or answers thereto which exceed twenty-five (25) pages (including appendices) in length shall not be accepted for filing by the Office of the Documentary Services.

(c) *Successive petitions.* A successive petition for rehearing, reargument, reconsideration filed by the same party or person, and upon substantially the same ground as a former petition which has been considered or denied will not be entertained.

§ 302.38 Petitions for rulemaking.

Any interested person may petition DOT for the issuance, amendment, modification and repeal of any regulation, subject to the provisions of Part 5, Rulemaking Procedures, of the Office of the Secretary regulations (49 CFR 5.1 et seq.)

§ 302.39 Objections to public disclosure of information.

(a) *General.* Part 7 of the Office of the Secretary regulations, Public Availability of Information, governs the availability of records and documents of DOT to the public. (49 CFR 7.1 et seq.)

(b) *Information contained in paper to be filed.* Any person who objects to the public disclosure of any information contained in any paper filed in any proceeding, or in any application, report, or other document filed pursuant to the provisions of the Federal Aviation Act of 1958, as amended, or any rule, regulation, or order of the DOT thereunder, shall segregate, or request

the segregation of, such information into a separate paper and shall file it, or request that it be filed, with the administrative law judge or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed, separately in a sealed envelope, bearing the caption of the enclosed paper, and the notation "Classified or Confidential Treatment Requested Under § 302.39." At the time of filing such paper, or when the objection is made by a person not himself or herself filing the paper, application, report or other document, within five (5) days after the filing of such paper, the objecting party shall file a motion to withhold the information from public disclosure, in accordance with the procedure outlined in paragraph (e) of this section, or in accordance with the procedure outlined in paragraph (d) of this section if objection is made by a Government department or a representative thereof. Notwithstanding any other provision of this section, copies of the filed paper and of the motion need not be served upon any other party unless so ordered by the DOT.

(c) *Information contained in oral testimony.* Any person who objects to the public disclosure of any information sought to be elicited from a witness or deponent on oral examination shall, before such information is disclosed, make his or her objection known. Upon such objection duly made, the witness or deponent shall be compelled to disclose such information only in the presence of the administrative law judge or the person before whom the deposition is being taken, as the case may be, the official stenographer and such attorneys for and lay representative of each party as the administrative law judge or the person before whom the deposition is being taken, as the case may be, shall designate, and after all present have been sworn to secrecy. The transcript of testimony containing such information shall be segregated and filed in a sealed envelope, bearing the title and docket number of the proceeding, and the notation "Classified or Confidential Treatment Requested Under § 302.39 Testimony Given by (name of witness or deponent)." Within five (5) days after such testimony is given, the objecting person shall file a motion, except as hereinafter provided in paragraph (d) of this section, in accordance with the procedure outlined in paragraph (e) of this section, to withhold the information from public disclosure. Notwithstanding any other provision of this section, copies of the segregated portion of the transcript and of the motion need not be

served upon any other party unless so ordered by the DOT.

(d) *Objection by Government departments or representative thereof.* In the case of objection to the public disclosure of any information filed by or elicited from any United States Government department, or representative thereof, under paragraph (b) or (c) of this section, the department making such objection shall be exempted from the provisions of paragraphs (b), (c), and (e) of this section insofar as said paragraphs require the filing of a written objection to such disclosure. However, any department, or person representing said department, if it so desires, may file a memorandum setting forth the reasons on the basis of which it is claimed that a public disclosure of the information should not be made. If such a memorandum is submitted, it shall be filed and handled as is provided by this section in the case of a motion to withhold information from public disclosure.

(e) *Form of motion to withhold information from public disclosure.* Subject to the exception of paragraph (d) of this section, no information covered by paragraphs (b) and (c) of this section need be withheld from public disclosure unless written objection to such disclosure is filed with the DOT in accordance with the following procedure:

(1) The motion shall be headed with the title and docket number of the proceeding and shall be signed by the objecting person, any duly authorized officer or agent thereof, or by counsel representing such person in the proceeding.

(2) The motion shall include (i) a description of the information sought to be withheld, sufficient for identification of the same; (ii) a statement explaining how and why the information falls within the exemptions from the Freedom of Information Act (5 U.S.C. 552(b)(1)-(9); and (iii) a statement explaining how and why public disclosure of the information would adversely affect the interests of the objecting persons and is not required in the interest of the public.

(3) Such motion shall be filed with the administrative law judge or the person conducting the hearing or proceeding, as the case may be, or with the person with whom said application, report, or document is required to be filed.

If such motion relates to contracts, agreements, understandings, or arrangements an executed original copy and two copies of such motion shall be filed.

(f) *Motions referred to DOT.* The order of DOT containing its ruling upon each such motion will specify the extent to which, and the conditions upon which, the information may be disclosed to the parties and to the public, which order shall become effective upon the date stated therein, unless, within five (5) days after the date of the entry of the DOT's order with respect thereto, a petition is filed by the objecting person requesting reconsideration by DOT, or a written statement is filed indicating that the objecting person in good faith intends to seek judicial review of the DOT's order.

(g) *Objections in proceeding before the DOT.* Notwithstanding any of the provisions of this section, whenever the objection to disclosure of information shall have been made, in the first instance, before the DOT itself, the written motion of objection contemplated by paragraphs (b), (c), and (e) of this section shall not be necessary but may be submitted if the parties so desire or if the DOT, in a particular case, shall so direct.

§ 302.40 Saving clause.

Repeal, revision or amendment of any Economic Regulation of the DOT shall not affect any pending enforcement proceeding or any enforcement proceeding initiated thereafter with respect to causes arising or acts committed prior to said repeal, revision or amendment, unless the act of repeal, revision or amendment specifically so provides.

Subpart B—Rules Applicable to Enforcement Proceedings

§ 302.200 Applicability of this subpart.

(a) *In general.* This subpart contains the specific rules that apply to DOT proceedings to enforce the act and the rules, regulations, orders and other requirements issued by DOT. Subpart A of this part contains other rules that apply to these proceedings.

(b) *Informal complaints.* Informal complaints may be made in writing with respect to anything done or omitted to be done by any person in contravention of any provision of the act or any requirement established pursuant thereto without compliance with this part. Matters so presented may, if their nature warrants, be handled by correspondence or conference with the appropriate persons. Any matter not disposed of informally may be made the subject of a formal proceeding pursuant to this subpart. The filing of an informal complaint shall not bar the subsequent filing of a formal complaint.

§ 302.201 Formal complaints.

Any person may make a formal complaint to the Assistant General Counsel for Aviation Enforcement and Proceedings about any violation of the economic regulatory provisions of the act or of DOT's rules, regulations, orders, or other requirements. Every formal complaint shall conform to the requirements of § 302.3, concerning the form and filing of documents. The filing of a complaint shall result in a formal enforcement proceeding only if the Assistant General Counsel for Aviation Enforcement and Proceedings issues a notice instituting an enforcement proceeding as to all or part of the complaint under § 302.206(a) or the Deputy General Counsel does so under § 302.206(b). A formal complaint may be amended at any time before service of an answer to the complaint. After service of an answer but before institution of an enforcement proceeding, the complaint may be amended with the permission of the Assistant General Counsel for Aviation Enforcement and Proceedings. After institution of an enforcement proceeding, the complaint may be amended only on grant of a motion filed under § 302.18.

§ 302.202 (Reserved)

§ 302.203 Insufficiency of formal complaint.

In any case where the Assistant General Counsel for Aviation Enforcement and Proceedings is of the opinion that a complaint does not sufficiently set forth the material required by any applicable rule, regulation or order of the DOT, or is otherwise insufficient, he or she may advise the party filing the same of the deficiency and require that any additional information be supplied by amendment.

§ 302.204 Third-party complaints.

(a) A third-party complaint, and any amendments thereto, submitted pursuant to § 302.201 shall be served by the person filing such documents upon each party complained of, upon the Deputy General Counsel, and upon the Assistant General Counsel for Aviation Enforcement and Proceedings.

(b) Within fifteen (15) days after the date of service of a third-party complaint, each person complained of shall file an answer in conformance with and subject to the requirements of § 302.207(b). Extensions of time for filing an answer may be granted by the Assistant General Counsel for Aviation Enforcement and Proceedings for good cause shown.

(c) A person complained against in a third-party complaint may offer to satisfy the complaint through submission of facts, offer of settlement or proposal of adjustment. Such offer shall be in writing and shall be served, within fifteen (15) days after service of the complaint, upon the same persons and in the same manner as an answer. The submittal of an offer to satisfy the complaint shall not excuse the filing of an answer.

(d) Motions to dismiss a third-party complaint shall not be fileable prior to the filing of a notice instituting an enforcement proceeding with respect to such complaint or a portion thereof.

§ 302.205 Procedure when no enforcement proceeding is instituted.

(a) Within a reasonable time, but not more than 60 days, after an answer to a formal third-party complaint is filed, or such extension of that 60-day period as may be granted pursuant to § 302.206(b), the Assistant General Counsel for Aviation Enforcement and Proceedings shall either issue a notice instituting a formal enforcement proceeding in accordance with § 302.206(a) or issue a notice dismissing the complaint in whole or in part, stating the reasons for such dismissal.

(b) A notice dismissing a complaint issued pursuant to paragraph (a) of this section shall become effective as a final order of DOT 30 days after service thereof.

§ 302.206 Commencement of enforcement proceeding.

(a) Whenever in the opinion of the Assistant General Counsel for Aviation Enforcement and Proceedings, there are reasonable grounds to believe that any provision of the Act, or any rule, regulation, order, limitation, condition, or other requirement established pursuant thereto, has been or is being violated, that, in the case of third-party complaints, efforts to satisfy a complaint insofar as required by § 302.204 have failed, and that the investigation of any or all of the alleged violations is in the public interest, the Assistant General Counsel for Aviation Enforcement and Proceedings may issue a notice instituting a formal enforcement proceeding. The notice shall incorporate by reference a formal complaint submitted pursuant to § 302.201 or shall be accompanied by a complaint by an attorney from the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings. The notice and accompanying complaint, if any, shall be formally served upon each respondent and each complainant. The

proceedings thus instituted shall be processed in regular course in accordance with this part. However, nothing in this part shall be construed to limit the authority of the Department to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedures which it may deem necessary or proper.

(b) The Assistant General Counsel for Aviation Enforcement and Proceedings may at any time move, upon a showing of good cause, for an extension of the time within which to act upon a third-party complaint. Whenever the Assistant General Counsel for Aviation Enforcement and Proceedings has failed to act on a third-party complaint within 60 days of the date when the answer is due, or within such extension of that period as may have been granted, the following motions may be addressed to the Deputy General Counsel:

(1) By the complainant to institute a proceeding by docketing the complaint upon a showing that it is in the public interest to do so; and

(2) By the respondent to dismiss the complaint upon a showing that it is in the public interest to do so.

(c) The Deputy General Counsel may grant, deny, or defer any of the motions, in whole or in part, and take appropriate action to carry out his or her decision.

§ 302.206a Assessment of civil penalties.

(a) Whenever the Assistant General Counsel for Aviation Enforcement and Proceedings seeks an assessment of civil penalties in an enforcement proceeding, the Deputy General Counsel shall serve on all parties to the proceeding a notice of the violations alleged and the amount of penalties for which the respondent may be liable. The notice may be included in the notice instituting an enforcement proceeding or in a separate document.

(b) Within 15 days after service of a notice proposing assessment of civil penalties, the respondent shall file a response specifically presenting any matters he or she intends to rely on in opposition to or mitigation of such civil penalties. The response may be contained in an answer filed under § 302.207.

(c) In any proceeding in which civil penalties are sought, the initial and final decisions shall state the amount of any civil penalties assessed upon a finding of violation, and the time and manner in which payment shall be made to the United States.

§ 302.207 Answer.

(a) Within 15 days after the date of service of a notice issued pursuant to

§ 302.206, the respondent shall file an answer to the complaint attached thereto or incorporated therein unless an answer has already been filed in accordance with § 302.204. Any requests for extension of time for filing of an answer to a complaint attached to or incorporated in a notice instituting an enforcement proceeding shall be filed with DOT in accordance with § 302.17.

(b) All answers shall conform to the requirements of § 302.8(a)(2) and shall fully and completely advise the parties and the Department as to the nature of the defense and shall admit or deny specifically and in detail each allegation of the complaint unless the person complained of is without knowledge, in which case, his or her answer shall so state and the statement shall operate as a denial. Allegations of fact not denied or controverted shall be deemed admitted. Matters alleged as affirmative defenses shall be separately stated and numbered and shall, in the absence of a reply, be deemed to be controverted.

§ 302.208 Default.

Failure of a respondent to file and serve an answer within the time and in the manner prescribed by this part shall be deemed to authorize the Department, in its discretion, to find the facts alleged in the complaint incorporated in or accompanying the notice instituting an enforcement proceeding to be true and to enter such orders as may be appropriate without notice or hearing, or, in its discretion, to proceed to take proof, without notice, of the allegations or charges set forth in the complaint or order, provided that the DOT decisionmaker or administrative law judge may permit late filing of an answer for good cause shown.

§ 302.209 Reply.

The DOT decisionmaker (or the administrative law judge) may, in his or her discretion, require or permit the filing of a reply in appropriate cases, otherwise no reply shall be filed.

§ 302.210 Parties.

The parties to an enforcement proceeding shall be the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings, the respondent, any person whose formal complaint alleged violations that were later covered by the notice of enforcement, and any other person permitted to intervene under § 302.15.

§ 302.210a Consolidation of proceedings.

The DOT decisionmaker or Chief Administrative Law Judge, upon his or her own initiative, or upon motion of any party, may consolidate for hearing

or for other purposes, or may contemporaneously consider, two or more enforcement proceedings which involve substantially the same parties, or issues which are the same or closely related, if he or she finds that such consolidation or contemporaneous hearing will be conducive to the dispatch of business and to the ends of justice and will not unduly delay the proceedings.

§ 302.211 Prehearing conference.

A prehearing conference may be held in an enforcement proceeding whenever the DOT decisionmaker or the administrative law judge believes that the fair and expeditious disposition of the proceeding requires one. If a prehearing conference is held, it shall be conducted in accordance with § 302.23.

§ 302.212 Admissions as to facts and documents; motions to dismiss and for summary judgment.

(a) At any time after answer has been filed, any party may file with DOT and serve upon the opposing side a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request or for the admission of the truth of any relevant matters of fact stated in the request with respect to such documents. 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 ten (10) days after service thereof, or within such further time as the DOT decisionmaker or the administrative law judge may allow upon motion and notice, the party to whom the request is directed serves upon the requesting party a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he or she cannot truthfully either admit or deny such matters. Service of such request and answering statement shall be made as provided in § 302.8. Any admission made by a party pursuant to such request is only for the purposes of the pending proceeding, or any proceeding or action instituted for the enforcement or any order entered therein, and shall not constitute an admission by him or her for any other purpose or be used against him or her in any other proceeding or action.

(b) At any time after answer has been filed, any party may file with the DOT decisionmaker or the administrative law judge a motion to dismiss or a motion for summary judgment, including supporting affidavits. The procedure on such motions shall be in accordance

with the Federal Rules of Civil Procedure (28 U.S.C.), particularly Rules 6(d), 7(b), 12, and 56, except that answers and supporting papers to a motion to dismiss or for summary judgment shall be filed within 7 days after service of the motion.

(c) Parties may petition the DOT decisionmaker to review action by the administrative law judge granting summary judgment or dismissing an enforcement proceeding under the procedure established for review of an initial decision in § 302.28.

§ 302.213 Hearing.

After the issues have been formulated, whether by the pleadings or otherwise, the administrative law judge or the DOT decisionmaker shall give the parties reasonable written notice of the time and place of the hearings.

§ 302.214 Appearances by persons not parties.

With consent of the administrative law judge or the DOT decisionmaker, appearances may be entered without request for or grant of permission to intervene by interested persons who are not parties to the proceeding. Such persons may, with consent of the administrative law judge or the DOT decisionmaker, cross-examine a particular witness or suggest to any party or counsel therefor questions or interrogations to be propounded to witnesses called by any party, but may not otherwise examine witnesses and may not introduce evidence or otherwise participate in the proceeding. However, such persons may present to both the administrative law judge and the DOT decisionmaker an oral or written statement of their position on the issues involved in the proceeding.

§ 302.215 Settlement of proceedings.

(a) The Deputy General Counsel and the respondent may agree to settle all or some of the issues in an enforcement proceeding at any time before a final decision. The Deputy General Counsel shall serve a copy of any proposed settlement on each party and shall submit the proposed settlement to the administrative law judge for approval. The submission of a proposed settlement shall not automatically delay the proceeding.

(b) Any party to the proceeding may submit written comments supporting or opposing the proposed settlement within 10 days from the date of service.

(c) The administrative law judge shall approve the proposed settlement, as submitted, if it appears to be in the public interest, or otherwise shall disapprove it.

(d) Information relating to settlement offers and negotiations will be withheld from public disclosure if the Deputy General Counsel determines that disclosure would interfere with the likelihood of settlement of an enforcement proceeding.

§ 302.216 Evidence of previous violations.

Evidence of previous violations by any person or of any provision of the act or any requirement thereunder found by DOT or a court in any other proceeding or criminal or civil action may, if relevant and material, be admitted in any enforcement proceeding involving such person.

§ 302.217 Motions for immediate suspension of operating authority pendente lite.

All motions for the suspension of the economic operating authority of an air carrier during the pendency of proceedings to revoke such authority shall be filed with, and decided by the DOT decisionmaker. Proceedings on the motion shall be in accordance with § 302.18. In addition, the DOT decisionmaker shall afford the parties an opportunity for oral argument on such motion.

§ 302.218 Modification or dissolution of enforcement actions.

Whenever any party to a proceeding in which an order of DOT has been issued pursuant to section 1002(c) of the Act, or an injunction or other form of enforcement action has been issued by a court of competent jurisdiction pursuant to section 1007, believes that changed conditions of fact or law, or the public interest, require that said order or judicial action be modified, or set aside, in whole or in part, such party may file with DOT a motion requesting that DOT take such administrative action or join in applying to the appropriate court for such judicial action, as the case may be. The motion shall state the changes desired and the changed circumstances warranting such action, and shall include the materials and argument in support thereof. The motion shall be served on each party to the proceeding in which the enforcement action was taken. Within thirty (30) days after the service of such motion, any party so served may file an answer thereto. DOT shall dispose of the motion by such procedure as it deems appropriate.

Subpart C—Rules Applicable to Mail Rate Proceedings

§ 302.300 Applicability of this subpart.

This subpart sets forth the special rules applicable to proceedings for the

establishment of mail rates by DOT for foreign air transportation and air transportation between points in Alaska. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules, regulations, and orders of DOT.

§ 302.301 Parties to the proceeding.

The parties to the proceeding shall be the air carrier or carriers for whom rates are to be fixed, the Postal Service, the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings and any other person whom DOT permits to intervene. (See § 302.15.)

Final Mail Rate Proceedings

§ 302.302 Participation by persons other than parties.

In addition to participation in hearings in accordance with § 302.14, persons other than parties may, within the time fixed for filing notice of objections to an order to show cause in a mail rate proceeding as provided in § 302.305, submit a memorandum of opposition to, or in support of, the position taken in the petition or order. Such memorandum shall not be received as evidence in the proceeding.

§ 302.303 Institution of proceedings.

Proceedings for the determination of rates of compensation for the transportation of mail may be commenced by the filing of a petition by an air carrier whose rate is to be fixed, or the Postal Service, or upon the issuance of an order by DOT.

(a) The petition shall set forth the rate or rates sought to be established, a statement that they are believed to be fair and reasonable, the reasons supporting the request for a change in rate, and a detailed economic justification sufficient to establish the reasonableness of the rate or rates proposed.

(b) In any case where a carrier is operating under a final mail rate uniformly applicable to an entire rate-making unit as established by the Department, a petition must clearly and unequivocally challenge the rate for such entire rate-making unit and not only a part of such unit.

(c) All petitions, amended petitions, and documents relating thereto shall be served upon the Postal Service by sending a copy to the Assistant General Counsel, Transportation, by registered or certified mail, postpaid, prior to the filing thereof with the Department. Proof of service on the Postal Service shall consist of a statement in the document

that the person filing it has served a copy on the Assistant General Counsel, Transportation, as required by this section. The petition need not be accompanied by any further proof of service, but upon setting any petition down for public hearing, the Department will cause notice of such hearing to be given to such interested persons as it deems appropriate in a particular case.

(d) Answers to petitions shall be filed within 20 days after service of the petition.

Procedure When an Order To Show Cause Is Issued

§ 302.304 Order to show cause.

Whether the proceeding is commenced by the filing of a petition or upon the Department's own initiative, the DOT may issue an order directing the respondent to show cause why it should not adopt such provisional findings and conclusions, and such rates, as may be specified in the order to show cause.

§ 302.305 Objections and answer to order to show cause.

(a) Any person having objections to the provisional rates specified in such order shall file with the Department a notice of objection within ten (10) days after the date of service of such order.

(b) If such notice is filed as aforesaid, written answer and any supporting documents shall be filed within thirty (30) days after the service of the order to show cause. The Department may specify different times for filing a notice of objection or an answer. An answer to an order to show cause shall contain specific objections, and exhibits in support thereof, and shall set forth the findings and conclusions, the rates, and the supporting exhibits which would be substituted for the corresponding items in the Statement of Provisional Findings and Conclusions, if such objections were found valid.

(c) A notice or answer filed by a person who is neither a party nor a person ultimately permitted to intervene shall be treated as a memorandum filed under § 302.302.

§ 302.306 Effect of failure to timely file notice and answer raising material issue of fact.

If no notice, or, if after notice, no answer is filed within the designated time, all parties shall be deemed to have waived the right to a hearing and all other procedural steps short of a final decision of the Department fixing rates, and, in such case, or if an answer timely filed raises no material issue of fact, the Department may thereupon, upon the

basis of all of the documents filed in the proceeding, enter a final order fixing the fair and reasonable rate or rates as specified in the order to show cause.

§ 302.307 Procedure when material issue of fact is timely raised.

If an answer raising a material issue of fact is filed within the time designated in the Department's order, a prehearing conference and hearing shall be held unless waived by all parties. The issues shall be limited to those specifically raised by the answer, except that at the prehearing conference, the administrative law judge may permit the parties to raise such additional issues as he or she deems necessary to a full and fair determination of a fair and reasonable rate. (Reference should be made to Subpart A of this part for rules applicable to hearings.)

§ 302.308 Evidence.

All direct evidence shall be in writing and shall be filed in exhibit form in advance of the hearing unless, for good cause shown, the administrative law judge otherwise directs.

Procedure When No Order To Show Cause Is Issued

§ 302.309 Hearing to be ordered.

When no order to show cause is to be issued by the Department, the Department will order a hearing before an administrative law judge similar to that provided for in §§ 302.307 and 302.308, except that the issues at such hearing shall be formulated initially at a prehearing conference.

Temporary Rate Proceedings

§ 302.310 Procedure for fixing temporary service and subsidy mail rates.

(a) At any time during the pendency of a proceeding for the determination of final mail rates, the Department, upon its own initiative, or on petition by the carrier whose rates are in issue or the Postal Service, may fix temporary rates of compensation for the transportation of mail subject to downward or upward adjustment upon the determination of final mail rates.

(b) Temporary service mail rates: The procedure for determining temporary mail rates involving an issue as to the service mail rates payable by the Postal Service pursuant to section 403(c) of the Act shall be the same as for the determination of final mail rates, except that:

(1) Notice of objections to the Department's show cause order proposing temporary service mail rates must be filed by any party or petitioner for intervention within 8 days, and an

answer within 15 days, of the time such order is served;

(2) Failure to file notice of objections within the 8-day period shall be deemed to be a waiver of all further procedural steps before final decision, including hearing and initial or tentative decision, and the proceeding will stand submitted to the DOT decisionmaker for final decision.

(3) In the absence of a convincing showing that it will result in substantial prejudice to any party or delay the proceeding, the administrative law judge shall require the parties to submit all their testimony in writing and shall closely limit cross-examination to the essential issues (bearing in mind the purpose and urgency of fixing temporary mail rates together with the fact that such temporary rates are subject to downward or upward adjustment upon the fixing of final rates), and shall in all other respects urgently expedite the proceeding.

Informal Mail Rate Conference Procedure

§ 302.311 Invocation of procedure.

Conferences between DOT employees, representatives of air carriers, the Postal Service and other interested persons may be called by DOT employees for the purpose of considering and clarifying issues and factual material in pending proceedings for the establishment of rates for the transportation of mail.

§ 302.312 Scope of conferences.

The mail rate conferences shall be limited to the discussion of, and possible agreement on, particular issues and related factual material in accordance with sound rate-making principles. The duties and powers of DOT employees in rate conferences essentially will not be different, therefore, from the duties and powers the Department has in the processing of rate cases not involving a rate conference. The employee function in both instances is to present clearly to the DOT decisionmaker the issues and the related material facts, together with recommendations. The DOT decisionmaker will make an independent determination of the soundness of the employee's analyses and recommendations.

§ 302.313 Participants in conferences.

The persons entitled to be present in mail rate conferences will be the representatives of the carrier whose rates are in issue, the staff of the Postal Service, and the authorized DOT employees. No other person will attend unless the DOT employees deems his or

her presence necessary in the interest of one or more purposes to be accomplished, and in such case his or her participation will be limited to such specific purposes. No person, however, shall have the duty to attend merely by reason of invitation by the authorized DOT employees.

§ 302.314 Conditions upon participation.

(a) *Nondisclosure of information.* As a condition to participation, every participant, during the period of the conference and for 90 days after its termination, or until the Department takes public action with respect to the facts and issues covered in the conference, whichever is earlier:

(1) Shall, except for necessary disclosures in the course of employment in connection with conference business, hold the information obtained in conference in absolute confidence and trust; (2) shall not deal, directly or indirectly, for the account of himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the carrier involved in the rate conference except that under exceptional circumstances special permission may be obtained in advance from the Department; and (3) shall adopt effective controls for the confidential handling of such information and shall instruct personnel under his or her supervision, who by reason of their employment come into possession of information obtained at the conference, that such information is confidential and must not be disclosed to anyone except to the extent absolutely necessary in the course of employment, and must not be misused. The word "information", as used in paragraph (b) of this section, shall refer only to information obtained at the conference regarding the future course of action or position of the Department or its employees with respect to the facts or issues discussed at the conference.

(b) *Signed statement required.* Every representative of a carrier actually present at any conference shall sign a statement that he or she has read this entire instruction and promises to abide by it and advise any other participant to whom he or she discloses any confidential information of the restrictions imposed above. Every representative of the Postal Service actually present at any conference shall, on his or her own behalf, sign a statement to the same effect.

(c) *Presumption of having conference information.* A director of any carrier, which has had a representative at the conference, who deals either directly or

indirectly for himself or herself, his or her immediate family, members of his or her firm or company, or as a trustee, in securities of the air carrier involved in the conference, during the restricted period set forth above, shall be presumed to have come into possession of information obtained at the conference knowing that such information was subject to the restrictions imposed above; but such presumption can be rebutted.

(d) *Compliance report required.* Within ten (10) days after the expiration of the time specified for keeping conference matters confidential every participant, as defined in this section, shall file a verified compliance report with the Documentary Services Division stating that he or she has complied in every respect with the conditions of this section, or if he or she has not so complied, stating in detail in what respects he or she has failed to comply.

(e) *Persons subject to the provisions of this section.* For the purposes of this section, participants shall include (1) any representative of any carrier and any representative of the Postmaster General actually present at the conference; (2) the carrier and the officers of any carrier which has had a representative at the conference; (3) the directors of any carrier, which has had a representative at the conference, the members of any firm of attorneys or consultants, which has had a representative at the conference, and the members of the Postmaster General's staff, who come into possession of information obtained at the conference, knowing that such information is subject to the restrictions imposed in this section.^{*}

§ 302.315 Information to be requested from carrier.

With respect to the rate for the future period, the carrier will be requested to submit detailed estimates as to traffic, revenues and expenses by appropriate periods and the investment which will be required to perform the operations for a full future year. Full and adequate support shall be presented for all estimates, particularly where such estimates deviate materially from the carrier's past experience. With respect to the rate for a past period, essentially the same procedure shall be followed. Other information or data likewise may be requested by the DOT employees. All data submitted by the carrier shall be certified by a responsible officer.

^{*} Restrictions on disclosure of confidential information and dealing in air carrier securities are imposed upon the DOT employees pursuant to applicable law.

§ 302.316 DOT analysis of data for submission of answers thereto.

After a careful analysis of these data, the DOT employees will, in most cases, send the carrier what might be termed a statement of exceptions showing areas of differences. Where practicable, the carrier may submit its answer to these exceptions. Conferences will then be scheduled to work out a clear understanding and resolution of the issues and facts from the standpoint of sound ratemaking principles.

§ 302.317 Availability of data to Postal Service.

The representatives of the Postal Service shall have access to all conference data and, insofar as practicable, shall be furnished copies of all pertinent data prepared by the DOT employees and the carrier, and a reasonable time shall be allowed to get acquainted with the facts and issues and to make any presentation deemed necessary. *Provided*, That in cases other than those involving an issue as to the service mail rates payable by the Postal Service pursuant to section 406(c) of the Act representatives of the Postal Service shall be furnished with copies of data under this provision only upon their written request.

§ 302.318 Post-conference procedure.

The rate conferences not being in the nature of proceedings, no briefs, or argument, or any formal steps, will be entertained by the Department. The form, content and time of the staff's presentation to the Department are entirely matters of internal procedure. Any party to the mail rate proceeding may, through an authorized DOT employee, request the opportunity to submit a written or oral statement to the DOT decisionmaker on any unresolved issue. The Department will grant such requests whenever it deems such action desirable in the interest of further clarification and understanding of the issues. The granting of an opportunity for such further presentation shall not, however, impair the rights that any party might otherwise have under the act and the rules of practice.

§ 302.319 Effect of conference agreements.

No agreements or understanding reached in rate conferences as to facts or issues shall in any respect be binding on the Department or any participant. Any party to mail rate proceedings will have the same rights to file an answer and take other procedural steps as though no rate conference had been held. The fact, however, that rate conferences were held and certain

agreements or understandings may have been reached on certain facts and issues renders it proper to provide that upon the filing of an answer by any party to the rate proceeding all issues going to the establishment of a rate shall be open, except insofar as limited in prehearing conference in accordance with § 302.23.

§ 302.320 Waiver of §§ 302.313 and 302.314.

After the termination of a mail rate conference hereunder, the carrier, whose rates were in issue, may petition the Department for a release from the obligations imposed upon it and all other persons by §§ 302.313 and 302.314. The Department will grant such petition only after a detailed and convincing showing is made in the petition and supporting exhibits and documents that there is no reasonable possibility that any of the abuses sought to be prevented will occur or that the Department's processes will in any way be prejudiced. There will be no hearing or oral argument on the petition and the Department will grant or deny the request without assigning reasons therefor.

§ 302.321 Time of commencing and terminating conference.

At the commencement of an informal mail rate conference pursuant to this section, the authorized DOT employees conducting such conferences shall issue to each person present at such conference a written statement to the effect that such conference is being conducted pursuant to this section and stating the time of commencement of such conference; and at the termination of such conference the DOT employees conducting such conference shall note in writing on such statement the time of termination of such conference.

Subpart D—Rules Applicable to Exemption Proceedings

§ 302.400 Applicability.

This subpart sets forth the rules applicable to proceedings for exemptions under sections 101(3), 416(b)(1), 416(b)(3), and 416(b)(7) of the Federal Aviation Act. It also provides for the granting of emergency exemptions. The provisions of Subpart A of this part also apply to such proceedings where not inconsistent with this subpart. Proceedings for the issuance of exemptions by regulation are subject to the provisions governing rulemaking.

§ 302.401 Filing of application.

(a) Except as provided in paragraphs (b) and (c) of this section, applications

for exemption shall conform to the requirements of §§ 302.3 and 302.4.

(b) Applications for exemption from section 401 or 402 of the Act (and section 403 of the Act if accompanying the former) which involve 10 or fewer flights may be submitted to the Licensing Division, Office of Aviation Operations on CAB Form 302 or the DOT replacement form. However, that form may not be used for:

(1) Applications filed under section 416(b)(7) of the Act;

(2) Applications by persons who do not have either:

(i) An effective air carrier certificate or foreign air carrier permit from DOT, or

(ii) A properly completed application for such a certificate or permit, and an effective exemption from the DOT for operations similar to those proposed;

(3) Successive applications for the same or similar authority that would total more than 10 flights; or

(4) Any other application for which the DOT decides the requirements of §§ 302.3 and 302.4 are more appropriate. Upon a showing of good cause, an application may be filed by cablegram, telegram, or telephone. All telephone requests must be confirmed by written application within three business days of the original request.

(c) Applications for exemption from section 403 of the Act, tariffs (except for waivers filed under Subpart Q of Part 221 of this Chapter), or DOT regulations concerning tariffs may be submitted by letter. Three copies of such applications shall be sent to the Documentary Services Division, Office of the General Counsel. Upon a showing of good cause, the application may also be filed by cablegram, telegram, or telephone. All telephone requests must be confirmed by written application within three business days of the original request.

(d) Applications filed under paragraph (a) of this section shall be docketed and any additional documents filed shall be identified by the assigned docket number.

(e) Applications filed under paragraph (b) or (c) of this section will normally not be docketed. The DOT may require such applications to be docketed if appropriate. The DOT will list the names and addresses of all persons filing such applications, and will briefly describe the authority sought, in its weekly list of applications filed.

§ 302.402 Contents of application.

(a) *Title.* An application filed under § 302.401(a) shall be entitled "Application for Exemption," and shall state if the application involves renewal

and/or amendment of existing exemption authority.

(b) *Factual statement.* Each application shall state:

(1) The section(s) of the Act or the rule, regulation, term, condition, or limitation from which exemption is requested;

(2) The proposed effective date and duration of the exemption;

(3) A description of how the applicant proposes to exercise the authority (for example, applications for exemption from section 401 or 402 of the Act should include at least: places to be served; equipment types, capacity and source; type and frequency of service; and other operations which the proposed service will connect with or support); and

(4) Any other facts the applicant relies upon to establish that the proposed service will be consistent with the public interest.

(c) *Supporting evidence.* (1) Each application shall be accompanied by:

(i) A statement of economic data, or other matters or information that the applicant desires the DOT to officially notice;

(ii) Affidavits, or statements under penalty of perjury, establishing any other facts the applicant wants the Board to rely upon; and

(iii) Information showing the applicant is qualified to perform the proposed services.

(2) In addition to the information required by paragraph (c)(1) of this section, an application for exemption from section 401 or 402 of the Act (except exemptions under section 416(b)(7)) shall state whether the authority sought is governed by a bilateral agreement or by principles of comity and reciprocity. Applications by foreign carriers shall state whether the applicant's homeland government grants U.S. carriers authority similar to that requested. If so, the application shall state whether the fact of reciprocity has been establishing by the DOT and cite the pertinent finding. If the fact of reciprocity has not been established by the DOT, the application shall include documentation to establish such reciprocity.

(d) *Emergency cabotage.* Applications under section 416(b)(7) of the Act shall, in addition to the information required in paragraphs (b) and (c) of this section, contain evidence showing that:

(1) Because of an emergency created by unusual circumstances not arising in the normal course of business, traffic in the markets requested cannot be accommodated by air carriers holding certificates under section 401 of the Act;

(2) All possible efforts have been made to accommodate the traffic requested by using the resources of such air carriers (including, for example, the use of foreign aircraft, or sections of foreign aircraft, that are under lease or charter to such air carriers, and the use of such air carriers' reservation systems to the extent practicable);

(3) The authority requested is necessary to avoid undue hardship for the traffic in the market that cannot be accommodated by air carriers holding certificates under section 401 of the Act; and

(4) In any case where inability to accommodate traffic in a market results from a labor dispute, the grant of the requested exemption will not result in an undue advantage to any party to the dispute.

(e) *Renewal applications.* An application requesting renewal of an exemption that is intended to invoke the automatic extension provisions of 5 U.S.C. 558(c) shall comply with, and contain the statements and information required by, Part 377 of this chapter.

(f) *Record of service.* An application shall list the parties served as required by § 302.403.

§ 302.403 Service of application.

(a) *Manner of service.* An application for exemption shall be served as provided by § 302.8.

(b) *General requirements.* Except for an application for exemption from sections 403 and 404 of the Act, an applicant shall serve on the persons listed in paragraph (c) of this section a notice that the application has been filed, and, upon request, shall promptly provide those persons with copies of the application and any supporting documents. (Applicants filing CAB Form 302, or the DOT replacement form may serve a copy of the form instead of a notice.) The notice must clearly state the authority sought, the due date for responsive pleadings, and that copies of the application will be supplied upon request. Responsive pleadings shall be filed in accordance with paragraph (c) of this section.

(c) *Persons to be served.* (1) Applicants for scheduled interstate or overseas air transportation authority shall serve (i) all U.S. air carriers (including commuter air carriers) that publish schedules in the "Official Airline Guide" or the "Air Cargo Guide" for the city-pair market(s) specified in the application, (ii) local airport authorities at each point specified in the application, and (iii) any other person who has filed a pleading in a related proceeding under section 401 or 416 of the Act.

(2) Applicants for scheduled foreign air transportation authority shall serve (1) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or in the "Air Cargo Guide" and (ii) any other person who has filed a pleading in a related proceeding under section 401, 402, or 416 of the Act.

(3) Applicants for charter-only or nonscheduled-only authority shall serve any person who has filed a pleading in a related proceeding under section 401, 402, or 416 of the Act. However, applicants that file less than 16 days prior to the proposed start of service must also serve (i) those U.S. carriers (including commuter carriers) that are known to be operating in the general market(s) at issue and (ii) those persons who may be presumed to have an interest in the subject matter of the application.

(d) *Additional service.* The DOT may, in its discretion, order additional service made on any other person.

§ 302.404 Posting of application.

A copy of every application for exemption shall be posted in the Documentary Services Division and listed in the DOT's weekly list of applications filed.

§ 302.405 Dismissal or rejection of incomplete application.

(a) *Dismissal or rejection.* The DOT may dismiss or reject any application for exemption that does not comply with the requirements of this part.

(b) *Additional data.* The DOT may require the filing of additional data with respect to any application for exemption, answer, or reply.

§ 302.406 Answers to applications for exemption.

Within 15 days after the filing of an application for exemption, any person may file an answer in support of or in opposition to the grant of a requested exemption. Such answer shall set forth in detail the reasons why the exemption should be granted or denied. An answer shall include a statement of economic data or other matters the DOT is requested to officially notice, and shall be accompanied by affidavits establishing any other facts relied upon.

§ 302.407 Replies to answers.

Within seven days after the last day for filing an answer, an applicant may file a reply to one or more answers.

§ 302.408 Request for hearing.

The DOT will not normally conduct formal hearings concerning applications

for exemption. However, the DOT may, in its discretion, order a hearing on an application. Any applicant, or any party opposing an application, may request a hearing. Such a request shall set forth in detail the reasons why the filing of affidavits or other written evidence will not permit the fair and expeditious disposition of the application. A request relying on factual assertions shall be accompanied by affidavits establishing such facts. If the DOT orders a hearing, the procedures in Subpart A of this part shall apply.

§ 302.409 Exemptions on the Department's initiative.

The DOT may grant exemptions on its own initiative when it finds that such exemptions are required by the circumstances and consistent with the public interest.

§ 302.410 Emergency exemptions.

(a) *Applicability.* When required by the circumstances and consistent with the public interest, the DOT may take action, without notice, on exemption applications prior to the expiration of the normal period for filing answers and replies. When required in a particular proceeding, the DOT may specify a lesser time for the filing of answers and replies, and notify interested persons of this time period.

(b) *Applications.* (1) Applications for emergency exemption need not conform to the requirements of Subparts A and D of this part (except as provided in this section and in § 302.402(d) concerning emergency cabotage requests). However, an application for emergency exemption must normally be in writing and must state in detail the facts and evidence that support the application, the grounds for the exemption, and the public interest basis for the authority sought. In addition, the application shall state specific reasons that justify departure from the normal exemption application procedures. The application shall also identify those persons notified as required by paragraph (c) of this section. The DOT may require additional information from any applicant before acting on an application.

(2) The DOT will consider oral requests, including telephone requests, for emergency exemption authority under this section in circumstances that do not permit the immediate filing of a written application. All oral requests must, however, provide the information required in paragraph (b)(1) of this section, except that actual evidence in support of the application need not be tendered when the request is made. All

oral requests must be confirmed by written application, together with all supporting evidence, within three business days of the original request.

(c) Notice. Except when the DOT decides that no notice need be given, applicants for emergency exemption shall notify, as appropriate, those persons specified in § 302.403(c) of this subpart. Such notification shall be made in the same manner, contain the same information, and be dispatched at the same time, as the application made to the DOT.

Subpart E—Rules Applicable to Proceedings with Respect to Rates, Fares and Charges

§ 302.500 Applicability of this subpart.

This subpart sets forth the special rules applicable to proceedings with respect to rates, fares and charges in foreign air transportation. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules, regulations and orders of DOT.

§ 302.501 Institution of proceedings.

A proceeding to determine rates, fares, or charges for the foreign air transportation of persons or property by aircraft, or the lawful classification, rule, regulation, or practice affecting such rates, fares or charges, may be instituted by the filing of a petition or complaint by any person, or by the issuance of an order by DOT.

§ 302.502 Contents and service of petition or complaint.

(a) If a petition or complaint is filed it shall state the reasons why the rates, fares, or charges, or the classification, rule, regulation, or practice complained of are unlawful and shall support such reasons with a full factual analysis.

(b) A petition or complaint shall be served by the petitioner or complainant upon the carrier against whose tariff provision the petition or complaint is filed.

§ 302.503 Dismissal of petition or complaint.

If DOT is of the opinion that a petition or complaint does not state facts which warrant an investigation or action on its part, it may dismiss such petition or complaint without hearing.

§ 302.504 Order of investigation.

The Department on its own initiative, or if it is of the opinion that the facts stated in a petition or complaint warrant it, may issue an order instituting an investigation of the lawfulness of any present or proposed rates, fares, or

charges for the transportation of persons or property by aircraft or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares, or charges, and assigning the proceeding for hearing before an administrative law judge. (Reference should be made to Subpart A of this part for rules applicable to hearings.)

§ 302.505 Complaints requesting suspension of tariffs—answers to such complaints.

(a) Formal complaints seeking suspension of tariffs pursuant to section 1002(j) of the Act shall fully identify the tariff and include reference (1) to the issued or posting date, (2) to the effective date, (3) to the name of the publishing carrier or agent, (4) to the DOT number, and (5) to specific items or particular provisions protested or complained against. The complaint should indicate in what respect the tariff is considered to be unlawful, and state what complainant suggests by way of substitution.

(b) A complaint requesting suspension of a tariff ordinarily will not be considered unless made in conformity with this section and filed no more than ten (10) days after the issued date contained within such tariff.

(c) A complaint requesting suspension, pursuant to section 1002(j) of the Act, of an existing tariff for foreign air transportation may be filed at any time. However, such a complaint must be accompanied by a statement setting forth compelling reasons for not having requested suspension within the time limitations provided in paragraph (b) of this section.

(d) In an emergency satisfactorily shown by complainant, and within the time limits herein provided, a telegraphic complaint may be sent to the Department and to the carrier against whose tariff provision the complaint is made. Such a telegraphic complaint shall state the grounds relied upon, and must immediately be confirmed by complaint filed and served in accordance with this part.

(e) Answers to complaints shall be filed within six (6) working days after the complaint is filed.

§ 302.506 Burden of going forward with the evidence.

At any hearing involving a change in a rate, fare, or charge for the transportation of persons or property by aircraft, or the lawful classification, rule, regulation, or practice affecting such rate fare, or charge, the burden of going forward with the evidence shall be upon the person proposing such change to show that the proposed changed rate,

fare, charge, classification, rule, regulation or practice is just and reasonable, and not otherwise unlawful.

§ 302.508 Computing time for filing complaints.

In computing the time for filing formal complaints pursuant to § 302.505, with respect to tariffs which do not contain a posting date, the first day preceding the effective date of the tariff shall be the first day counted, and the last day so counted shall be the last day for filing unless such day is a Saturday, Sunday, or legal holiday for DOT, in which event the period for filing shall be extended to the next successive day which is neither a Saturday, Sunday, nor holiday. The computation of the time for filing complaints as to tariffs containing a posting date shall be governed by § 302.16.

Subpart F—[Reserved]

Subpart G—[Reserved]

§ 302.705 Hearing.

In the event a hearing is ordered by the Department, Subpart A of this part shall govern the proceeding.

Subpart H—[Reserved]

Subpart I—Rules Applicable to Route Proceedings under Sections 401 and 402 of the Act

General Provisions

§ 302.901 Applicability.

This subpart sets forth the special rules applicable to proceedings for conferment and/or modification of route authority under sections 401 and 402 of the Federal Aviation Act of 1958. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act, and to the substantive rules (Parts 201 and 211 for the form of applications) and orders of DOT.

§ 302.909 [Reserved]

Initiation of Route Proceedings

§ 302.915 Initiation of route proceedings by DOT order.

(a) *Purpose and policy.* The purpose of this section is to establish a procedure for the initiation of proceedings involving particular routes or geographic areas, in addition to existing procedures under Subpart A, so that the Department may select the one best suited to the efficient and expeditious disposition of route proceedings.

(b) *Order instituting proceedings.* The Department may initiate a route proceeding by issuing an order of

investigation or an order to show cause which, respectively, defines the scope of the issues in the proceeding, or consolidates pending applications and proceedings for simultaneous hearing, or institutes investigations under section 401(g) or 402(f) of the Act directed to the amendment of outstanding certificates of public convenience and necessity and foreign air carrier permits, and specifies other matters included in the proceeding.

(c) *Pleadings in response to Department order instituting proceedings.* Any person having a substantial interest may respond to the Department's order instituting a proceeding by filing with the Department a written answer, or a motion pursuant to § 302.12, or both, within the period of time specified in said order. Such answer or motion shall set forth all objections and proposals which such persons may have with respect to the geographic scope of the proceeding or the scope of the issues, as respectively defined in such order. Such answer or motion shall be in lieu of petitions for reconsideration of said order under § 302.37. Any such objection or proposal which is not set forth in such answer or motion shall be deemed to have been waived. Any person who fails to file a timely answer or motion in response to the Department's order shall also be deemed to have waived his or her right to have his or her own application consolidated or contemporaneously considered with those falling within the geographic scope of the proceeding or the scope of the issues therein, as respectively defined in said order. *Provided, however,* That where any further order of the Department adds to the geographic scope of a proceeding or the scope of the issues therein beyond that defined in the Department's order instituting such proceeding, failure to file an answer or motion addressed to the Department's first order shall not preclude the filing of a petition under § 302.37, or of a motion under § 302.12, addressed exclusively to the additional scope or issues.

(d) *Answers to motions.* Answers in support of or in opposition to motions as mentioned in paragraph (c) of this section may be filed within seven (7) days after service of such motions or within such other period as may be specified in the Department's order.

Conduct of Route Proceedings

§ 302.930 Evidence in route proceedings.

Route authority not specifically applied for. Applicants for certificate authority under section 401 of the Act may not introduce, in support of awards

to them of such authority, evidence that does not support service to the points, routes, or areas specifically described in their applications.

Subpart J—Rules Applicable to Proceedings Involving Charter Air Carriers

§ 302.1001 Applicability.

This subpart sets forth procedural rules specifically applicable to certain proceedings involving charter air carriers. For information as to other applicable rules, reference should be made to Subparts A and B of this part, to the Federal Aviation Act of 1958, as amended, and to the substantive rules and orders of the Department. See especially Part 208 of this chapter (Economic Regulations).

§ 302.1002 Definition.

As used in this part, "charter air carrier" means a person holding operating authority issued pursuant to section 401(d)(3) or 417 of the Federal Aviation Act of 1958, as amended.

Immediate Suspension of Operating Authority

§ 302.1011 Rules governing proceedings.

Proceedings for suspension, modification or revocation of a charter air carrier certificate pursuant to section 401(n)(5) of the Act, shall be governed by §§ 302.1012 to 302.1017 and, as to matters not provided for in said sections, by Subparts A and B of this part.

Note: Secs. 302.1012 to 302.1017 do not apply to proceedings for modification, suspension or revocation not initiated under, or by reference to, the provisions of section 401(n)(5) of the Act.

§ 302.1012 Order of suspension.

In any case in which the Department determines that the failure of a charter air carrier to comply with the provisions of paragraphs (q) or (r) of section 401 of the Act or regulations or orders of the Department thereunder requires, in the interest of the rights, welfare or safety of the public immediate suspension of such carrier's certificate or other operating authority as the case may be, the Department will issue, without notice or hearing, an order of suspension which will set forth:

(a) The duration of the suspension, which initially will be for not more than 30 days;

(b) The specific provision or provisions of section 401 (q) or (r), or of the regulations or orders of the Department thereunder with which the carrier has failed to comply together with the manner of such failure;

(c) A determination that such failure requires the immediate suspension, in whole or in part as the case may be, of the carrier's operating authority in the interest of the rights, welfare, or safety of the public;

(d) A statement that the order shall constitute a complaint instituting a formal economic proceeding on which a hearing shall be held to determine whether the charter air carrier's operating authority should be modified, suspended or revoked;

(e) A statement as to which attorneys of the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings are to be made a party to the proceeding.

§ 302.1013 Answer of carrier.

(a) *Time for filing, and contents.* Within 7 days of service of the order of suspension, the carrier may file and serve on all parties an answer to the order of suspension. No objections or affirmative defenses not plainly raised in the answer may be raised subsequently in the proceeding, except if based on grounds of newly discovered evidence or supervening events. Late filing of an answer shall be permitted only for good cause shown.

(b) *Failure to file an answer.* In case of the carrier's failure to file and serve an answer to the order within the time and in the manner prescribed, the right to all further procedural steps before final decision, including hearing, briefs, and recommended and tentative decisions, shall be deemed waived, and the Department will proceed immediately to disposition of the case.

§ 302.1014 Motions.

(a) *Motions for termination of suspension and/or proceeding.* (1) The charter air carrier may at any time file and serve on all parties to the proceeding, a motion addressed to the Department asking that the suspension be lifted, on the ground (i) that suspension, pending completion of the proceeding, is not required in the interest of the rights, welfare or safety of the public; or (ii) that the carrier has come into compliance with the provision or provisions with which it had failed to comply. Such motions may be combined with a motion to terminate the proceeding. Such motions shall be made in lieu of petitions for reconsideration of the Department's initial order, or of motions to dismiss.

(2) Motions made pursuant to paragraph (a)(1) of this section will be submitted to the DOT decisionmaker for determination. The DOT decisionmaker may grant motions for termination of

suspension in proper cases without waiting for expiration of the time for answers but parties may submit informal written or telegraphic statements of position on such motions which will be considered if received prior to DOT action. Such communications need not be served separately but shall be copied in full in a timely answer filed and served pursuant to the provisions of this part.

(b) *Motions directed to pleadings.* No motion for more definite statement shall be made but the substance thereof may be stated in the answer. The administrative law judge may permit or require a more definite statement or other amendment to any pleading at the hearing upon just and reasonable terms.

(c) *Motions for extension of time.* Substantial extensions of procedural dates shall be granted only when required in the interest of justice, unless the respondent air carrier stipulates that it will refrain from operating the suspended service until the Department's adjudication on the merits of the proceedings becomes final even though the Department has exhausted its emergency suspension power. The filing of motions for extension shall not operate to excuse failure of timely compliance with any procedural requirement.

(d) *Other motions.* The provisions of § 302.18 shall govern the above mentioned motions in respects not provided for in this section, and shall govern any other motions, except that answers to written motions shall be filed and served within 5 days of service of such motions.

§ 302.1015 Additional suspension.

Pending the completion of proceedings hereunder, the Department, upon motion or its own initiative, may further extend the period of suspension of the charter carrier's operating authority for an additional period or periods aggregating not more than 60 days.

§ 302.1016 Expedited hearing.

The administrative law judge shall set the date of hearing not later than 15 days after the issuance of the DOT decisionmaker's suspension order. He or she may postpone the date of the hearing, or grant continuations of the hearing, only to the extent necessary in the interest of justice. The administrative law judge shall urgently expedite the proceeding and shall fix all procedural dates on the basis of maximum acceleration consistent with justice. Proposed findings and conclusions and supporting reasons shall be stated orally on the record. The delegation of § 302.27(a) shall not be

applicable and the administrative law judge shall, upon termination of the hearing, make his or her initial decision orally on the record. Requests for a written initial decision may be granted on the same condition as substantial extensions of procedural dates (§ 302.1014(c)).

§ 302.1017 Final decision.

The parties may appeal from the initial decision by filing with the Department and serving upon all other parties a notice of appeal within two days after the rendering of the initial decision if it is made orally, or the service of a written initial decision, as the case may be. No exceptions shall be filed but within 10 days of the notice of appeal each party may file one brief (§ 302.31(c)) with the Department. The DOT decisionmaker will give three days' notice of oral argument, where granted. If no notice of appeal is filed, or if no brief is filed by the party or parties having filed a notice of appeal, within the times herein provided, the initial decision shall without further proceedings become the final decision of the Department five days after expiration of the time for filing notice of appeal or brief, as the case may be unless the DOT decisionmaker has issued an order to review upon his or her own initiative.

Subpart K-N—[Reserved]

Subpart O—Procedure for Processing Contracts for Transportation of Mail by Air in Foreign Air Transportation

§ 302.1501 Applicability.

This subpart sets forth the rules applicable to certain contractual arrangements between the Postal Service and certificated air carriers for the transportation of mail by air entered into pursuant to 39 U.S.C. 5402(a), 84 Stat. 772. Such contracts must be for the transportation of at least 750 pounds of mail per flight, and no more than 5 percent, based on weight, of the international mail transported under any such contract may consist of letter mail. Any such contract is required by the statute to be filed with the Department not later than 90 days before its effective date, and unless the Department disapproves the contract not later than 10 days prior to its effective date, the contract automatically becomes effective.

§ 302.1502 Filing.

Any air carrier which is a party to a contract to which this subpart is applicable shall file eight copies of the contract in the Documentary Services Division, Department of Transportation,

Washington, D.C. 20590, not later than 90 days before the effective date of the contract. A copy of such contract shall be served upon the persons specified in § 302.1504 and the certificate of service shall specify the persons upon whom service has been made. One copy of each contract filed shall bear the certification of the Secretary or other duly authorized officer of the filing carrier to the effect that such copy is a true and complete copy of the original written instrument executed by the parties.

§ 302.1503 Explanation and data supporting the contract.

Each contract filed pursuant to this subpart shall be accompanied by economic data and such other information in support of the contract upon which the filing air carrier intends that the Department rely, including, in cases where pertinent:

(a) Estimates of the costs of performing the contract, and an explanation of the basis for the estimates which clearly sets forth the methodology involved in the assignment of direct and all allocated costs and the investment related thereto (including, where available and relevant, data as to costs of performing past contracts for the transportation of mail by air);

(b) Estimates of the effect of the contract upon such carrier's revenues, and an explanation of the basis for the estimates (including, where available and relevant, data as to effects upon revenues resulting from past contracts for the transportation of mail by air); and

(c) Estimates of the annual volume of contract mail (weight and ton-miles) under the proposed contract, the nature of such mail (letter mail, parcel post, third class, etc.), together with a statement as to the extent to which this traffic is new or diverted from existing classes of air and surface mail services and the priority assigned to this class of mail.

§ 302.1504 Service.

A copy of each contract filed pursuant to § 302.1502, and a copy of all material and data filed pursuant to § 302.1503, shall be served upon each of the following persons:

(a) Each certified route air carrier, other than the contracting carrier, which is authorized to carry mail between any pair of points between which mail is to be transported pursuant to the contract;

(b) Each commuter air carrier (as defined in § 298.2 of Part 298 of this chapter) which serves between any pair of points between which mail is to be

transported pursuant to the contract; and

(c) The Assistant General Counsel, Transportation Division, U.S. Postal Service, Washington, D.C. 20260-1124.

§ 302.1505 Complaints.

Within 15 days of the filing of a contract, any interested person may file with the Department a complaint against the contract setting forth the basis for such complaint and all pertinent information in support of same. A copy of the complaint shall be served upon the air carrier filing the contract and upon each of the persons served with such contract pursuant to § 302.1504.

§ 302.1506 Answers to complaints.

Answers to the complaint may be filed within 10 days of the filing of the complaint, with service being made as provided in § 302.1505.

§ 302.1507 Further procedures.

(a) In any case where a complaint is filed, the Department shall issue either an order dismissing the complaint, or an order disapproving the contract, or such other order as may be appropriate. Any such order shall be issued not later than 10 days prior to the effective date of the contract.

(b) In cases where no complaint is filed, the Department may issue an order directing the parties to the contract to show cause why the contract should not be disapproved, or such other order as may be appropriate. Unless otherwise specified by the Department, written answer to the order and supporting document shall be filed within 10 days of the date of service of the order to show cause. A final order containing the Department's determination as to whether the contract should be disapproved, shall be issued not later than 10 days prior to the effective date of the contract.

§ 302.1508 Petitions for reconsideration.

Except in the case of a Board determination to disapprove a contract, no petitions for reconsideration of any DOT determination pursuant to this subpart shall be entertained.

Subpart P—[Reserved]

Subpart Q—Expedited Procedures for Processing Licensing Cases

§ 302.1701 Applicability.

This subpart sets forth the rules applicable to proceedings on

(a) Applications for certificates of public convenience and necessity and renewals, amendments, modifications, suspensions and transfers of certificates

under sections 401(d)(1), 401(d)(2), 401(d)(3), 401(g), and 401(h) of the Act;

(b) Applications under section 401(e)(7)(B) of the Act for the removal or modification of a term, condition, or limitation attached to a certificate; and

(c) Applications for foreign air carrier permits, and renewals, alterations, amendments, modifications, suspensions, and transfers of such permits under sections 402(c) and 402(f) of the Act.

§ 302.1702 Subpart A governs.

Except as modified by this Subpart, the provisions of Subpart A of this part continue to apply.

§ 302.1703 Filing of applications.

Any person may file an application of the type described in § 302.1701. Applications for foreign air carrier permits shall be filed as specified in § 211.2 of this chapter. The Department will publish in the *Federal Register* a weekly list of applications filed under this subpart.

§ 302.1704 Contents of applications.

(a) Applications under this subpart (including applications filed under § 302.1720(c) or conforming applications filed under § 302.1720(e) or § 302.1730(c)) shall indicate on the cover page how the applicant proposes that its application be processed (See § 302.1750).

Certificate applications shall contain the information required by Part 201 of this chapter and foreign air carrier permit applications shall contain the information required by Part 211 of this chapter. Applications shall also include:

(1) A statement of economic data and other matters that the applicant desires the Department to notice officially;

(2) Written evidence establishing the facts that the applicant relies on to establish its fitness and to show that the grant of the relief requested is consistent with or required by the public convenience and necessity, or is in the public interest, as applicable; and

(3) The applicant's opening argument.

(b) Each application shall be accompanied by an Environmental Evaluation in conformity with Parts 312 and 313 of this chapter unless a waiver or exemption has been granted under § 312.6.

(c) Later filed competing applications shall conform to the base and forecast years used by the original applicant and need not contain traffic and financial data for markets for which data have already been submitted by another person.

(d) Applications shall include a list of the names and addresses of all persons that have been served.

§ 302.1705 Service of documents.

(a) *General requirements.* (1) Applicants shall serve on the persons listed in paragraph (b) of this section a notice that an application has been filed, and upon request shall promptly provide those persons with copies of the application and supporting documents. The notice must clearly state the authority sought and the due date for other pleadings. Persons shall file responsive pleadings in accordance with paragraph (b).

(2) After the order establishing further procedures under § 301.1750 has been issued, persons need only serve documents on those listed in the service list accompanying the order.

(3) In the case of an application sought to be consolidated, the applicant shall serve the notice required in paragraph (a) of this section on all persons served by the original applicant.

(b) *Persons to be served.* (1) *U.S. air carriers.* (i) In certificate proceedings described in §§ 302.1701(a) and 302.1701(b) (except for those proceedings under section 401(d)(3) of the Act):

(A) applicants for certificates to engage in interstate or overseas air transportation, and other persons, shall serve: (1) the airport authority of each airport that the applicant proposes to serve, and (2) any other person who has filed a pleading in the docket.

(B) applicants for certificates to engage in foreign air transportation or other persons shall serve: (1) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or in the "Air Cargo Guide," (2) the airport authority of each U.S. airport that the applicant proposes to serve, and (3) any other person who has filed a pleading in the docket.

(ii) In certificate proceedings under section 401(d)(3) of the Act, applicants and other persons are not required to serve any person, except as the DOT may direct.

(2) *Foreign air carriers.* (1) In foreign air carrier permit proceedings described in § 302.1701(c) (except for those proceedings involving charter-only authority), applicants and other persons shall serve: (A) all U.S. air carriers (including commuter air carriers) that publish schedules for the country-pair market(s) specified in the application in the "Official Airline Guide" or the "Air Cargo Guide," (B) the U.S. Department of State, and (C) any other person who has filed a pleading in the docket.

(ii) In foreign air carrier permit proceedings for charter-only authority,

applicants shall serve the U.S. Department of State and any other person who has filed a pleading in the docket.

(c) *Additional service.* The Department may, in its discretion, order additional service upon such persons as the facts of the situation warrant. Where only notices are required, parties are encouraged to serve copies of their actual pleadings where feasible.

§ 302.1706 Computation of time.

All time periods prescribed in this subpart are stated in terms of calendar days. Intermediate Saturdays, Sundays and holidays shall be included in the computation. In all other respects, § 302.16 applies.

§ 302.1707 Verification.

The facts asserted in any pleading filed under this subpart shall be attested to by persons having knowledge of them and this attestation shall be stated in an affidavit in support of the pleading. Such persons shall be those who will appear as witnesses to substantiate the facts asserted if an oral hearing becomes necessary.

§ 302.1708 Joint pleadings.

Parties having common interests shall, to the extent practicable, arrange for the joint preparation of pleadings.

§ 302.1709 Definition of parties.

Notwithstanding the provisions of §§ 302.14 and 302.15, any person may participate in proceedings under this subpart. Petitions for leave to intervene are not required. Any person may become a party by filing a pleading in the docket before the issuance of the order establishing further procedures.

§ 302.1710 Economic data and other facts.

Whenever economic data and other facts are provided, such information shall include enough detail so that final results can be obtained, without further clarification. Sources, bases, and methodology used in constructing exhibits, including any estimates or judgments, shall be provided.

§ 302.1711 Continuances and extensions of time.

The procedures described in § 302.17 will apply to proceedings under this subpart. The filing deadlines in certificate proceedings will be strictly enforced and extensions will be granted only in extraordinary circumstances. Extensions in foreign air carrier permit cases will be granted for good cause shown.

§ 302.1712 Oral presentation; initial or recommended decision.

(a) *Cases to be decided on written submissions.* Applications under this subpart will be decided on the basis of written submissions unless the DOT decisionmaker, on petition or on his or her own initiative, determines that an oral presentation or an administrative law judge's decision is required.

(b) *Petitions for oral presentation or judge's decision.* Any party may file a petition for oral evidentiary hearing, oral argument, an initial or recommended decision, or any combination of these. Petitions shall demonstrate that one or more of the criteria set forth in § 302.1770 are applicable to the issues for which an oral presentation or judge's decision is requested. Such petitions shall be supported by a detailed explanation of the following:

(1) Why the evidence or argument to be presented cannot be submitted in the form of written evidence or briefs, including an estimate of the time required for the oral presentation and the number of witnesses whom the petitioner would present;

(2) Which issues should be examined by an administrative law judge and why such issues should not be presented directly to the DOT decisionmaker for decision; and

(3) If cross-examination of any witness is desired, the name of the witness, if known, the subject matter of the desired cross-examination or the title or number of the exhibit to be cross-examined, what the petitioner expects to establish by the cross-examination, and an estimate of the time needed for it.

(c) *Time for filing petitions.* Petitions for an oral hearing, oral argument, or a judge's decision shall be filed as soon as practicable, but in no event later than:

(1) 52 days after the filing of the original application in proceedings governed by § 302.1720; (2) 35 days after the filing of the original application in proceedings governed by § 302.1730; and (3) 14 days after the due date for answers in proceedings governed by § 302.1740.

(d) *Stipulations.* Where a stipulation of disputed facts would eliminate the need for an oral presentation or judge's decision, parties shall include in their petitions an offer to withdraw the request should the stipulation be made.

§ 302.1713 Preliminary procedures for rejection or deferral of nonconforming applications.

Within 21 days after the filing of any application under this subpart (including an application which is sought to be consolidated or a conforming

application), the DOT decisionmaker may, on behalf of the Department, (a) reject any application that does not comply with this subpart, or (b) defer further processing of the application until information necessary to process the application is submitted. Applications will not be processed, and the time periods contained in this subpart shall not begin to run, until the application is complete. In addition, the DOT decisionmaker may, on behalf of the Department, defer action on a foreign air carrier permit application for foreign policy reasons. Petitions for review of the staff action taken under this section may be filed in accordance with Subpart C of Part 385 of this chapter.

§ 302.1720 Procedures in certificate cases.

(a) *Applicability.* This section applies to the certificate cases described in § 302.1701(a).

(b) *Notice on cover page.* Applications to which this section applies shall include a notice on the cover page stating that any person that wishes to support or oppose the application must file an answer indicating briefly that person's position, and serve that answer on all persons served with the application. The notice shall also state the due date for answers.

(c) *Conforming applications or motions to modify scope.* Any person may file an application for the same authority as sought in an application filed under § 302.1701(a). Requests to modify the issues to be decided and to consolidate applications filed in other dockets, shall be filed as a "motion to modify scope." Motions and applications under this section shall include economic data, other facts, and any argument in support of the person's position and must be filed within 28 days after the original application is filed.

(d) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers shall set forth the basis for the position taken, including any economic data or other facts relied on. Answers to the original application shall be filed within 28 days after the filing of the original application. Answers to applications filed in accordance with paragraph (c) of this section shall be filed within 42 days after the filing of the original application.

(e) *Answers to motions to modify scope.* Any person may file an answer to a motion to modify scope within 42 days after the filing of the original application. Answers shall set forth the

basis for the support of or opposition to the motion, including any economic data or other facts relied on. Answers may argue that an application should be dismissed. Answers may also seek to consolidate an application filed in another docket if that application conforms to the scope of the proceeding proposed in the motion to modify scope and include the information prescribed in § 302.1704. Answers and applications shall not, however, propose the consideration of additional markets.

(f) *Order establishing further procedures.* Within 90 days after the filing of the original application, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1730 Procedures in restriction removal cases.

(a) *Applicability.* This section applies to the certificate cases described in § 302.1701(b).

(b) *Applications.* Each application to which this section applies shall be limited to a single city-pair market or a single restriction unless a waiver of this requirement has first been obtained under § 302.1790. All restriction removal applications (including conforming applications under paragraph (c) of this section) shall include a notice on the cover page that any person wishing to support or oppose the application must file an answer briefly describing its position, and serve a copy of the answer on all persons served with the application. The notice shall also state the due date for answers. Any application that does not conform with this paragraph will be rejected unless a waiver has been granted before the application is filed.

(c) *Conforming applications.* The issues in any proceeding under this section will be limited to those raised in the original application. Motions to modify the scope of the proceeding will not be entertained. Any person may file an application conforming to the scope of the proceeding within 14 days after the filing of the original application. Conforming applications are automatically consolidated. Nonconforming applications will be rejected under § 302.1713.

(d) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers to the original application shall be filed within 14 days after the filing of that application. Answers to conforming applications shall be filed within 28 days after the filing of the original application.

(e) *Order establishing further procedures.* Within 60 days after the

filing of the original application, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1740 Procedures in foreign air carrier permit cases.

(a) *Applicability.* This section applies to the foreign air carrier permit cases described in § 302.1701(c).

(b) *Notice on cover page.* Applications to which this section applies shall include a notice on the cover page stating that any person may support or oppose the application by filing an answer and serving a copy of the answer on all persons served with the application. The notice shall also state the due date for answers. Time limits shall be calculated from the date of filing with the Documentary Services Division. Amendments to applications will be considered new applications for the purpose of calculating the time limitations of this subsection.

(c) *Answers to applications.* Any person may file an answer in support of or in opposition to any application. Answers shall be filed within 28 days after the filing of the application and shall include any economic data, other facts, and argument upon which the person relies to support its position.

(d) *Executive departments.* The views of the Department of State and the Federal Aviation Administration's evaluation of the applicant's operational fitness shall be filed not later than the due date for answers to applications.

(e) *Order establishing further procedures.* As soon as possible after the date that answers are due, the DOT decisionmaker will issue an order establishing further procedures for processing the case.

§ 302.1750 Disposition of applications—Orders establishing further procedures.

(a) *General requirements.* Within the time limits established in § 302.1720(f), § 302.1730(e), or § 302.1740(e), as applicable, the DOT decisionmaker will issue an order establishing further procedures in each case. The order will establish the scope of the issues to be considered and the procedures to be employed, and will indicate whether one or more attorneys from the office of the Assistant General Counsel for Aviation Enforcement and Proceedings will participate as a party. With respect to all or any portion of each application, the DOT decisionmaker will take one of the following actions:

(1) Set the application for oral evidentiary hearing. In this event, all of the procedures set forth in §§ 302.1751 through 302.1755 will apply unless the DOT decisionmakers decides otherwise.

The DOT decisionmaker may limit the scope of the issues to be decided in an oral evidentiary hearing. In that event, the procedures set forth in §§ 302.1751 through 302.1755 will apply to the oral evidentiary hearing phase of the case, and the DOT decisionmaker will indicate what procedures will be employed in deciding the other issues in the case.

(2) Dismiss the application. This action constitutes a final DOT order subject to judicial review. Petitions for reconsideration of such an order will be entertained. This option will not be used in restriction removal cases under § 302.1730.

(3) Announce that the Department has begun to make a determination with respect to the application under simplified procedures without oral evidentiary hearing. In this event, the DOT decisionmaker will indicate which, if any, of the procedural steps set forth in §§ 302.1752 through 302.1756 will be employed. The DOT decisionmaker may also indicate that other non-oral evidentiary hearing procedures will be employed.

(4) Announce that the Department will decide the case by show cause procedures or issue an Order to Show Cause why the application should not be granted.

(b) *Additional evidence.* The order establishing further procedures may provide for the filing of additional evidence.

(c) *Petitions for reconsideration of an order establishing further procedures.* Petitions for reconsideration of an order establishing further procedures will not be entertained except to the extent that the order dismissed all or part of an application. If a petition for reconsideration results in the reinstatement of all or part of an application, the deadline for final Department decision established in § 302.1757 will be calculated from the date of the order reinstating the application.

§ 302.1751 Oral evidentiary hearing.

If the Department determines under § 302.1750(a) that an oral evidentiary hearing should be held, the application or applications will be set promptly for oral hearing before an administrative law judge. The issues will be those set forth in the order establishing further procedures.

§ 302.1752 Briefs to the administrative law judge.

Briefs to the administrative law judge shall be filed within the following periods, as applicable:

(a) 14 days after the close of the oral evidentiary hearing established under § 302.1750(a)(1), unless the administrative law judge determines that, under the circumstances of the case, briefs are not necessary or that the parties will require more time to prepare briefs; or

(b) 14 days after the filing of additional evidence called for in the order establishing further procedures if no oral evidentiary hearing is called for, unless the Department determines that some other period should be allowed.

§ 302.1753 Administrative law judge's initial or recommended decision.

(a) In a case that has been set for oral evidentiary hearing under § 302.1750(a)(1), the administrative law judge shall adopt and serve an initial or recommended decision within 136 days after the issuance of the order establishing further procedures unless:

(1) The Department, having found extraordinary circumstances, has by order delayed the initial or recommended decision by a period of not more than 30 days; or

(2) An applicant has failed to meet the procedural schedule adopted by the judge or the DOT decisionmaker. In this case the administrative law judge may, by notice, extend the due date for the issuance of an initial or recommended decision for a period not to exceed the period of delay caused by the applicant.

(b) In a case in which some of the issues have not been set for oral hearing under § 302.1750(a)(1), the administrative law judge shall issue an initial or recommended decision within the time established by the DOT decisionmaker in the order establishing further procedures, except that that due date may be extended in accordance with paragraph (a)(2) of this section.

(c) The initial or recommended decision shall be issued by the administrative law judge 14 days after it is served. Unless exceptions are filed under § 302.1754 or the DOT decisionmaker issues an order to review on its own initiative, an initial decision shall become effective as the final order of DOT the day it is issued. Where exceptions are timely filed or the DOT decisionmaker takes action to review on his or her own initiative, the effectiveness of the initial decision is stayed until further order of the DOT decisionmaker.

(d) In all other respects, the provisions of § 302.27 shall be applicable.

§ 302.1754 Exceptions to administrative law judge's initial or recommended decision.

(a) *Time for filing.* Within 7 days after service of any initial or recommended decision of an administrative law judge, any party may file exceptions to the decision with the Department.

(b) *Form and content of exception.* Exceptions shall comply with § 302.30(b).

(c) *Effect of failure to file timely and adequate exceptions.* The provisions of § 302.30(c) shall apply.

(d) *Review is automatic.* If timely and adequate exceptions are filed, review of the initial or recommended decision is automatic.

§ 302.1755 Briefs.

The provisions of § 302.31 shall apply, except that:

(a) In a case in which an initial or recommended decision has been served and exceptions have been filed, any party may file a brief in support of or in opposition to any exceptions. Such briefs shall be filed within 14 days after service of the initial or recommended decision.

(b) In a case in which an initial or recommended decision has been issued and no exceptions have been filed, briefs shall not be filed unless the DOT decisionmaker has taken review on his or her own initiative and specifically provided for the filing of briefs to the DOT decisionmaker.

(c) In a case in which an initial or recommended decision will not be issued, briefs to the DOT decisionmaker may be filed only if specifically provided for in the order establishing further procedures, and only upon the issues specified in that order. Such briefs may be filed by any party within 21 days after the service date of the order establishing further procedures, unless that order established a different due date.

§ 302.1756 Oral argument before the DOT decisionmaker.

If the order establishing further procedures provides for an oral argument, or if the DOT decisionmaker otherwise decides to hear oral argument, all parties will be advised of the date and hour set for that argument and the amount of time allowed each party. The provisions of § 302.32(b) shall also apply.

§ 302.1757 Final decision of the Department.

In addition to the provisions of § 302.36, the following provisions shall apply:

(a) In the case of a certificate application that has been set for oral evidentiary hearing under § 302.1750(a)(1), DOT will issue its final order within 90 days after the initial or recommended decision is issued. If an applicant has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the date for a final decision for a period equal to the period of delay caused by the applicant.

(b) If the DOT decisionmaker does not act in the time period established in paragraph (a) of this section in the case of an application for a certificate to engage in foreign air transportation, the initial or recommended decision shall be transmitted to the President under section 801 of the Act.

(c) In the case of a certificate application that has been processed under § 302.1750(a)(3) or (4), the Department will issue its final order within 180 days after the order establishing further procedures. If an applicant has failed to meet the procedural schedule established by the Department, the DOT decisionmaker may, by notice, extend the due date for a final decision for a period equal to the period of delay caused by the applicant.

§ 302.1758 Petitions for reconsideration.

The provisions of § 302.37 shall apply to petitions for reconsideration.

§ 302.1760 Internal procedures.

(a) In deciding which of the procedures set forth in § 302.1750 will be used for each case under this subpart, the DOT decisionmaker will receive a recommendation from the Director, Office of Aviation Operations. That recommendation will be coordinated with the General Counsel and the Chief Administrative Law Judge, or their designees. If there is disagreement in that group, separate recommendations will be promptly submitted to the extent necessary to reflect their views.

(b) In deciding each case under this subpart on the merits, the DOT decisionmaker will receive a recommendation from the Director, Office of Aviation Operations, and the Assistant General Counsel for International Law. If there is disagreement among these employees, separate recommendations will be promptly submitted to the extent necessary to reflect those views.

§ 302.1770 Criteria for use of oral evidentiary hearing procedures and assignment of a case to an administrative law judge.

The Department will assign applications made under §§ 302.1701,

302.1720 (c) and (e), 302.1730(c) and 302.1740 for consideration under the expedited procedures of this subpart and order the record presented directly to the DOT decisionmaker for final decision unless it determines that:

(a) Use of expedited procedures will prejudice a party;

(b) Material issues of decisional fact cannot adequately be resolved without oral evidentiary hearing procedures; or

(c) Assignment of an application for oral evidentiary hearing procedures or an initial or recommended decision by an administrative law judge is otherwise required by the public interest.

§ 302.1780 Standards for deciding cases in which expedited, simplified procedures are employed.

The standards employed in deciding cases under § 302.1750(a)(3) or (4) shall be the same as the standards applied in cases decided under § 302.1750(a)(1). These are the standards set forth in the Federal Aviation Act of 1958, as amended, as interpreted and expanded upon under the Act.

§ 302.1790 Waivers.

Upon the filing of a motion, the DOT decisionmaker or the Assistant General Counsel for International Law, as appropriate, may, on behalf of the Department, grant such waivers from the terms and limitations contained in this subpart as it shall find to be consistent with the public interest and the proper dispatch of DOT's business. Petitions for review of the staff action taken under this section may be filed in accordance with Subpart C of Part 385 of this chapter.

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PART 303—REVIEW OF AIR CARRIER AGREEMENTS AND 408 APPLICATIONS

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Authority: 49 U.S.C. Subtitle I, 1378, 1379, 1382, 1384, 1386 and 1551.

Subpart A—Procedure for the Processing of Undocketed Section 412 Contracts and Agreements¹

§ 303.1 Applicability.

This subpart sets forth the specific rules applicable to the processing of section 412 contracts and agreements which have not been docketed. After receipt by DOT of any such contract or agreement, the Docket Clerk, Documentary Services Division, shall assign a DOT contract number to such document. The processing of a docketed section 412 contract or agreement shall, to the extent applicable be governed by the other subparts of this part and Part 302 of this chapter. An undocketed agreement which is subsequently docketed shall thereafter be processed as a docketed proceeding. The provisions of this subpart shall not

apply to contracts or agreements which are processed pursuant to the provisions of Subpart B of this part.

§ 303.2 Public file.

The Docket Clerk, Documentary Services Division, shall maintain a public file with respect to every undocketed section 412 contract or agreement. The public file shall be available for inspection in the Documentary Services Division. If a section 412 contract or agreement is thereafter docketed with the Documentary Service Division, the public file thereon, if any, shall thereupon be consolidated into the docket which shall be available for public inspection at the Documentary Services Division of the DOT (see § 303.7).

§ 303.3 Notice to the public.

Notice of the filing of section 412 contracts and agreements is provided in a weekly publication of DOT entitled "Agreements Filed with the Department of Transportation under section 412(a)." Subscription to this publication may be obtained by complying with the provisions of Part 389 of this chapter (DOT Organization Regulations). In the event that an undocketed section 412 contract or agreement is thereafter docketed, notice of such docketing is given in a weekly publication of DOT entitled "Applications and/or amendments thereto filed with the Department of Transportation during the week ending ———." Subscription to this publication also may be obtained as outlined above in this section.

§ 303.4 General requirements.

The requirements of Part 261 of this chapter shall apply to all section 412 contracts and agreements.

§ 303.5 Service requirements.

Except as the DOT decisionmaker may otherwise prescribe in particular cases, there is no requirement that section 412 contracts or agreements be served on other parties. The provisions of Subpart A of Part 302 with respect to service shall be computed with to the extent applicable.

§ 303.6 Filing of comments.²

Interested persons may file comments, and/or reply comments with respect to undocketed section 412 contracts or agreements. In particular cases where the DOT decisionmaker, may prescribe, comments and/or reply comments shall be served upon each party to a section 412 contract or agreement to which the comments appertain, and the service provisions of Subpart A of Part 302 shall be complied with. In the absence of a DOT order prescribing time limits, comments and/or reply comments in undocketed cases may be filed at any time prior to approval or disapproval of the agreement.

² See § 302.4(d)(2), as to form of comments.

§ 303.7 Procedure for docketing.

When the Assistant Secretary for Policy and International Affairs, or the DOT decisionmaker determines that a section 412 contract or agreement should be docketed, the Assistant Secretary for Policy and International Affairs shall transmit the public file thereon to DOT's Documentary Services Division to be incorporated in the docket (see § 303.2).

§ 303.8 Staff action.

When the DOT decisionmaker takes action under delegated authority approving or disapproving an undocketed section 412 contract or agreement, and, thereafter, a petition for review of staff action is filed pursuant to Subpart C of Part 385 of this chapter (DOT Organization Regulations), he or she shall concurrently with the receipt of a duly filed petition for review, forward the public file on such contract or agreement to DOT's Documentary Services Division.³

§ 303.9 DOT action.

When DOT issues an order taking final action with respect to any undocketed, section 412 contract or agreement, petition, for reconsideration of such order may be filed by interested persons by following the procedure set forth in § 302.37.

Subpart B—Procedure for Processing Section 412 Contracts and Agreements Submitted for Prior Approval

§ 303.11 Applicability.

This subpart sets forth the particular rules applicable to the processing of section 412 contracts or agreements which are, by their terms, to become effective only upon or after DOT's approval: *Provided, however*, That the provisions of this subpart shall not apply to traffic conference resolutions of the International Air Transport Association.

§ 303.12 Filing.

An agreement or contract submitted by an air carrier association, as defined in Part 263 of this chapter, on behalf of its members, or by an air carrier, which is, by its terms, to become effective only upon or after DOT's approval, shall be filed in accordance with the provisions of Part 261 of this chapter, except to the extent that such provisions are inconsistent with this subpart, and shall be accompanied by an application seeking such approval. Such application shall conform to the formal requirements of Subpart A of Part 302. Such application shall be assigned a docket number and any additional documents filed in connection with such contract or agreement shall be identified by the assigned docket number.

³ See § 385.13(p) of the Board's Organization Regulations (14 CFR 385.13(p)).

¹ Certain section 412 contracts and agreements are docketed immediately upon receipt by DOT, e.g., IATA rate conference agreements and amendments thereto.

§ 303.13 Title.

The application shall be entitled "Application for Prior DOT Approval of an Agreement."

§ 303.14 Contents of application.

The application shall contain the contract or agreement, and shall explain the nature and purpose of the agreement, and how it changes any practice existing under a previously approved contract or agreement. One copy of the contract or agreement shall be certified and verified as required by § 261.5 of Part 261 of this chapter. The application shall contain economic data or other material which the applicant desires DOT to officially notice. The application may also contain argument in support of the application, provided that with respect to an application filed by an air carrier association, as defined in Part 263 of this chapter, the requirements of said Part 263 are met. The application shall also contain the names of the persons served, and a notice that any party in interest may, within twenty-one (21) days of the date the application was filed, file and serve an answer in support of, or in opposition to, the application.

§ 303.15 Service of application.

An application for prior DOT approval of an agreement shall be served as provided by § 302.8. With regard to an application filed by an air carrier association, as defined in Part 263 of this chapter, a copy of the application shall be served on the following parties who shall be presumed to have an interest in the subject matter of the application:

(a) Travel agent associations known or believed to the applicant to be comprised of members who would be affected by the agreement;

(b) Consumer representatives who have previously advised the applicant of their desire for service of such agreement(s); and

(c) The Department of Justice, Antitrust Division. The Assistant Secretary for Policy and International Affairs or the DOT decisionmaker may order additional service made on such person or persons as the facts of the situation warrant.

§ 303.16 Posting of application.

DOT shall cause a copy of every application under this paragraph filed with it to be posted promptly on a public bulletin board at its principal offices in Washington, D.C.

§ 303.17 Additional data.

The Assistant Secretary for Policy and International Affairs or the DOT decisionmaker may request the filing of additional data with respect to any application under this paragraph or any answer or reply filed by a party in interest in connection therewith.

§ 303.18 Answers and reply.

Within 21 days after filing of an application, any person may file an answer to that application. Within 14 days after the last date for filing an answer under this section, the applicant may file a reply to one or more answers. Service of answers and replies shall be made upon the person whose previous filing is the subject of the responsive filing and upon the other persons who were served with that previous filing. Service shall be effected according to § 302.8.

Subpart C—Information Submitted in Section 408 Applications**§ 303.21 Purpose and applicability.**

This rule sets forth the form and content of applications that must be submitted to DOT under section 408(b)(1) of the Act. It applies to any proposed consolidation or acquisition of control that is not exempt from section 408 and that directly or indirectly involves two or more air carriers, an air carrier and a foreign air carrier, or an air carrier and an intrastate air carrier, including transactions involving persons in control of such carriers.

§ 303.22 Definitions.

As used in this part, "documents" means (1) all written, recorded, transcribed or graphic matter including letters, telegrams, memoranda, reports, studies, forecasts, lists, directives, tabulations, logs, or minutes and records of meetings, conferences, telephone or other conversations or communications; and (2) all information contained in data processing equipment or materials. The term does not include daily or weekly statistical reports in whose place an annual or monthly summary is submitted.

§ 303.23 Filing of applications.

(a) Each person required to file an application under section 408(b)(1) of the Act for DOT approval of transactions described in § 303.21 shall file 12 copies of a complete application as required by §§ 303.28 through 303.38 of this part in the Documentary Services Division, except that only two copies of the information required by §§ 303.11 and 303.37(f) must be filed.

(b) For each consensual transaction covered by this part, all the information required by §§ 303.30 through 303.38 shall be submitted, as part of the application, for each party to the section 408 transaction. The parties to the section 408 transaction may file either separate applications or one joint application.

(c) For each non-consensual transaction covered by this part, the applicant shall also provide the information required by §§ 303.30 through 303.38 for its target company to the extent that such information is

available to it. DOT may order the target company or other persons to submit some or all of the information required by §§ 303.30 through 303.38, or other information.

(d) The application shall be indexed to correspond to the individual sections of 303.30 through 303.38. Each page of the application and each document submitted with the application shall be marked with the name, initials, or some other identifying symbol of the applicant. The application shall also indicate the date of preparation and the name and corporate position of the preparer and recipient of each document submitted.

(e) Where the required information is in data processing equipment, on microfilm or is otherwise not eye-readable, the applicant shall provide such information in eye-readable form.

(f) Evidence that applicants wish DOT to consider in addition to that required by §§ 303.30 through 303.38 shall also be filed with the application. This evidence shall include all exhibits, data, and testimony on which the applicant intends to base its direct case and the names and addresses of all witnesses whom it will seek to call in the event that an oral evidentiary hearing is held. An applicant is not precluded from later filing answers, replies, or rebuttal exhibits or testimony.

(g) Within 10 days after a section 408 application is filed, any interested person may file a motion with DOT asking that the application be dismissed on the grounds that it is incomplete. An application is complete if it is not in substantial compliance with §§ 303.30 through 303.38.

(h) If an application is found to be incomplete, DOT may dismiss it without prejudice to refiling. If the application is dismissed, the statutory time period will not begin until a completed application is filed.

(i) After the 10-day period provided in § 303.23(g) has elapsed or after DOT has disposed of all motions filed during that period seeking dismissal of the application on the grounds of incompleteness, the application will not later be dismissed unless there is a finding that there is an omission so substantial that DOT cannot reasonably act on it or do so within the statutory time period.

(j) The information provided by the applicant shall be updated in a timely fashion throughout the period of consideration of the application.

(k) If any information or documents required by §§ 303.30 through 303.38 are not available, the applicants shall file an affidavit executed by the individual responsible for the search explaining why they cannot be produced.

(l) The DOT decisionmaker or the administrative law judge may order the applicant(s) to submit information in addition to that required by §§ 303.30 through 303.38.

(m) An applicant may withhold a document required by this part on the grounds that it is privileged but each document so withheld shall be identified and a brief description of the nature of the document, a statement indicating the basis of the privilege claimed, and the names of the preparers and recipients of the document shall be supplied. If any interested party contests the assertion of privilege, the document shall be promptly submitted to the DOT decisionmaker or the administrative law judge for *in camera* inspection.

§ 303.24 Confidentiality.

(a) An applicant may request that any part of its section 408 application be withheld from the public by filing a motion for confidentiality under § 302.39(d) of this chapter. In cases assigned to an administrative law judge, that judge will rule on motions for confidential treatment.

(b) No person shall have access to the confidential information except (1) attorneys of record and their experts who file affidavits promising not to disclose the information and to use it only in connection with the section 408 proceedings to which the information is directed, and (2) DOT personnel working on the proceeding. Inspection of confidential documents may begin as soon as the affidavits are filed.

(c) That portion of a section 408 application for which confidential treatment has been requested shall be considered received for purposes of filing only. It shall not be part of the public record or an *in camera* record of the case until it has been admitted into evidence.

§ 303.25 Copies to interested persons.

(a) A copy of the complete application shall be filed with the Department of Justice at the same time it is filed with the DOT.

(b) Upon request, the complete application shall be promptly made available to any person who has petitioned to intervene under § 302.14 or § 302.15 of this chapter. The applicant shall have copies of the complete application for distribution and shall, if requested, be responsible for expeditiously providing the application to any requesting party.

§ 303.26 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to this part.

§ 303.27 Exemptions.

Any person may petition DOT to exempt any transaction from all or part of the requirements of this part.

§ 303.30 Background information.

The application shall contain the following information:

(a) The names and mailing addresses of the parties to the transaction and the names, titles, and duties of the officers and directors of each corporation;

(b) A description of the transaction, including the exchange ratio, the terms of any tender offer, and the form of financing;

(c) A copy of the final or most recent draft agreement between the parties relating to the transaction;

(d) The percentage of the outstanding voting securities of either corporation that is owned or controlled by the other corporation or by its officers or directors. The application shall also set forth the consideration paid for these securities, the date and method of their purchase, and the form of payment;

(e) A list of all offices and directorships held in any other corporation which is a common carrier or is substantially engaged in the business of aeronautics by officers or directors of any party to the transaction;

(f) A list of all other financial relationships between the parties to the transaction, or between their officers, directors or major shareholders;

(g) All studies, reports and analyses regarding the proposed transaction or the other party to the transaction made by or for an applicant within 3 years preceding the application. These materials shall include, but not be limited to, any discussion of the proposed transaction or other party to the proposed transaction with respect to:

(1) Competition, markets, market shares, actual competitors, or potential entrants;

(2) Potential for sales growth or expansion into new markets;

(3) Efficiencies or costs of the proposed transaction; or

(4) The financial condition or operating strengths or weaknesses of the proposed partner or target company.

(h) If the applicant is relying for approval of the proposed transaction on a claim that that transaction would meet significant transportation needs of the public and that these needs may not be satisfied by a reasonably available

alternative having materially less anticompetitive effects, all studies, reports and analyses made within 2 years preceding the filing of the application regarding other possible mergers, consolidations, or acquisitions that it had considered.

§ 303.31 Financial information.

The application shall contain the following:

(a) The following reports filed with the United States Securities and Exchange Commission within three years prior to the date of the application:

- (1) All reports filed on Form 10K;
- (2) All registration statements and all reports filed on Forms 10-Q and 8-K;
- (3) All proxy statements; and
- (4) All schedules 14 D-1 with all amendments.

(b) Annual reports to shareholders for the 3 years preceding the application;

§ 303.32 Equipment information.

The application shall include the following:

(a) A list of aircraft owned or leased by the applicant by aircraft type and age;

(b) If the aircraft is leased from others, the owner of the aircraft and the terms of the lease; if the applicant leases aircraft to others, the lessee and the terms of the lease;

(c) A detailed description of all plans and orders for the acquisition, lease or major modifications of flight equipment, including the price and projected delivery date of any aircraft; and

(d) A detailed description of all plans and agreements for the sale or lease of aircraft.

§ 303.33 Competitive information.

The application shall contain the following:

(a) Separate lists of all non-stop city-pairs (1) that are served by the applicant, (2) that are served by the other party to the proposed transaction, and (3) into which the applicant or the other party to the proposed transaction is considering entry;

(b) All studies, reports, and analyses that were submitted to the applicant's chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, within 2 years prior to the filing of the application, that discuss route development, internal expansion, service expansion or the marketing plans or strategies of the applicant;

(c) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss any

of the following subjects in relation to any area served by both parties (whether the area discussed in the document is one or more cities, city-pairs, routes, hubs, regions, states, tiers, service to foreign points or any other geographical area):

- (1) Competition;
- (2) The possibility of new entry;
- (3) Profitability or yield;
- (4) Fare levels or availability of discount fares;
- (5) Capacity or scheduling;
- (6) Load factors or break-even levels;
- (7) Identity of potential entrants; or
- (8) Possible responses to new entry or to changes in a competitor's fares, scheduling, capacity or number of discount seats offered.

(d) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss any of the topics listed in § 303.33(c) in relation to any area served by the other party to the proposed transaction (whether the area discussed in the document is one or more cities, city-pairs, routes, hubs, regions, states, tiers, service to foreign points or any other geographical area).

(e) All documents prepared by or for the company within 2 years prior to the filing of the application that discuss the effect of changes in conditions in any area served by one party to the proposed transaction on traffic, fares, profitability or availability of discount fares in any area served by the other party.

§ 303.34 Availability of resources.

For each airport served by both parties to the proposed transaction, the applicant(s) shall supply a detailed description of the following:

- (a) The availability of fuel and the policy of fuel suppliers as to the supply and price of fuel to new entrants;
- (b) The availability of landing slots at any of the airports that have access allocated by the FAA;
- (c) The environmental constraints on each airport that limit or regulate additional service, whether of new entrants to the airport or of expanded service by incumbents. The report on environmental constraints shall include a description of any regulation that affects airport use, including but not limited to noise, air, and surface pollution;
- (d) Airport constraints as to the size or type of aircraft that can be operated at that airport, including, but not limited to, such considerations as runway length, availability of ramp space, and safety considerations; and
- (e) Any constraints with respect to terminal facilities, including but not

limited to counter or ticketing space, gate space, baggage or cargo consolidation space, and ramp space.

§ 303.35 Potential public benefits of the proposed transaction.

(a) If the applicant intends to rely on public benefits to justify approval of its proposed transaction, the applicant shall describe those benefits in detail and include all documents submitted to its chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, that discuss the following subjects:

- (1) Any decrease in operating costs or increase in operating efficiencies. This should include an estimate of when the savings will be realized;
- (2) Service benefits and proposed changes in price/quality options;
- (3) Any enhancement of competition and the regions where that enhancement will occur; or
- (4) Any changes in employment opportunities.

(b) The applicant shall provide all data, and set forth the method of calculation, upon which its claims of benefits rely. Any categories of cost savings provided shall be consistent with the financial data filed in CAB Form 41 or DOT replacement form.

(c) In describing the public benefits, the applicant shall distinguish between a one-time cost saving or benefit resulting from the transaction and continuing operational efficiencies or benefits.

§ 303.36 Potential adverse impact of the proposed transaction.

The application shall include all documents that were submitted to the applicant's chief executive, financial, marketing, or operating officer, its Board of Directors, its executive committee, or any financial institution, that discuss the following in relation to the proposed transaction:

- (a) Any increase in the operating costs of the applicant with an estimate of when the increased cost will be incurred;
- (b) Any decrease in the quantity or quality of air service;
- (c) Any lessening of competition as a result of the proposed merger; and
- (d) Any costs that would result from labor protective provisions that are necessary to complete the transaction.

§ 303.37 Labor relations.

Applicants shall provide the following information:

- (a) Whether the surviving carrier will accept DOT's standard labor protective provisions as a condition of DOT approval of the transaction;

(b) The number of employees, by each class or craft, employed by each party to the transaction, and the number of employees by class or craft in their employ but on furlough. With respect to those employees on furlough, they shall indicate the reasons for such furlough. They should also indicate the order of recall (and the basis thereof) of these employees;

(c) Whether any plans exist for the dismissal, displacement, transfer, reduction of flying time or furlough of any employees in any class or craft as a result of operating changes which would flow from the proposed merger. If so, applicants shall list for each such class or craft the number of employees affected, the type of action (e.g., dismissal, transfer, furlough, etc.) anticipated, and the manner in which the plans would be implemented;

(d)-(e) [Reserved]

(f) Copies of the collective bargaining agreements they have with the different classes of employees.

§ 303.38 Fuel consumption.

(a) The applicant shall estimate the amount of fuel that would be consumed by:

- (1) The consolidated or commonly controlled entities during the next calendar year following the approval; and
- (2) Each carrier individually during the next calendar year following disapproval.

(b) With both estimates in paragraph (a), the applicant shall include a statement as to the availability of the required fuel.

PART 305—RULES OF PRACTICE IN INFORMAL NONPUBLIC INVESTIGATIONS

Sec.

- 305.1 Applicability.
- 305.2 Definition.
- 305.3-305.4 [Reserved]
- 305.5 Initiation of investigation.
- 305.6 Appearance of witnesses.
- 305.7 Issuance of investigation subpoenas.
- 305.8 [Reserved]
- 305.9 Rights of witnesses.
- 305.10 Nonpublic character of proceedings.
- 305.11 Procedures after investigation.
- 305.12 Motions to quash or modify an investigation subpoena.

Authority: Secs. 202, 204, 411, 415, 1001, 1002, 1004, 1007, Pub. L. 85-726, as amended; 72 Stat. 742, 743, 770, 771, 788, 792, 796 (49 U.S.C. 1322, 1324, 1381, 1385, 1481, 1482, 1484, 1487; 5 U.S.C. 555, 556).

§ 305.1 Applicability.

The provisions of this part shall govern informal nonpublic investigations, as distinguished from

formal investigations and adjudicatory proceedings, undertaken by the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings with a view to obtaining information from any person. While the Department seeks and encourages voluntary cooperation and believes that it is in the best interest of all parties concerned, it will utilize the procedures provided by this part to compel the disclosure of information by any person where DOT wishes to determine whether such person, or any other person, has been or is violating any provisions of Title IV or sections 101(3), 1002, 1003, or 1108(b) of the Act, or any rule, regulation, order, certificate, permit, or letter or registration issued pursuant thereto by DOT and when the information appears to be relevant to the matter under investigation. This part shall not apply to employees or records of other agencies of the United States Government, the District of Columbia, or the several States and their political subdivisions.

§ 305.2 Definition.

For the purpose of, and as used in this part, the term "investigation" means a non-adjudicatory, informal nonpublic investigation for the purpose of determining whether formal enforcement action should be instituted with respect to alleged violations of law.

§§ 305.3—305.4 (Reserved)

§ 305.5 Initiation of investigation.

An investigation may be initiated by order of the Department. Attorneys of the Office of the Assistant General Counsel for Aviation Enforcement and Proceedings shall conduct such investigations pursuant to the provisions of this part and they shall be designated Investigation Attorneys. Investigation Attorneys, administrative law judges and the DOT decisionmaker are hereby authorized to exercise and perform their duties and functions under this part in accordance with the provisions of the Act and the rules and regulations of the Department.

§ 305.6 Appearance of witnesses.

Witnesses may be required to appear before any administrative law judge for the purpose of receiving their testimony or receiving from them documents or other data relating to any subject under investigation. Such testimony shall be mechanically or stenographically recorded, and a transcript thereof shall be made and incorporated in the record of the investigation.

§ 305.7 Issuance of investigation subpoenas.

(a) The Deputy General Counsel, the DOT decisionmaker, the chief administrative law judge or the administrative law judge designated to preside at the reception of evidence, may issue a subpoena directing the person named therein to appear before a designated administrative law judge at a designated time and place to testify or to produce documentary evidence relating to any matter under investigation, or both. Each such subpoena shall briefly advise the person required to testify or submit documentary evidence of the purpose and scope of the investigation, and a copy of the order initiating the investigation shall be attached to the subpoena.

(b) Witnesses subpoenaed to appear shall be paid the fees and mileage prescribed in § 302.21 of the Rules of Practice (14 CFR 302.21). Service of such subpoenas shall be made in accordance with the provisions of § 302.8 of the Rules of Practice (14 CFR 302.8).

§ 305.8 (Reserved)

§ 305.9 Rights of witnesses.

Any person required to testify or to submit documentary evidence shall be entitled to procure, on payment of lawfully prescribed costs, a copy of any document produced by such person and of his or her own testimony as stenographically reported. Any person compelled to testify or to produce documentary evidence may be accompanied, represented, and advised by counsel.

§ 305.10 Nonpublic character of proceedings.

Investigations shall be attended only by the witnesses and their counsel, the administrative law judge, the Investigation Attorney, other DOT personnel concerned with the conduct of the proceeding and the official stenographer. All orders initiating investigations, motions to quash or modify investigation subpoenas, orders disposing of such motions, documents, and transcripts of testimony shall be part of the record in the investigation. Unless DOT determines otherwise, all orders initiating investigations which do not disclose the identity of the particular persons of firms under investigation shall be published in the *Federal Register*. Except as otherwise required by law, the remainder of the record of such proceedings shall constitute internal DOT documents which shall not be available to the general public. The use of such records in DOT proceedings

subject to Part 302 of the Rules of Practice shall be governed by §§ 302.19(g) and 302.39 and by the law of evidence applicable to DOT proceedings.

§ 305.11 Procedures after investigation.

Upon completion of the investigation, where the Deputy General Counsel determines that no corrective action is warranted, the investigation will be closed, and any documentary evidence obtained in the investigation will be returned to the persons who produced it. Where remedial action is indicated by the investigation, the Deputy General Counsel will proceed pursuant to Subpart B of Part 302 of the Rules of Practice or will take such other action as may be appropriate.

§ 305.12 Motions to quash or modify an investigation subpoena.

Any person upon whom an investigation subpoena is served may, within seven (7) days after such service or at any time prior to the return date thereof, whichever is earlier, file a motion to quash or modify such subpoena with the administrative law judge who issued such subpoena, or in the event the administrative law judge is not available, with the chief administrative law judge for action by himself or herself or by the DOT decisionmaker. Such motions shall be made in writing in conformity with Rules 3 and 4 of the Rules of Practice (Part 302 of this subchapter); shall state with particularity the grounds therefor and the relief sought; shall be accompanied by the evidence relied upon and all such factual matter shall be verified in accordance with the provisions of Rule 202 of the aforesaid Rules of Practice. Written memoranda or briefs may be filed with the motions, stating the points and authorities relied upon. No oral argument will be heard on such motions unless the chief administrative law judge, the administrative law judge or the DOT decisionmaker directs otherwise. A subpoena will be quashed or modified if the evidence whose production is required is not reasonably relevant to the matter under investigation, or the demand made does not describe with sufficient particularity the information sought, or the subpoena is unlawful or unduly burdensome. The filing of a motion to quash or modify an investigation subpoena shall stay the return date of such subpoena until such motion is granted or denied. The DOT decisionmaker may at any time review, upon his or her own initiative, the ruling of an administrative law judge or the chief administrative law judge denying a

motion to quash a subpoena. In such cases, the DOT decisionmaker may order that the return date of a subpoena which he or she has elected to review be stayed pending DOT action thereon.

PART 310—INSPECTION AND COPYING OF DOT OPINIONS, ORDERS, AND RECORDS

- Sec.
310.1 General.
310.2 Records available.
310.3 Exempted records.

Appendix A—Description and Location of Records Generally Available

Appendix B—Types of Records Generally Excluded From Availability

Authority: Sec. 204(a), 72 Stat. 743; 49 U.S.C. 1324; 81 Stat. 54; 5 U.S.C. 552.

§ 310.1 General.

The provisions of Part 7 of the regulations of the Office of the Secretary shall apply to the inspection and copying of DOT opinions, orders, and records under this chapter. (49 CFR Part 7)

§ 310.2 Records available.

For the guidance and convenience of the public, a list is attached to this part designated Appendix A, which describes various records which are available for inspection and copying. Records which do not fall within one of the described categories nevertheless may be open to inspection and copying. Conversely a record listed in Appendix A to this part may be withheld from general inspection and copying because all or part of it may be an exempted record. By way of example, records otherwise normally available may be exempted where they consist of docket materials withheld from public disclosure under § 302.39 of the Procedural Regulations in this chapter, certain carrier reports received on a confidential basis, or records relating to exempted personnel and classified matters. Exempted records are described in § 310.3.

§ 310.3 Exempted records.

(a) As used herein, "exempted records" include those records which, pursuant to 5 U.S.C. 552(b) or other applicable law or regulation, are not required to be made available generally for inspection or copying.

(b) Appendix B to this part lists various kinds of records which are "exempted records" and therefore may be excluded from public availability. Appendix B to this part is for the convenience and guidance of the public and is not an exhaustive listing; other records not listed therein may be subject to withholding as "exempted records."

Any "exempted record" will be withheld from public disclosure only where it is determined that the release of the record would be inconsistent with the purpose of the exemption.

APPENDIX A—Description and Location of Records Generally Available

[NOTE: Any item may be withheld from disclosure if exempted, whether or not the item is listed herein]

Agreements filed under section 412 of Federal Aviation Act: (To be determined).

Copies of, and filings and records in connection therewith.

Air freight forwarder applications and operating authorizations, and filings in connection therewith.

Aircraft lease or purchase transactions under Part 299, Economic Regulations: Filings in connection therewith.

Applications of foreign charter carriers for approval of charter flights, as required by specific DOT or Board Order.

Blind sector applications: Part 216—Copies of applications and authorizations in connection therewith.

DOT Manual: Instructions to staff and index thereof.

Charters: Requests for waivers of DOT or Board regulations.

Civil penalty compromise records filed under Subpart H of the Department's rules of practice.

Conferences between DOT or Civil Aeronautics Board and other persons, transcripts of.

Consumer complaint files, as distinguished from investigation files.

Contracts of the DOT or Civil Aeronautics Board: Contracts awarded; invitations to bid.

Correspondence relating to items listed in Appendix A.

Dockets and related material:

Agents: File showing agents designated for service under section 1005(b) of Federal Aviation Act.

Applications sent to the President under section 801 of Federal Aviation Act: Card record of.

Docket binders: Containing material of record in docketed proceedings, and correspondence in connection therewith.

Docket indexes: Listing by docket number, the filings in each docket and DOT or Board issuances in same.

By name of applicant or petitioner, each application, petition, etc. bearing a new docket number.

By name of city, applications for service to said city and disposition thereof.

By name of carrier and by docket number, a description of pending applications.

Documents served by Docket Section: Daily record of.

Oral arguments: List of, by date order.

Parties to individual docketed proceedings: Lists of, with addresses.

Foreign aircraft permits: Copies of applications (Form 272), permits, reports of cargo operations (Form 321), and other filings in connection therewith.

Forms used in dealing with the public:

Copies of forms

List of forms showing number and title.

Inclusive tours: Tour prospectuses and other documents relating to inclusive tour charters under Part 378.

International Air Transport Association (IATA) resolutions, minutes, and other IATA material.

Mail compensation:

Air carrier claims for mail pay (Forms 398 and 545).

Carrier payments memoranda (instructions regarding billing).

Class rate information on Form 548 (local service carriers).

Monthly listings of summarized passenger loads by flight stages (Schedule T-5), except subsidy ineligible portion.

Summary of obligations and disbursements to air carriers (Form 470).

Mileage records: Official DOT or Board records of mileage.

Minutes of the DOT or Civil Aeronautics Board: Approved minutes of the Board on matters that are not pending.

Opinions of the General Counsel Orders and Opinions of the DOT or Civil Aeronautics Board:

Copies of, including published bound volumes "Civil Aeronautics Board Reports".

Index of, by subject, summarizing action taken.

Index-Digest of opinions and precedential orders, and citation file.

Weekly summaries of orders.

Overseas military personnel charter applications and authorizations, and filings in connection therewith.

Policy Statements of the DOT or Civil Aeronautics Board; and index thereof.

Postal Service: Contracts for the transportation of mail filed pursuant to 39 U.S.C. 5005.

Public index.

Published DOT or Board documents.

Regulations of the DOT or Civil Aeronautics Board; Table of contents of codified regulations.

Reports of air carriers and related material:

Accounting and reporting directives to supplement the Uniform System of Accounts and Reports.

ADP instruction directives to supplement Traffic and Capacity Data Collection ADP Manual.

Air carrier Form 41 reports, consisting of various financial and statistical schedules filed at various frequencies by each certificated air carrier under Part 241.

Air carrier passenger origin-destination survey reports (Form 2787), domestic only. (Subject to prior staff use. Cost of separation and deletion of confidential international data for account of requestor.)

Air taxi operator reports required by various DOT or Board orders.

Air taxi operators: Commuter air carrier reports of scheduled services (Form 298-C), except Schedule F-1.

Air taxi operators: Registration for exemption under Part 298 (Form 298-A).

Air taxi operators: Interests in and operations with large aircraft.

Carrier officers and directors reports of ownership of stock and other interests.

Extension of credit to political candidates report (Form 183).

Extensions of time for report filing.

Foreign air carriers reports of civil aircraft charters (Form 217).

Insurance certificates and notices:

- Air freight forwarders certificates of insurance (Form 350).
- Air taxi operators certificates of insurance (Form 257) and standard endorsements (Form 262).
- Supplemental air carriers: Certificates of insurance and endorsements (Forms 606, 607 and 608).
- Notice of cancellation of insurance by insurer (Form 609A).
- Notice of cancellation of insurance by carrier (Form 609B).

International Civil Aviation Organization statistical report (ICAO Form C).

Local service carrier summarized passenger loads by flight schedule (Schedule T-6), except subsidy ineligible portions.

Magnetic tapes prepared by the DOT or Board from reports filed by air carriers.

Manual of ADP instructions for traffic and capacity data collection and related materials.

Manuals of air carrier accounts and reporting instructions prescribed by the DOT or Board.

Manual of instructions to air carriers for passenger origin-destination survey statistics and related materials.

National Air Carrier Association (NACA), commercial charter exchange activity, membership roster and flight data (Form 452).

Origin-destination survey of airline passenger traffic, domestic data and outputs.

Observations of the Director to air carriers, requesting or transmitting specific information to supplement or amplify reports.

Passengers denied confirmed space (Form 251).

Passenger origin-destination directives, to supplement Passenger O&D Manual.

Public accountants reports.

Reports of a miscellaneous nature filed pursuant to DOT or Board order.

Unaccommodated passenger reports (Form 250).

Waivers of accounting and reporting requirements and record retention.

Route and service authorizations: (Airport-to-Airport Mileages)

Certificates of public convenience and necessity.

Foreign air carrier permits.

Historic and current records and indexes of points served, airports, dates of service inauguration, service deletions, suspensions and restorations, and DOT or Board actions affecting carrier service authorizations.

Settlement documentation filed under Rule 215 of the DOT's or Board's rules of practice.

Statements of authorization for off-route charter trips by foreign air carriers (Part 212): Copies of applications for, filings in connection therewith and copies of authorizations.

Study group charters: Tour prospectuses and other documents relating to study group charters under Part 373.

Tariff matters:

Agent matters:

- Alternate agents' affidavits as to disability of principal tariff publishing agent.
- Corporate tariff agents' designation of issuing officer.
- Powers of attorney (issued by carriers to tariff publishing agents).
- Tariff publishing instructions (from carriers to agents).
- Certifications of tariff publications and requests for copies.
- Concurrences (issued by carriers to tariff publishing carriers).
- Correspondence with carriers or agents requesting correction of Part 221 violations in tariffs.
- Free or reduced-rate transportation:
- Access to aircraft or free-transportation requests (SF 160).
- Application for, under § 223.8 of Economic Regulations.
- Carrier manuals containing instructions, rules, regulations and practices governing issuance and interchange of passes.
- Reports by carriers of free transportation of technical representatives of aircraft manufacturers (§ 223.2 (c), (d) of Economic Regulations).

Postponed Board actions: Notices of, on tariffs filed on 45 days' notice, and not acted upon by Board 15 days prior to effective date, under § 399.36 of Policy Statements.

Rejection notices.

Special tariff permissions.

Tariffs and tariff transmittal letters.

Tariff embargo notices.

Trade agreements filed under Part 225 of Economic Regulations.

Waivers from Part 221 of Economic Regulations.

Trade association manuals.

Travel group charters: Filings and other documents relating to travel group charter filings under Part 372a (excluding names, addresses and phone numbers of TGC participants).

Unpublished statistical compilations.

Votes of Board members: Final votes of Board members in Board proceedings.

Appendix B—Types of Records Generally Excluded From Availability

The following list contains by way of example those records which are "exempted records" under this part. The examples of exempted records are listed according to the applicable subsections of 5 U.S.C. 552(b).

(1) *Documents classified pursuant to Executive Order No. 10501.* Classified minutes and classified exhibits in formal proceedings.

(2) *Personnel rules and practices.* Files pertaining to personnel.

Technical manuals and instructions pertaining to the audit of carrier accounts.

(3) *Material exempted by statute.* Matter which heretofore has been exempted from public disclosure under sections 902(f) and 1104 of the Federal Aviation Act, or by specific order will continue to be exempt.

Such matters include carrier audit papers and correspondence relating thereto, and matters on which DOT has granted a motion for nondisclosure pursuant to § 302.39 of its rules of practice.

(4) *Trade secrets and commercial or financial information.* Past or future matter submitted in confidence but for which no formal request under § 302.39 of the rules of practice has been made and granted will be held in confidence to the extent deemed allowable. This provision refers solely to unpublished materials the disclosure of which would be inconsistent with the intent of the Freedom of Information Act. No assurance of withholding material is implied by this, however, and affected persons should formally request withholding under § 302.39 where they deem it necessary to protect their interests.

Examples of confidential matters under this subsection include: local service carrier passenger loads by flight schedules (Schedule T-5, subsidy ineligible portion); origin-destination survey of airline passenger traffic (international); MAC charter rate information submitted in advance of MAC rate proceedings; financial data (Schedule F-1, Form 98-c); materials related to informal subsidy conferences; air carrier service segment data submitted under Part 241; air carrier or air carrier organization letters, information or views used in developing U.S. positions in international aviation matters; and names, addresses, and phone numbers of TGC participants listed in Travel Group Charter filings under Part 372a.

(5) *Inter/intra-agency memoranda.*

Copies of decisions awaiting Presidential action except as provided in § 399.101 of the DOT's Policy Statements.

Notation, calendar, and for information memoranda.

Budget, management, program evaluation, records disposal, research planning and program files.

Internal memoranda on the Administrative Conference of the United States.

Staff analyses not published by DOT.

Files regarding requisitions, equipment, and space.

Memoranda regarding interagency committees.

Intergovernmental communications on loan guarantee matters.

Research and legislative reference files of the General Counsel.

Memoranda and studies regarding positions in international aviation matters.

Developmental files, research materials, and workpapers.

(6) *Invasion of personal privacy.*

Correspondence and inquiries regarding personnel. Individual personnel files and records.

(7) *Low enforcement investigatory files.*

Formal and informal internal investigatory files regarding alleged violations of the Federal Aviation Act or requirements thereunder; and names, addresses, and phone numbers of TGC participants listed in Travel Group Charter filings under Part 372a.

PART 310a—ACCESS TO SYSTEMS OF RECORDS—REGULATIONS AND EXEMPTIONS IMPLEMENTING THE PRIVACY ACT OF 1974

§ 310a.1 General.

The provisions of Part 10 of the regulations of the Office of the Secretary shall apply to the maintenance of an access to systems of records pertaining to individuals. (49 CFR Part 10)

PART 311—CLASSIFICATION AND DECLASSIFICATION OF NATIONAL SECURITY INFORMATION AND MATERIAL

§ 311.1 General.

The provisions of Part 8 of the regulations of the Office of the Secretary shall apply to the classification and declassification of national security information. (49 CFR Part 8)

PART 313—IMPLEMENTATION OF THE ENERGY POLICY AND CONSERVATION ACT

Sec.

313.1 Purpose, scope, and authority.

313.2 Policy.

313.3 Definitions.

313.4 Major regulatory actions.

313.5 Energy information.

313.6 Energy statements.

313.7 Integration with environmental procedures.

Authority: Secs. 204, Pub. L. 85-726, as amended, 72 Stat. 743, 49 U.S.C. 1324, Pub. L. 84-163, 89 Stat. 940, 42 U.S.C. 6362(b).

§ 313.1 Purpose, scope, and authority.

(a) The Energy Policy and Conservation Act (42 U.S.C. 6201 et seq., hereinafter "EPCA") authorizes and directs certain actions to conserve energy supplies through energy conservation programs and where necessary, the regulation of certain energy uses, and to provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products. In furtherance of these purposes, section 382 of EPCA requires several transportation regulatory agencies, including DOT, to submit a number of reports to the Congress with respect to energy conservation and efficiency, and where practicable and consistent with the exercise of DOT's authority under other law, to include in any major regulatory action a statement of its probable impact on energy efficiency and energy conservation. Section 382(b) of EPCA directs DOT to define the term "major regulatory action" by rule.

(b) Section 204(a) of the Federal Aviation Act of 1958, as amended (hereinafter "Act"), authorizes DOT to establish such rules, regulations, and

procedures as are necessary to the exercise of its functions and are consistent with the purposes of the Act.

(c) The purpose of these regulations is to establish procedures and guidelines for the implementation of DOT's responsibility under EPCA to include in any major regulatory action taken by DOT a statement of the probable impact on energy efficiency and energy conservation.

(d) These regulations apply to all proceedings before DOT, as provided herein.

§ 313.2 Policy.

(a) *General.* It is the policy of DOT to view the conservation of energy and the energy efficiency improvement goals of EPCA as part of DOT's overall mandate, to be considered along with the several public interest and public convenience and necessity factors enumerated in section 102 of the Federal Aviation Act (49 U.S.C. 1302). To the extent practicable and consistent with DOT's authority under the Act and other law, energy conservation and efficiency are to be weighed in the decisionmaking process just as are DOT's traditional policies and missions.

(b) *Implementation.* Implementation of this policy is through the integration of energy findings and conclusions into decisions, opinions, or orders in proceedings involving a major regulatory action, as defined in this part.

(c) *Proceedings in progress.* The provisions of this part are intended primarily for prospective application. Proceedings in progress on the effective date of this part, in which an application has been docketed but no final decision made public, shall adhere to § 313.6(a) of this part, provided that the fair, efficient, and timely administration of DOT's regulatory activities is not compromised thereby. Nothing herein shall imply a requirement for new or additional hearings, a reopening of the record, or any other procedures which would tend to delay a timely decision in proceedings in progress.

(d) *Hearings.* Public hearings will not normally be held for the purpose of implementing EPCA, particularly in connection with proposed actions which do not require notice and hearing as a prerequisite to decision under the Act. Hearings may be ordered in exceptional circumstances where the proposed action is of great magnitude or widespread public interest and, in addition, presents complex issues peculiarly subject to resolution through evidentiary hearings and the process of cross examination.

§ 313.3 Definitions.

As used in this part: (a) "Act" means the Federal Aviation Act of 1958, as amended.

(b) "Energy efficiency" means the ratio of the useful output of services in air transportation to the energy consumption of such services.

(c) "Energy statement" is a statement of the probable impact of a major regulatory action on energy efficiency and energy conservation, contained in a decision, opinion, order, or rule.

(d) "EPCA" means the Energy Policy and Conservation Act.

(e) "Major regulatory action" is any decision by the DOT decisionmaker or administrative law judge requiring an energy statement pursuant to § 313.4 of this part.

(f) "NEPA" means the National Environmental Policy Act of 1969.

§ 313.4 Major regulatory actions.

(a) Any initial, recommended, tentative or final decision, opinion, order, or final rule is a major regulatory action requiring an energy statement, if it:

(1) May cause a near-term net annual change in aircraft fuel consumption of 10 million (10,000,000) gallons or more, compared to the probable consumption of fuel were the action not to be taken; or

(2) Is specifically so designated by DOT because of its precedential value, substantial controversy with respect to energy conservation and efficiency, or other unusual circumstances.

(b) Notwithstanding paragraph (a)(1) of this section, the following types of actions shall not be deemed as major regulatory actions requiring an energy statement:

(1) Tariff suspension orders under section 1002(j) of the Act, temporary suspensions under section 401(j) of the Act, emergency exemptions or temporary exemptions not exceeding 24 months under sections 101(3) or 416(b) of the Act and other proceedings in which timely action is of the essence;

(2) Orders instituting or declining to institute investigations or rulemaking, setting or declining to set applications for hearing, on reconsideration, or on requests for stay;

(3) Other procedural or interlocutory orders;

(4) Actions taken under delegated authority; and

(5) Issuance of a certificate where no determination of public convenience and necessity is required.

(c) Notwithstanding paragraph (a)(1) of this section, DOT may provide that an energy statement shall not be prepared

in a proceeding which may result in a major regulatory action, if it finds that:

- (1) The inclusion of an energy statement is not consistent with the exercise of DOT's authority under the Act or other law;
- (2) The inclusion of an energy statement is not practicable because of time constraints, lack of information, or other unusual circumstances; or
- (3) The action is taken under laws designed to protect the public health or safety.

§ 313.5 Energy information.

(a) It shall be the responsibility of applicants and other parties or participants to a proceeding which may involve a major regulatory action to submit sufficient information about the energy consumption and energy efficiency consequences of their proposals or positions in the proceeding to enable the administrative law judge or the DOT decisionmaker, as the case may be, to determine whether the proceeding will in fact involve a major regulatory action for purposes of this part, and if so, to consider the relevant energy factors in the decision and prepare the energy statement.

(b) In proceedings involving evidentiary hearings, the energy information shall be submitted at such hearings pursuant to DOT's usual procedural regulations and practices, under control of the administrative law judge or other hearing officer.

(c) In proceedings not involving evidentiary hearings, the energy information shall be submitted at such time as other materials in justification of an application are submitted. Where an application itself is intended as justification for DOT action, the energy information shall be submitted with the application. In rulemakings not involving hearings, the energy information shall normally be submitted along with comments on the notice of proposed rulemaking, or as directed in any such notice or any advance notice.

§ 313.6 Energy statements.

(a) Each major regulatory action shall include, to the extent practicable, consideration of the probable impact of the action taken or to be taken upon energy efficiency and conservation. The administrative law judge or the DOT decisionmaker, as the case may be, shall normally make findings and conclusions about:

- (1) The net change in energy consumption;
- (2) The net change in energy efficiency; and
- (3) The balance struck between energy factors and other public interest

and public convenience and necessity factors in the decision.

(b) Energy findings and conclusions contained in any initial or recommended decision are a part of that decision and thus subject to discretionary review by DOT.

(c) In the case of orders to show cause initiated by DOT, energy findings and conclusions may be omitted if adequate information is not available. In such instances, the energy statement shall be integrated into the final decision.

§ 313.7 Integration with environmental procedures.

(a) In proceedings in which an environmental impact statement or a detailed environmental negative declaration is prepared by a responsible official pursuant to DOT's Procedural Regulations implementing the National Environmental Policy Act of 1969 (NEPA), the energy information called for by this Part may be included in that statement or declaration in order to yield a single, comprehensive document. In such instances, the procedures of DOT's NEPA regulations shall govern the submission of the energy information. However, it shall remain the responsibility of the administrative law judge or the DOT decisionmaker, as the case may be, to make the findings and conclusions required by § 313.6(a) of this part.

(b) A determination that a major regulatory action within the meaning of EPCA and this Part may be involved in a proceeding is independent from any determination that the proceeding is a "major Federal action significantly affecting the quality of the human environment" within the meaning of NEPA, and vice versa.

PART 314—EMPLOYEE PROTECTION PROGRAM

Subpart A—General

- Sec.
- 314.1 Applicability.
 - 314.2 Definitions.
 - 314.3 Conformity with Subpart A of Part 302.
 - 314.4 Information requirements.
 - 314.5 Major contractions.
 - 314.6 Qualifying dislocation.

Subpart B—Determination of Qualifying Dislocation

- 314.10 Beginning of proceeding.
- 314.11 Applications.
- 314.12 Answers.
- 314.13 Disposition of applications.
- 314.14 Show-cause order.
- 314.15 Oral proceedings.
- 314.16 Final determination.

Subpart C—Major Contractions

- 314.20 Regular monthly computation.

- 314.21 Advance determinations.
- 314.22 Notice of major contraction.

Authority: Secs. 204, 407, Pub. L. 85-726, as amended, 72 Stat. 743, 766, 49 U.S.C. 1324, 1377; sec. 43, Pub. L. 95-504, 92 Stat. 1750 (49 U.S.C. 1552).

Note.—The reporting requirements contained in Part 314 have been approved by the Office of Management and Budget under control number 3024-0053.

Subpart A—General

§ 314.1 Applicability.

Section 43 of the Airline Deregulation Act of 1978, Pub. L. 95-504, establishes an employee protection program. After a determination by DOT that an air carrier has undergone a qualifying dislocation, the Secretary of Labor gives financial assistance to certain employees of the carrier. This part sets out procedures for the Department to determine whether a qualifying dislocation has occurred.

§ 314.2 Definitions.

As used in this part:

"Bankruptcy" means an adjudication of bankruptcy under Title 11 of the United States Code.

"Carrier" means an air carrier that on October 24, 1978, held a certificate issued under section 401 of the Federal Aviation Act of 1958.

§ 314.3 Conformity with Subpart A of Part 302.

Except where they are inconsistent with this part, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

§ 314.4 Information requirements.

The Department may require any carrier to submit any information that it considers necessary to carry out its functions under this part.

§ 314.5 Major contractions.

A major contraction is a reduction by at least 7½ percent of the total number of full-time employees of an air carrier within a 12-month period, and includes an advance determination of major contraction as set forth in § 314.21. The method by which DOT determines whether a carrier has undergone a major contraction is set forth in Subpart C.

§ 314.6 Qualifying dislocation.

A qualifying dislocation is a bankruptcy or major contraction of a carrier, the major cause of which is the change in regulatory structure provided by the Airline Deregulation Act of 1978.

Subpart B—Determination of Qualifying Dislocation

§ 314.10 Beginning of proceeding.

A proceeding to determine whether a bankruptcy or major contraction is a qualifying dislocation begins either with an application filed with the Department or an investigation on DOT's own initiative. Proceedings that begin with an application are governed by §§ 314.11 through 314.16. DOT-initiated proceedings are governed by §§ 314.14 through 314.16.

§ 314.11 Applications.

(a) *Who may file.* An application may be filed by an employee who has been deprived of employment or adversely affected with respect to compensation, or by a representative of one or more such employees.

(b) *Title and contents.* Applications shall be titled "Application for Determination of Qualifying Dislocation," and shall contain, with respect to at least one employee:

- (1) Name and address of the employee;
- (2) Number of years employed by carrier as of October 24, 1978;
- (3) Name and address of the applicant, if different from paragraph (b)(1);
- (4) Name of carrier-employer;
- (5) Position held by employee immediately before being deprived of employment or adversely affected with respect to compensation;
- (6) Date on which employee was deprived of employment or adversely affected with respect to compensation; and
- (7) An explanation of the applicant's basis for claiming that a qualifying dislocation has occurred, including all supporting evidence available to the applicant.

(c) *Service.* The Department will serve a copy of each application on the affected carrier, the collective bargaining representatives of that carrier's employees, the Secretary of Labor, and any State agencies that are acting as agents of the Secretary of Labor to administer the Employee Protection Program.

(Approved by the Office of Management and Budget under control number 3024-0053)

§ 314.12 Answers.

Any person may file an answer to an application within 15 days after the application is served.

§ 314.13 Disposition of applications.

(a) After the due date for answers, the Department will dismiss the application or begin an investigation to determine

whether a qualifying dislocation has occurred.

(b) The Department will dismiss an application if it does not name an employee who, on October 24, 1978, had been employed by a carrier for at least 4 years.

(c) The Department will dismiss an application if the carrier has neither become bankrupt nor undergone a major contraction.

(d) The Department will dismiss an application even though the carrier has become bankrupt or undergone a major contraction, if it finds that the bankruptcy or major contraction clearly did not have as its major cause the change in regulatory structure provided by the Airline Deregulation Act.

(e) A DOT order dismissing an application will announce the reasons for the dismissal.

§ 314.14 Show-cause order.

When the Department makes a preliminary determination of whether the major cause of the bankruptcy or major contraction was the change in regulatory structure provided by the Airline Deregulation Act of 1978, it will issue an order announcing a tentative decision that a qualifying dislocation has, or has not, occurred. The order will direct all interested persons to show cause why the tentative decision should not be made final, and will allow 30 days for objections to be filed. The Department will publish a summary of the order in the Federal Register and serve a copy of the order on each of the following:

- (a) The applicant and the applicant's representative, if any;
- (b) The affected carrier;
- (c) The collective bargaining representatives of the carrier's employees; and
- (d) The Secretary of Labor;
- (e) State agencies that are acting as agents of the Secretary of Labor to administer the Employee Protection Program.

§ 314.15 Oral proceedings.

The Department will provide for an oral evidentiary hearing, with notice published in the Federal Register and served on the persons listed in § 314.14, if there are material issues of decisional fact that cannot otherwise be adequately resolved. The DOT decisionmaker may in his or her discretion hear oral argument before making a final determination.

§ 314.16 Final determination.

The Department will publish in the Federal Register a summary of an order announcing its final determination and,

within 3 business days after the determination, serve a copy of the order on the persons listed in § 314.14.

Subpart C—Major Contractions

§ 314.20 Regular monthly computation.

(a) The Department will monitor the number of full-time employees of each carrier, including employees deprived of employment because of a strike, as reported monthly by carriers in accordance with Part 241 of this chapter.

(b) The DOT does not require monthly reporting of the number of positions that are vacant as a result of terminations for cause and, except as set forth in paragraph (c)(3) of this section, will not account for those positions in computing major contractions. In the cases set forth in paragraphs (c)(1) and (c)(2) of this section, the DOT presumes that the number of employment positions vacant as a result of terminations for cause is small enough that accounting for them would not change the result.

(c) Each month, with respect to each carrier:

(1) If the carrier's current reported full-time employment level is 92 percent or less of any of the carrier's preceding 12 monthly levels, DOT will find that the carrier has undergone a major contraction.

(2) If the current reported level is 93 percent or more of each of the carrier's preceding 12 monthly levels, the Department will not find that the carrier has undergone a major contraction.

(3) If neither of the conditions described in paragraphs (c)(1) and (c)(2) of this section is present, the Department will ascertain by special report from the carrier, and add to the reported employment levels, the number of positions that were vacant in each of the relevant months as a result of terminations for cause. If the resulting figure for the current month is 92.5 percent or less of the resulting figure for any of the preceding 12 months, the Department will find that the carrier has undergone a major contraction. Otherwise, the Department will not make such a finding.

§ 314.21 Advance determinations.

(a) If circumstances indicate that a major contraction will occur, the Department may make an advance determination of a major contraction without waiting for the regular monthly computation set forth in § 314.20. The Department will consider whether to make an advance determination either on its own initiative or upon receipt of an application from an employee who has been deprived of employment or

adversely affected with respect to compensation, or a representative of one or more such employees.

(b) An application under this section shall be titled "Application for Advance Determination of Major Contraction." It shall contain the information set forth in § 314.11 (b)(1) through (b)(6) and an explanation of the applicant's basis for claiming that a major contraction will occur, including all supporting evidence available to the applicant. A person may consolidate an application under this section with an application under § 314.11 for determination of a qualifying dislocation.

(c) The Department will terminate an advance determination of major contraction whenever it finds that the predicted major contraction has not occurred or will not occur.

§ 314.22 Notice of major contraction.

Upon finding a major contraction under § 314.20, or making or terminating an advance determination under § 314.21, the Department will publish the finding in the Federal Register and send written notice of it to the persons listed in § 314.14.

PART 316—COLLECTION OF CLAIMS OWED THE UNITED STATES

Sec.

- 316.1 Purpose.
- 316.2 Applicability.
- 316.3 Notice of claim.
- 316.4 Interest, penalty charges, and collection fees.
- 316.5 Collection by offset.
- 316.6 Settlement of claims.
- 316.7 Referral for litigation.
- 316.8 Disclosure to consumer reporting agency.
- 316.9 DOT claims agent.

Authority: Secs. 204, 401, 402, 407, 416, Pub. L. 85-726, as amended, 72 Stat. 740, 754, 757, 758, 771; 49 U.S.C. 1324, 1371, 1372, 1377, 1386, Secs. 3 and 5, Pub. L. 89-308, as amended, 89 Stat. 308, 96 Stat. 1754-1758, 31 U.S.C. 3701-3719.

Note: The information collection requirements contained in this part have been approved by the Office of Management and Budget under number 3024-0070.

§ 316.1 Purpose.

This part implements the Federal Claims Collection Act, as amended by the Debt Collection Act and interpreted by the General Accounting Office and Department of Justice. It provides procedures under which the Department will collect claims owed to the United States arising from activities under its jurisdiction. The part further sets forth the procedures for the Department to determine and collect interest and other charges on those claims under the Debt

Collection Act and for referral of unpaid claims for litigation.

§ 316.2 Applicability.

The part applies to all claims due the United States under the Federal Claims Collection Act as amended by the Debt Collection Act, arising from activities under the jurisdiction of the DOT under the responsibilities transferred to it by section 1601(b)(1) of the Federal Aviation Act of 1958, is amended, including amounts due the United States from fees, overpayments, fines, civil penalties, damages, interest, and other sources.

§ 316.3 Notice of claim.

(a) DOT will send a written notice to any person who owes payment to the United States under this part, stating the basis for the claim, the possible interest and penalty charges under this part for non-payment, additional consequences of non-payment, and the date full payment is due. That payment will normally be due 30 days from the date notice under this part is mailed. The notice of claim will be sent return receipt requested.

(b) If the claim is disputed, the debtor shall respond to the notice in writing and state whether and when full payment is to be made, and the reasons for non-payment. If full payment is not made by the date asked in the notice, the debtor shall also state the reasons for the inability to make full payment and how and when payments are to be made.

(c) If no response to the notice is received by the date asked in the notice, the Department may take further action under this part or under 4 CFR Parts 101-105, and the Federal Claims Collection Act, as amended. These actions may include reports to credit bureaus, contracts with collection agencies, revocation of licensing or offset of Federal salary or other administrative offset, as authorized in 31 U.S.C. 3701-3719.

§ 316.4 Interest, penalty fees, and collection charges.

(a) DOT will assess interest on unpaid claims. The interest rate used by the Department is set by the Secretary of the Treasury. DOT will further charge penalty fees of not more than 6 percent per year of the unpaid claim for failure to pay a part of a debt more than 90 days past due. DOT will also impose collection charges to cover the costs of processing and handling overdue claims, based on the costs incurred.

(b) Interest on debts will be charged and will run from the date the notice of claim is mailed if the amount of the debt

is not paid within 30 days from that date. The Department may extend the 30-day period when in the public interest. Interest will be calculated only on the principal of the debt. The rate of interest charged is the rate in effect on the date from which interest begins to run. The rate will remain fixed for the duration of the indebtedness.

(c) The Department may waive interest, collection charges or penalty fees if it finds that:

(1) The debtor is unable to pay any significant sum within a reasonable period of time;

(2) Collection of interest or charges jeopardizes collection of the principal of the claim; or

(3) It is otherwise in the best interests of the United States, including, under such circumstances, where an offset or installment payment agreement is in effect.

§ 316.5 Collection by offset.

(a) Whenever feasible, DOT will collect claims under this part by means of administrative offset against obligations of the United States to the debtor. Collection by Federal salary will be under the procedures in 4 CFR Part 102.

(b) The Department will notify the debtor in writing of its intent to use offset procedures to collect the debt unless the debtor agrees to repayment. The Department will ask other Federal agencies to help in the offset whenever possible. The notice to the debtor shall also include the type and amount of the claim and an explanation of the debtor's rights for records and review under 31 U.S.C. 3716(a).

§ 316.6 Settlement of claims.

(a) DOT may not waive the principal of any debt owed the United States.

(b) DOT may settle claims not exceeding \$20,000 by compromise at less than the principal of the claim if:

(1) The debtor shows an inability to pay the full amount within a reasonable time;

(2) The Government would be unable to enforce collection in full through litigation or administrative means within a reasonable time;

(3) The cost of collecting the full amount is not justified by the amount of the claim; or

(4) With respect to enforcement debts, DOT's enforcement policy would be served by settlement of the claim for less than the full amount.

§ 316.7 Referral for litigation.

Claims that cannot be settled under § 316.6 or for which collection action

cannot be ended or suspended under 4 CFR Parts 103 and 104 will be referred to the General Accounting Office for litigation.

§ 316.8 Disclosure to consumer reporting agency.

DOT may disclose delinquent debts to consumer reporting agencies under the Federal Claims Collection Act, as amended. If, after a report has been made under this section, the status or amount of the claim substantially changes, DOT will notify the reporting agency in writing within 15 days of the change. Any request for verification information will be given to the reporting agency by the Department within 30 days of receipt of the request. Before disclosure to a reporting agency, the Department will obtain in writing a statement by the agency that it will comply with the Fair Credit Reporting Act and other applicable Federal statutes.

§ 316.9 DOT claims agent.

(a) The Assistant Secretary for Administration is the Claims Collection Agent for all claims under this part. The Assistant Secretary for Administration will take action as delegated under Part 385 of this chapter to carry out this part and the requirements of 4 CFR Parts 101-105.

(b) All action for the collection of claims under this part will be the responsibility of the Assistant Secretary for Administration. All DOT offices shall send documents supporting claims under this part to the Assistant Secretary for Administration for action. Delegated waivers or compromise under this part shall be with the concurrence of the General Counsel. Any action taken by the Assistant Secretary for Administration under this Part involving air carriers receiving subsidy will be in consultation with the appropriate Office director(s).

PART 320—PROCEDURES FOR AWARDING JAPANESE CHARTER AUTHORIZATIONS

Subpart A—General Provisions

Sec.

- 320.1 Purpose.
- 320.2 Applicability.
- 320.3 Definitions and terminology.
- 320.4 Charter authorizations.
- 320.5 Related carriers counted as one.

Subpart B—Specific Procedures

- 320.10 Transfer of charter authorizations.
- 320.11 Unused charter authorizations.
- 320.12 Reallocation of authorizations.
- 320.13 Notice of intent to use charter authorizations.
- 320.14 Report of charter authorizations used.

Authority: Secs. 204, 401, 407, 1102, Pub. L. 85-726, as amended, 72 Stat. 743, 754, 766, 797 (49 U.S.C. 1324, 1371, 1377, 1502).

Subpart A—General Provisions

§ 320.1 Purpose.

This part sets out procedures governing the transfer or reallocation of authority to perform the charter flights authorized by the September 7, 1982, Memorandum of Understanding concerning bilateral aviation relations between the United States and Japan. That memorandum provides that each country's direct air carriers may perform 300 one-way charter flights between the two countries each year in accordance with country-of-origin rules. Charter authorizations were awarded in 1982 by grandfather allotments and initial lottery.

§ 320.2 Applicability.

This part applies to United States direct air carriers with respect to charter flights between the U.S. and Japan beginning on October 1, 1982.

§ 320.3 Definitions and terminology.

(a) "Authorization" means the authority to perform one of the 300 annual one-way charter flights between the United States and Japan authorized in the Memorandum of Understanding described in § 320.1.

(b) A charter authorization is "used" when the flight is performed.

(c) An "allocation year" runs from October 1 through September 30 and is used as a reference for reporting requirements and reallocation of forfeited authorizations.

§ 320.4 Charter authorizations.

(a) No charter flights between the United States and Japan shall be operated except in accordance with a charter authorization awarded or acquired under this part.

(b) A charter flight award obtained through the grandfather allotment or the initial lottery shall entitle the holder to authorizations for each of the three years beginning October 1, 1982, with the following exceptions:

(1) A charter flight authorization for an allocation year that has not been used by September 30 of that year will result in a penalty of a forfeiture of two charter flight authorizations for the remaining allocation years, as provided in § 320.15;

(2) A charter flight authorization obtained by request under § 320.15 shall be for one allocation year.

§ 320.5 Related carriers counted as one.

Two or more air carriers that are related will be considered as a single air

carrier for the purposes of this part. One carrier is related to another carrier if it controls, is controlled by, or is under common control with the other carrier.

Subpart B—Specific Procedures

§ 320.10 Transfer of charter authorizations.

(a) Any air carrier holding a charter authorization awarded or acquired by it under this part may transfer it, for any consideration, to any other air carrier that meets the criteria set forth in § 320.12(a) as of the time of transfer.

(b) There shall be no penalty for the transfer of a charter authorization obtained in an initial lottery.

(c) An air carrier may transfer up to 10 percent of its grandfather authorizations for a given year without penalty. The base number shall not include any grandfather authorizations declined under § 320.11(c). A carrier's charter flight authorization for the remaining allocation years shall be reduced on a one-to-one basis for each flight beyond the 10 percent figure that it transfers.

(d) A transfer of a charter authorization shall not become effective until the transferring air carrier files a notice in duplicate with the DOT decisionmaker. The notice shall be labeled "Notice of Transfer of Japan Charter Authorization," and identify the transferred charter authorization by the flight authorization number(s) assigned under § 320.3(d). It shall be filed within 15 days after the date of the transaction, but in any event before departure of the authorized flight, whether the flight is performed by the transferee or by any subsequent transferee. The notice shall indicate the number of charter authorizations transferred and the date of the transaction, and shall be signed by both the transferor and the transferee.

(e) An air carrier that transfers a charter authorization to another carrier shall retain for at least 1 year after the conclusion of the allotment year for which it was awarded a record of the consideration received for the transfer.

(Approved by the Office of Management and Budget under control number 3024-0055)

§ 320.11 Unused charter authorizations.

(a) Any carrier that fails to use its charter flight authorization by September 30 of an allocation year shall be penalized in the remaining allocation years at the rate of two charter flight authorizations for each unused authorization. If this penalty results in a negative number, the carrier's allotment will be zero. The flight authorizations

forfeited under this section shall be reallocated as provided in § 320.16.

(b) Notwithstanding paragraph (a) of this section, any carrier may without penalty return any of its allocated authorizations to the DOT.

For any subsequent year covered by this rule, until October 31, of that year.

(c) Returns shall be made by written notice to the Office of the Assistant Secretary for Policy and International Affairs, U.S. Department of Transportation, Washington, D.C. 20590, and shall be considered made as of the date the notice is received by that Office. The notice shall identify the air carrier and the number of authorizations returned, and shall be labeled "Return of Japan Charter Authorizations."

(d) The DOT decisionmaker reserves the right, on his or her own motion, to assess a forfeiture of authorizations on a carrier, and/or bar the carrier's requests for authorizations for a specified period, if he or she finds that the carrier has unreasonably requested and received authorizations without using them, or has transferred authorizations to another carrier that had no intention of operating under them.

§ 320.12 Reallocation of authorizations.

(a) Any authorizations forfeited under § 320.14 or § 320.15, or returned to DOT under § 320.15(b), shall be reallocated according to the procedures of this section.

(b) The Department will maintain an up-to-date list of authorizations, outstanding authorizations returned, and the number currently available on request. This information is available to the public.

(c) An eligible carrier, as defined in § 320.12(a), may request authorizations from the Office of the Assistant Secretary for Policy and International Affairs. Each authorization shall be for one allocation year. The request shall be in writing, and labeled, "Request for Japan Charter Authorizations."

(d) Except as provided in this paragraph and paragraph (e) of this section, a request for authorizations may be made at any time. A particular carrier may make more than one request during any calendar month, but the total number of authorizations requested during any month shall be not more than 30. Requests made before October 1 for the allocation year beginning on that date, or a year after that date, shall be included in that carrier's "October request(s)," and when the number of flights requested is equal to 30, that carrier may not make another such request until November 1.

(e) A carrier that has been assessed a penalty under § 320.14 or § 320.15 with

respect to a given allocation year (beginning on or after October 1, 1983) shall not make a request for authorizations for a subsequent year until April 1 of the subsequent year.

(f) DOT will accept requests for authorizations continuously during business hours, beginning at 9:00 a.m. on the first business day of the Department following the last day of the turn-back period specified in § 320.15 (b)(1) and (b)(2). Requests will be filled from the pool of returned authorizations in the order they are received by the Office of the Assistant Secretary for Policy and International Affairs. If the requests at any time exceed the number of returned authorizations, a stand-by list will be established. However, all requests received on the above opening date will be considered as having been received simultaneously, and if they exceed the number of returned authorizations, their order will be established by random selection under procedures agreed to by the requestors or set forth in an order of the DOT decisionmaker.

(Approved by the Office of Management and Budget under control number 3024-0055)

§ 320.13 Notice of intent to use charter authorization.

An air carrier shall file in duplicate with the Office of the Assistant Secretary for Policy and International Affairs a notice of its intention to use a charter authorization at least 7 days before departure of the flight. The notice shall be labeled "Notice of Intent To Use Japan Charter Authorization," and include the flight authorization number(s).

(Approved by the Office of Management and Budget under control number 3024-0055)

§ 320.14 Report of charter authorizations used.

Within 15 days after any month in which an air carrier uses a charter authorization, it shall file in duplicate a report with the Office of the Assistant Secretary for Policy and International Affairs. The report shall be labeled "Report of Japan Charter Authorizations Used." It shall include identification numbers of the authorizations, flight itineraries, flight dates, aircraft type, and the number of passengers or cargo tons transported. Passenger and cargo figures may be aggregated for the month.

(Approved by the Office of Management and Budget under control number 3024-0055)

PART 323—TERMINATIONS, SUSPENSIONS, AND REDUCTIONS OF SERVICE

Sec.

323.1 Applicability.

- 323.2 Definitions.
- 323.3 Who shall file notices.
- 323.4 Contents of notices.
- 323.5 Time for filing notices.
- 323.6 General requirements for notices.
- 323.7 Service of notices.
- 323.8 Exemptions.
- 323.9 Objections to notices.
- 323.10 Time for filing objections.
- 323.11 Answers to objections.
- 323.12 General requirements for objections and answers.
- 323.13 DOT actions.
- 323.14 Temporary suspension authority for involuntary interruption of service.
- 323.15 Report to be filed after strikes.
- 323.16 Listings in schedule publications.
- 323.17 Delays in discontinuing service.
- 323.18 Carriers' obligations when terminating, suspending, or reducing air service.

Authority: Secs. 204, 401, 407, 411, and 419, Pub. L. 85-726, as amended, 72 Stat. 743, 754, 766, 769, 92 Stat. 1732; 49 U.S.C. 1324, 1371, 1377, 1381, 1389.

§ 323.1 Applicability.

This part applies to certificated air carriers who terminate or suspend service to a point, or in a market, and to all air carriers who terminate, suspend, or reduce service below the level of essential air transportation under section 419 of the Act.

§ 323.2 Definitions.

As used in this part:

"Act" means the Federal Aviation Act of 1958, as amended.

"Certificated carrier" means a direct air carrier holding a certificate of public convenience and necessity issued by the Civil Aeronautics Board (CAB) or DOT under section 401 of the Act, authorizing scheduled route service.

"Eligible point" means:

(1) Any point in the United States to which any certificated carrier was authorized under its section 401 certificate to provide service on October 24, 1978, whether or not such service was actually provided;

(2) Any point in the United States that was deleted from a section 401 certificate between July 1, 1958 and October 24, 1978, inclusive, and that the CAB designated as an eligible point under the Act; or

(3) Any other point in Alaska or Hawaii that the CAB or DOT designated as an eligible point under the Act.

"Essential air transportation" means the level of air transportation determined by the CAB or DOT for any eligible point under section 419(a)(2) or 419(b)(4) of the Act.

"FAA-designated hub" means any airport serving a small, medium, or large air traffic hub listed in the Department of Transportation publication, "Airport

Activity Statistics of Certificated Route Carriers."

"United States" includes the several States, the District of Columbia, and the several territories and possessions of the United States. "State" includes any of the individual entities comprising the United States.

§ 323.3 Who shall file notices.

(a) *Terminations, suspensions, or reductions by certificated carriers.* The notice described in § 323.4(a) shall be filed by any certificated carrier that intends to:

(1) Terminate or suspend all passenger air transportation that it is providing to any eligible point in the United States when that termination or suspension will leave no certificated carriers serving that point. Service shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between the two points;

(2) Reduce passenger air transportation so that any eligible point receives less than the level of essential air transportation determined by CAB or DOT;

(3) Terminate or suspend all passenger air transportation that it is providing to any eligible point in the United States for which CAB or DOT has not issued an essential air service determination under either § 325.5 or § 325.7 of this chapter, when that termination or suspension will leave only one certificated carrier serving that point. Service shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between the two points;

(4) Reduce passenger air transportation to any eligible point in Alaska for which CAB or DOT has not determined the level of essential air transportation so that the service between that point and every other point served by a certificated carrier is either:

(i) Less than two round trip flights per week, or

(ii) Less than the average weekly number of round trip flights actually provided during calendar year 1976, or

(iii) Less than the number of flights specified under an agreement between CAB or DOT and the State of Alaska; or

(5) Terminate, suspend, or reduce passenger air transportation at an eligible point for which CAB or DOT has issued, or is required to issue, an essential air transportation determination under section 419(a)(2) or section 419(b)(4) of the Act so that the

total available seats of all the carriers linking that point to FAA-designated hubs will be reduced by 33 percent or more during a 90-day period. Service to a hub shall be considered to be terminated or suspended whenever it is operated less than 5 days per week, with three or more intermediate stops, or in one direction only between two points.

(b) [Reserved]

(c) *Uncertificated carriers.* The notice described in § 323.4(a) shall be filed by any uncertificated carrier that intends to terminate, suspend, or reduce:

(1) Air transportation so that any eligible point receives less than the level of essential air transportation determined by the CAB or DOT;

(2) Passenger air transportation to any eligible point for which CAB or DOT has not determined the level of essential air transportation, other than a point in Alaska, so that there is no FAA-designated hub from which the point receives at least two round trip flights per day, 5 days per week; or

(3) Passenger air transportation to any eligible point in Alaska, for which CAB or DOT has not determined the level of essential air transportation, so that the service between that point and every other point served by a certificated carrier is either:

(i) Less than two round trip flights per week, or

(ii) Less than the average number of weekly round trip flights actually provided during calendar year 1976, or

(iii) Less than the number of flights specified under an agreement between CAB or DOT and the State of Alaska.

(d) For the purpose of this section, in ascertaining the level of air transportation being provided to a point or between two points, air transportation that has been the subject of a notice filed under this section shall be considered not in operation for the duration of the notice period.

(e) If a certificated carrier was, before October 24, 1978, granted authority to suspend air transportation, and that authority ends on a stated date, the carrier shall comply with the requirements of this part before continuing the suspension beyond that date.

(f) If a certificated carrier was, before October 24, 1978, granted authority to terminate or suspend air transportation, but has not suspended service, the carrier shall comply with the requirements of this part before terminating or suspending service.

§ 323.4 Contents of notices.

(a) The notice required under § 323.3 (a) and (c) shall contain:

(1) Identification of the carrier, including address and telephone number.

(2) Statement whether the carrier is a certificated carrier or an uncertificated carrier.

(3) Names of all other air carriers serving the point at the time of filing.

(4) Description of the service to be terminated, suspended, or reduced, including:

(i) Arrival and departure times at the affected points of the flights to be discontinued;

(ii) Aircraft type used,

(iii) Routes of the flights to be discontinued, and a statement of which routes, if any, will be left without nonstop or single-plane service from a certificated carrier by the intended change, and

(iv) Date of intended termination, suspension, or reduction of service.

(5) A statement whether CAB or DOT has determined the level of essential air transportation for the point, and

(i) If such a determination has been made, a statement whether the intended termination, suspension, or reduction will reduce air transportation to the point below the essential level; or

(ii) If such a determination has not been made, and the point is an eligible point, a statement whether the intended termination, suspension, or reduction reasonably appears to deprive the point of essential air transportation, and an explanation.

(6) If the point is an eligible point, the calendar date when objections are due under § 323.10.

(7) Proof of service upon all persons specified in § 323.7(a). The proof of service shall include the names of all carriers served and the names and addresses of all other persons served.

(b) [Reserved]

(c) DOT may require any carrier filing notice to supply additional information.

(Approved by the Office of Management and Budget under control number 3024-0030)

§ 323.5 Time for filing notices.

(a) Except as specified by paragraph (b) of this section, a notice required by § 323.3 shall be filed at least:

(1) 90 days before the intended termination, suspension, or reduction, if it is filed by a certificated carrier or by an uncertificated carrier receiving compensation under section 419 of the Act for service to the point;

(2) 30 days before the intended termination, suspension, or reduction, if it is filed by an uncertificated carrier not receiving compensation under section 419 of the Act for service to the point.

(b) The notice required by § 323.3(a)(3) shall be filed at least 30 days, and the notice required by § 323.3(a)(1) shall be filed at least 60 days, before the intended termination or suspension.

§ 323.6 General requirements for notices.

(a) Each notice filed under this part shall, unless otherwise specified, conform to the procedural rules of general applicability in Subpart A of Part 302 of this chapter.

(b) Each notice filed under this part shall be titled to indicate the point(s) involved, and to indicate whether it is a 30-, 60-, or 90-day notice and whether it involves a termination, a suspension, or a reduction of air transportation.

§ 323.7 Service of notices.

(a) A copy of each notice required by § 323.3 shall be served upon:

(1) The chief executive of the principal city or other unit of local government at the affected point. The principal city is the one named, or previously named, in the section 401 certificate by virtue of which the point qualifies as an eligible point. For points in Alaska or Hawaii that are designated as eligible points without having been listed on a section 401 certificate, the principal city is the most populous municipality at the point.

(2) [Reserved]

(3) The State agency with jurisdiction over transportation by air in the State containing any community required to be served under paragraph (a)(1) of this section. If there is no such State agency, the notice shall be sent to the governor of that State.

(4) The manager of, or other individual with direct supervision over and responsibility for, the airport at any community required to be served under paragraph (a)(1) of this section.

(5) The Postmaster General (marked for the attention of the Assistant General Counsel, Transportation), if the carrier filing the notice is authorized to transport United States mail to or from any community required to be served under paragraph (a)(1) of this section.

(6) Each air carrier providing scheduled service to a non-hub or FAA-designated small hub that is directly affected by the notice.

(7) The DOT Regional Office for the region in which the affected point is located.

(8) Any other person designated by DOT.

(b) [Reserved]

(c) Local communities, State agencies, and airport managers shall be served personally or by registered or certificated mail. All other persons may be served by ordinary mail.

§ 323.8 Exemptions.

Carriers are exempted from the following provisions of the Act or this part:

(a) Section 401(j) of the Act to the extent that that provision would otherwise require them to file a notice when terminating, suspending, or reducing service in foreign air transportation;

(b) Paragraphs (a)(1), (a)(3), and (a)(5) of § 323.3 to the extent that those provisions require them to file a notice when terminating or suspending the domestic leg of an international flight (fill-up service); and

(c) Sections 401(j) and 419 of the Act and all the provisions of this part to the extent that those provisions would otherwise require them to file a notice when terminating or suspending service at an eligible point at which they have been replaced under Part 326 of this chapter. This exemption shall apply only if the carrier terminates or suspends service on, or within 90 days after, the date that the new carrier begins service.

§ 323.9 Objections to notices.

(a) Any person may file an objection requesting DOT to prohibit any termination, suspension, or reduction of air transportation to an eligible point that is the subject of a notice filed under this part.

(b) Objections shall contain:

(1) Identification of the objector, including address and telephone number.

(2) A statement of DOT action requested.

(3) The schedules, routes, carriers, and aircraft types for all air transportation to the affected point other than that proposed to be terminated, suspended, or reduced.

(4) A suggested reasonable level of essential air transportation to the affected point.

(5) [Reserved]

(6) A justification of the suggested level of essential air transportation.

(7) Proof of service on the carrier filing the notice objected to, on all airport managers and State and local governments on whom the notice was filed, and any other person designated by DOT. The proof of service shall include the names of all carriers served and the names and addresses of all other persons served.

(c) Objectors are strongly urged to include in their objections facts to support the suggested level of essential air transportation (e.g., traffic and enplanement data, other market studies, facts descriptive of the point's isolation or dependence on air transportation).

(Approved by the Office of Management and Budget under control number 3024-0030)

§ 323.10 Time for filing objections.

(a) Objections shall be filed not later than:

(1) 12 days from the date of filing of a 30-day notice;

(2) 15 days from the date of filing of a 60-day notice; or

(3) 20 days from the date of filing of a 90-day notice.

(b) The Department may accept late-filed objections, upon motion, for good cause shown.

(c) Whenever a notice has been filed earlier than required under § 323.5, the Department may extend the time for filing an objection to that notice.

§ 323.11 Answers to objections.

(a) Any person may file an answer to an objection filed under this part.

(b) An answer must be filed not later than 7 business days after the filing of the objection to which it responds. Late-filed answers may be allowed, and extensions of filing time granted, by the Department for the same reasons as for objections.

(c) An answer may contain the same type of facts and discussion permitted for objections under this part, and must contain:

(1) Proof of service on the objector, on all persons on whom the objection was required to be served, and on any other person designated by the Department. The proof of service shall include the names and addresses of all persons served.

(2) Identification of the answering party, including address and telephone number.

(Approved by the Office of Management and Budget under control number 3024-0030)

§ 323.12 General requirements for objections and answers.

(a) Each objection and answer filed under this part shall, unless otherwise specified, conform to the procedural rules of general applicability in Subpart A of Part 302 of this chapter.

(b) Each objection shall be titled "Objection to Termination, Suspension, or Reduction of Air Service," and shall identify the notice to which it responds. Each answer shall be titled "Answer to Objection to Termination, Suspension, or Reduction of Air Service," and shall identify the objection to which it responds.

§ 323.13 DOT actions.

(a) If an objection has been filed under this part, DOT will dispose of the objection by order.

(b) If no objection has been filed within the time allowed by § 323.10(a), DOT may:

- (1) By order prohibit a termination, suspension, or reduction that reasonably appears to deprive any eligible point of essential air transportation;
- (2) Issue a notice or a final order that it will take no action on a notice filed under § 323.3; or
- (3) Take no action.

§ 323.14 Temporary suspension authority for involuntary interruption of service.

(a) Any air carrier may temporarily suspend service without filing a notice under § 323.3 for any interruption of service that the carrier cannot reasonably be expected to foresee or control, such as rules, standards, or other action, or inaction, of the Administrator of the Federal Aviation Administration or of a foreign government, emergency measures, strikes, weather conditions, construction work on airports, or disasters. However, the provisions of this paragraph shall apply to interruptions due to airport inadequacies only if the carrier is unable to serve the point through any airport convenient to the point with the type of equipment last regularly used to serve the point.

(b) In the case of an interruption of service caused by a strike, the carrier shall give immediate notice of the interruption to DOT. Suspension authority under this section due to a strike shall expire 90 days after employees return to work.

(c) If service to a point is interrupted for more than 3 consecutive days for reasons beyond the carrier's control other than a strike, the holder shall give notice to DOT within 3 days following the date of first interruption, setting forth the date of first interruption and a full statement of the reasons for the interruption.

(d) The notice required by paragraph (b) or (c) of this section shall be marked for the attention of the Director, Office of Essential Air Service.

(Approved by the Office of Management and Budget under control number 3024-0030)

§ 323.15 Report to be filed after strikes.

(a) Within 15 days following resumption of service after a strike, an air carrier shall file a report with DOT containing a list of all flights that were canceled, the date they were canceled, and the date service was resumed.

(b) The report shall be marked for the attention of the Director, Office of Essential Air Service.

(Approved by the Office of Management and Budget under control number 3024-0030)

§ 323.16 Listings in schedule publications.

Each air carrier filing a notice under paragraphs (a)(2), (a)(4), (a)(5), or (c) of § 323.3 shall continue to list the affected flights in all generally-distributed schedule publications in which the flight was listed before the notice. The listings shall continue until DOT permits the flights to be discontinued. The listings may include a notice stating that the flights are "to be discontinued as of (date) subject to government approval."

§ 323.17 Delays in discontinuing service.

If transportation that is the subject of a notice under this part is not discontinued within 90 days of the intended date stated in the notice, a new notice must be filed before the service may be discontinued. However, if DOT requires the carrier to provide service beyond the stated date, the carrier need not file a new notice if it discontinues the service within 90 days after DOT permits it to do so.

§ 323.18 Carriers' obligations when terminating, suspending, or reducing air service.

Any air carrier that terminates, suspends, or reduces air service, whether or not subject to the notice requirements of this part, shall make reasonable efforts to contact all passengers holding reservations on the affected flights to inform them of the flights' cancellation.

PART 324—PROCEDURES FOR COMPENSATING AIR CARRIERS FOR LOSSES

Sec.

- 324.1 Applicability.
- 324.2 Application for compensation for losses.
- 324.3 Procedures after receipt of application.
- 324.4 Informal conference procedures.
- 324.5 Participants in the conference.
- 324.6 Statement of confidentiality.
- 324.7 Post-conference procedure.
- 324.8 Effect of conference agreements.
- 324.9 Procedure for making advance payments.
- 324.10 Liability of carrier for excess payments.
- 324.11 Conformity with Subpart A of Part 302.

Authority: Secs. 204, 407, and 419 of Pub. L. 85-726, as amended, 72 Stat. 743, 766, 92 Stat. 1732, 49 U.S.C. 1324, 1377, 1389.

§ 324.1 Applicability.

This part applies to proceedings, under sections 419(a)(7)(B) and 419(a)(7)(C) of the Act, for compensating an air carrier for losses incurred in complying with a DOT or CAB order to continue service.

§ 324.2 Application for compensation for losses.

(a) To receive compensation for its losses incurred in complying with a DOT or CAB order to continue to provide essential air service, an air carrier shall file in the Documentary Services Division an application titled "Application for Compensation for Losses."

(b) The application may be filed after the first 30-day compulsory service period, but shall not be filed later than 90 days after the carrier is allowed to suspend, terminate, or reduce service. It shall include:

- (1) The dates of the compulsory service period covered by the application.
- (2) The amount of compensation that is sought.
- (3) Detailed information as to traffic, revenues, and expenses during the compulsory service period, and any investments that were required to perform the operations during that period.
- (4) Full support for all information.
- (5) The assurances required by § 379.4 of this chapter.

(6) A certification by a responsible officer of the air carrier that the information submitted is true and accurate to the best of his or her knowledge.

(7) A statement acknowledging that any compensation paid in advance under § 324.9 or periodically under § 324.3 is subject to adjustment by DOT.

(c) All information supplied by an air carrier in its application is subject to verification by DOT and DOT authorized auditors.

(d) DOT may dismiss an application if it does not contain the information required by this section and may close the case if a complete application is not filed within 90 days after the prior application was dismissed.

(Approved by the Office of Management and Budget under control number 3024-0034)

§ 324.3 Procedures after receipt of application.

(a) When the application is received before the air carrier has been permitted to institute its intended suspension, termination, or reduction in service, the procedure is as follows:

(1) DOT will issue an order setting an interim rate of compensation to be paid periodically to the carrier. This amount will be subject to DOT's final adjustment after the carrier is allowed to suspend, terminate, or reduce service as it requested.

(2) If the carrier seeks an increase in the amount of the periodic payments, it

must submit another application. DOT may revise the amount of the periodic payments on its own initiative in order to avoid paying excessive interim compensation.

(3) Within 90 days after the carrier is allowed to institute its suspension, termination, or reduction in service, it shall submit another application under § 324.2 so that DOT can make a final adjustment of that carrier's claim.

(b) When the application is received after the air carrier has been permitted to suspend, terminate, or reduce service, the procedure is as follows:

(1) If DOT finds the application adequate to support the compensation requested, it will issue a show-cause order proposing an amount of payment to the carrier.

(2) If DOT finds the application insufficient to support the compensation requested, it may seek more information. If DOT does not agree to the compensation requested, it will send the applicant a statement describing the areas in which it disagrees or finds the information presented insufficient, and will refer the matter to an informal conference under § 324.4.

(3) The applicant may file an answer to the statement of disagreement not later than 15 days after it is received.

(c) Any payment will be considered to be made on the first day that losses compensated by that payment were incurred.

§ 324.4 Informal conference procedures.

(a) When there is disagreement on the amount of compensation that should be paid, DOT will arrange a conference with representatives of the air carrier applicant for the purpose of understanding and resolving the issues and facts in proceedings under this part.

(b) The conference shall be limited to the discussion of, and possible agreement on, the fair and reasonable amount of compensation for losses that should be paid to the air carrier required to continue service under DOT order.

(c) When DOT takes public action on the matter, a written summary of the conference discussion will be filed in the Documentary Services Division and sent to the carrier involved.

§ 324.5 Participants in the conference.

Other than DOT's staff and representatives of the carrier whose losses are in issue, no person may attend unless DOT's staff considers their presence necessary to resolve one or more of the issues under discussion. In such case, their participation shall be limited to such specific issues. No person, however, is required to attend.

§ 324.6 Statement of confidentiality.

All persons in an informal conference, during the period of the conference and until DOT takes public action on the matter, shall strictly protect information obtained in the conference from disclosure except to DOT's and the applicant's concerned employees and counsel. All persons participating in the conference other than DOT staff shall sign a statement in which they agree to so protect the information.

§ 324.7 Post-conference procedure.

(a) If any pertinent issues are not resolved at the conference, the air carrier may request a hearing or the opportunity to submit a written or oral statement to the Department. DOT will grant the request if such action is needed for further clarification and understanding of the issues. Granting of the request will not, however, limit the rights that the carrier might otherwise have under the Act and the rules of practice.

(b) If the carrier has not previously received compensation under this part for providing essential service to the point involved in its application, DOT shall issue a show-cause order proposing an amount of payment to the carrier.

(c) If the carrier has been receiving advance payments under § 324.9 or periodic payments under § 324.3(a)(2), DOT shall issue a show-cause order proposing the final adjustment of the carrier's claim, setting forth DOT's tentative findings of the amount it owes the carrier or the amount the carrier owes DOT.

§ 324.8 Effect of conference agreements.

(a) No agreement or understanding on a rate of compensation that is reached in the conference shall be binding on DOT or any participant.

(b) The carrier will have the right to take other procedural steps, including requesting a hearing, as if no conference had been held.

§ 324.9 Procedure for making advance payments.

(a) At any time after a carrier is ordered to continue service, DOT may, upon its own initiative or on petition by the carrier, order advance payments for a carrier's future losses subject to adjustment upon determination of the final rate.

(b) A carrier's petition shall be titled "Petition for Advance Compensation for Losses."

(c) The carrier shall include with its petition, or will be required by DOT to submit, estimates of the information required under § 324.2(b) and a full

explanation of why it needs compensation in advance. The explanation shall include evidence of the carrier's financial condition and cash-flow prospects which taken together establish the need for an immediate cash infusion in order for service to be continued.

(d) Carriers receiving payments under this section may, absent a filing under § 324.2 of this part, continue to receive the amount of compensation ordered by the CAB or DOT under paragraph (a) of this section. DOT may revise the amount of these payments in order to avoid paying the carrier excessive compensation.

(Approved by the Office of Management and Budget under control number 3024-0034)

§ 324.10 Liability of carrier for excess payments.

(a) If the payments to a carrier exceed the amount authorized by CAB or DOT in its final adjustment, the affected air carrier shall be liable for repayment of the amount of such excess.

(b) If the carrier fails to make the repayment under paragraph (a) of this section, any future payment due that carrier under this chapter shall be applied to such indebtedness or DOT shall use any other means authorized by law to ensure repayment.

(c) Compliance with the provisions of this section shall not deprive a carrier of any right it would otherwise have to contest DOT's final adjustment.

§ 324.11 Conformity with Subpart A of Part 302.

The provisions of Subpart A of Part 302 of this chapter, except for § 302.8 of this chapter and any other provisions that are inconsistent with this part, shall apply to proceedings under this part.

PART 325—ESSENTIAL AIR SERVICE PROCEDURES

Sec.

- 325.1 Purpose.
- 325.2 Applicability.
- 325.3 Definitions.
- 325.4 State and local participation.
- 325.5 Determinations and designations.
- 325.6 Periodic reviews.
- 325.7 Appeal of the determination or designation.
- 325.8 Informal conferences.
- 325.9 Oral arguments.
- 325.10 Modification of the designated level of essential air service.
- 325.11 Form of documents.
- 325.12 Service of documents.
- 325.13 Environmental evaluations and energy information not required.
- 325.14 Conformity with Subpart A of Part 302.

Authority: Secs. 204, 419, Pub. L. 95-726, as amended, 72 Stat. 743, 92 Stat. 1732; 49 U.S.C. 1324, 1389.

§ 325.1 Purpose.

The purpose of this part is to establish procedures to be followed in designating eligible points and in determining essential air transportation levels for eligible points, and in the appeals and periodic reviews of these determinations, under section 419 of the Act.

§ 325.2 Applicability.

This part applies to essential air service determinations for communities designated as eligible under section 419(a) of the Act and to eligible point designations and essential air service determinations for communities that qualify under section 419(b) of the Act. It applies to the gathering of data by the Department, and to the participation of State, local, and other officials and other interested persons in the designation and determination processes.

Note.—Criteria for designating eligible points under section 419(b) are contained in Part 270 of this chapter. Guidelines for deciding essential air service levels are contained in Part 398 of this chapter.

§ 325.3 Definitions.

As used in this part, "eligible point" means:

(a) Any point in the United States, the District of Columbia, and the several territories and possessions of the United States to which any direct air carrier was authorized, under a certificate issued by CAB under section 401 of the Act, to provide air service on October 24, 1978, whether or not such service was actually provided;

(b) Any point in the United States and the several territories and possessions of the United States that was deleted from a section 401 certificate between July 1, 1968 and October 24, 1978, inclusive, and that has been designated as an eligible point under the Act; or

(c) Any other point in Alaska or Hawaii that has been designated as an eligible point under the Act.

§ 325.4 State and local participation.

(a) DOT, on a periodic basis, will send a questionnaire to each eligible point that is served by not more than one certificated air carrier, or is designated as an eligible point under section 419(b) of the Act, or for which DOT is reviewing its essential air service needs. The questionnaire will be addressed to:

(1) The chief executive of the principal city, or other unit of local government at the affected point, that is named or has been previously named in a qualifying section 401 certificate. For points in

Alaska or Hawaii that are named DOT as eligible points without having been listed on a section 401 certificate, the principal city is the most populous municipality at the point;

(2) The individual or entity with direct supervision over and responsibility for the airport at the eligible point; and

(3) The State agency with jurisdiction over air transportation in the State containing the eligible point. If there is no such State agency, the questionnaire will be sent to the governor of that State.

(b) Within 60 days after receipt of the questionnaire, five copies of the response shall be filed in the Documentary Services Division, unless the Department specifies another date. If no response is received within the period, essential air service for that eligible point may temporarily be set at the minimum level prescribed in section 419(f) of the Act.

(c) Any other interested person may, during the 60-day response period, submit information relevant to the essential air service level of that eligible point by filing in the Documentary Services Division, five copies of a document titled with the name of the point involved.

(d) As necessary, the DOT may request additional information to supplement the questionnaire.

(Approved by the Office of Management and Budget under control number 3024-0037)

§ 325.5 Determinations and designations.

(a) Not later than October 24, 1979, after reviewing all information submitted, CAB issued determinations of the essential level of air service for eligible points that, on October 24, 1978, were served by not more than one direct air carrier holding a certificate under section 401 of the Act for scheduled service to the point.

(b) DOT will issue a determination of the essential level of air service for a point within 6 months after each of the following events:

(1) A notice is received that service to an eligible point will be reduced to only one carrier that holds a section 401 certificate;

(2) A point is designated as an eligible point under section 419(b) of the Act and either paragraph (c) of this section, paragraph (d) of this section, or § 325.7(e); or

(3) A review was conducted of essential air service of that point under § 325.6.

(c) Not later than January 1, 1982, CAB designated the communities described in § 270.2(a) and (b) as eligible points or as ineligible.

(d) After January 1, 1982, DOT may designate communities in Alaska or

Hawaii as eligible points if they apply for such designation.

§ 325.6 Periodic reviews.

(a) The Department will start a periodic review of essential air service within 1 year of the date of the previous determination of essential air service for eligible points receiving subsidized service, within 2 years of the date of the previous determination for eligible points in Alaska, and within 3 years of the date of the previous determination for eligible points without subsidized air service.

(b) The review shall be conducted in accordance with the procedures in §§ 325.4, 325.5 and 325.7.

(c) The Department may review the designation under section 419(b) of a community as an eligible point to determine whether that point continues to meet the criteria in part 270 of this chapter.

§ 325.7 Appeal of the determination or designation.

(a) Any person objecting to an essential air service determination may within 60 days after its issuance file in the Documentary Services Division a document titled "Appeal of Essential Service Determination." The appeal shall:

(1) Contain specific objections to the essential air service determination, including support for all such objections;

(2) State how the essential air service determination departs from the guidelines in Part 398 of this chapter or what extraordinary factors justify deviating from those guidelines; and

(3) Describe the level of air service that the appellant believes is essential for that community.

(b) Any person objecting to the designation of a point as ineligible under section 419(b) of the Act may within 60 days after the designation is issued file in the Documentary Services Division a document titled "Appeal of Eligible Point Designation."

(c) The Department shall appoint an appeal panel consisting of three senior employees, to be drawn from the Office of Essential Air Service, the Office of the General Counsel, and the Assistant Secretary for Governmental Affairs. No office shall be represented on an appeal panel by more than one employee. The three-member panel will process the appeal and make a recommendation to the Assistant Secretary for Policy and International Affairs.

(d) An informal conference may be held, or more information may be requested, before the three-member panel makes its recommendation.

(e) The DOT decisionmaker shall decide the appeal after receiving a recommendation from the three-member panel.

(f) If no appeal is filed within the 60-day period, a determination or designation will become final, unless stayed by the Department.

(g) Pending the outcome of an "Appeal of Essential Service Determination," the essential air service for the eligible point involved shall be the level set by the determination issued under § 325.5.

(Approved by the Office of Management and Budget under control number 3024-0037)

§ 325.8 Informal conferences.

(a) If an appeal raises an issue that cannot be satisfactorily resolved on the basis of written submissions, the Department may order that an informal conference be held.

(b) The informal conference will be conducted by a senior DOT employee designated by the Assistant Secretary for Policy and International Affairs.

(c) Any interested person may attend the informal conference.

§ 325.9 Oral arguments.

If some appeals raise issues common to several communities so that expression of diverse viewpoints on these issues would help the Department dispose of them, the parties may be invited to participate in an oral argument at its offices in Washington, D.C.

§ 325.10 Modification of the designated level of essential air service.

(a) Any person may file with DOT a petition titled "Petition for Modification of Essential Air Service Level," asking to modify the essential air service level at a point.

(b) The petition shall identify the point affected, and specifically state the reasons why the petitioner believes the designated essential level is inadequate. It should contain any facts and arguments that support its requests, and describe the level of essential air service that should be substituted.

(c) Any person may, within 30 days after the filing of a petition for modification, file an answer to that petition titled "Answer to Petition for Modification."

(d) After review, the Department may seek more information and the procedures of §§ 325.5 and 325.7 will be followed.

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§ 325.11 Form of documents.

All documents filed under this part shall be filed in the Documentary

Services Division, U.S. Department of Transportation, 400 Seventh Street, S.W., Washington, D.C. 20590, and on their front page state:

(a) The title of the document;

(b) The name of the affected community;

(c) The name, address, and telephone number of a person who can be contacted for further information concerning the subject of the document; and

(d) In the case of a responsive document, the docket number of the document to which it responds.

§ 325.12 Service of documents.

Any person, except one filing individually as a consumer, who files a document under this part, including responses to the questionnaire, shall serve that document upon those listed in § 325.4(a) of this part and upon the following:

(a) The governor of the State in which the eligible point is located;

(b) Each air carrier providing scheduled service to the affected eligible point;

(c) In the case of a responsive document, the one who filed the document to which it responds; and

(d) The U.S. Postal Service, Assistant General Counsel, Transportation Division, Law Department, Washington, D.C. 20260.

§ 325.13 Environmental evaluations and energy information not required.

Notwithstanding any provision of Part 312 or Part 313 of this chapter, a person filing a petition or appeal under this part is not required to file an environmental evaluation or energy information with the application.

§ 325.14 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

PART 326—PROCEDURES FOR BUMPING SUBSIDIZED AIR CARRIERS FROM ELIGIBLE POINTS

Sec.

326.1 Purpose.

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Authority: Secs. 204, 401, 407, 419, and 706, Pub. L. 85-726, as amended, 72 Stat. 743, 754, 763, 766, 788, 92 Stat. 1732; 49 U.S.C. 1324, 1371, 1376, 1377, 1389, 1481.

§ 326.1 Purpose.

The purpose of this part is to establish procedures for an air carrier applying under section 419(a)(11) or (b)(8) of the Act to provide essential air transportation to an eligible point, where it would be displacing another carrier that is providing essential air transportation under a subsidy rate previously established under section 419 of the Act. This part applies even if the applicant is not applying for a subsidy for itself but is merely seeking to terminate the incumbent carrier's subsidy.

§ 326.2 Definitions.

As used in this part:

(a) "Applicant" means an air carrier that files a bumping application.

(b) "Bumping application" means an application by an air carrier proposing to provide essential air transportation at an eligible point and requesting the Department to terminate the subsidy paid to an incumbent carrier for providing essential air transportation at that eligible point. The application may also request a subsidy to provide essential air transportation to that point.

(c) "Eligible point" means:

(1) Any community in the United States, the District of Columbia, and the several territories and possessions of the United States to which any direct air carrier was authorized, under a certificate of public convenience and necessity issued by the Board under section 401 of the Act, to provide passenger air transportation on October 24, 1978, whether or not such service was actually provided;

(2) Any point in the United States and its several territories and possessions that was deleted from a section 401 certificate between July 1, 1968 and October 24, 1978, that has been designated as eligible under the criteria in Part 270 of this chapter; or

(3) Any other point in Alaska or Hawaii that has been designated as an eligible point under Part 270 of this chapter.

(d) "Essential air transportation" means the level of air service that is guaranteed an eligible point under section 419 of the Act and the guidelines in Part 398 of this chapter.

(e) "Hub" means a point annually enplaning more than 0.05 percent of the total annual enplanements in the United States or listed as such by the Department of Transportation

publication "Airport Activity Statistics of Certificated Route Carriers."

(f) "Incumbent carrier" means the air carrier serving an eligible point with subsidy at the time a bumping application is filed.

(g) "Subsidy under section 406" means payments made under section 406 of the Federal Aviation Act, Pub. L. 97-276, or any other appropriation act or continuing resolution that authorizes payments to air carriers based upon rate orders issued under section 406 of the Act.

§ 326.3 Application to bump an incumbent carrier.

(a) To replace an incumbent carrier at an eligible point, an air carrier shall file a bumping application in the Documentary Services Division.

(b) If the incumbent carrier is receiving its subsidy under section 406 of the Act, the application may be filed at any time after January 1, 1983.

(c) If the incumbent carrier is receiving its subsidy under section 419 of the Act, the application may not be filed until the incumbent carrier has been serving the eligible point for at least 2 years.

(d) The application shall include:

- (1) The name and address of the carrier filing the application;
- (2) The name of the incumbent carrier;
- (3) The name of the eligible point involved;

(4) Fitness information, as follows:

(i) If the applicant has already been found by the Department or CAB to be fit, willing, and able to provide scheduled service, it shall cite the most recent order establishing the finding.

(ii) If the applicant has not yet been found by the Department or CAB to be fit, willing, and able to provide a scheduled service, it shall include the fitness information required by Part 204 of this chapter to support such a finding. In making this showing, the applicant may incorporate by reference material submitted in a prior proceeding before the CAB or DOT.

(5) The information required by § 204.6(c) (2) and (3) of this chapter, even if the applicant is not seeking subsidy for itself;

(6) The service pattern proposed, including the hub and hubs to be served from the eligible point, the number of flights to be provided, whether the flights will be nonstop, and the type of aircraft to be employed. If the applicant is basing its application on improved service at the eligible point, it shall state how its proposed service represents an improvement over the incumbent carrier's service;

(7) If the applicant is seeking a subsidy, the assurances required by §§ 379.4 and 382.21 of this chapter;

(8) The earliest date or season that the applicant is prepared to begin service; and

(9) The availability of slots at the hub airport it proposes to serve.

(e) All information supplied by an air carrier in its application is subject to verification by DOT and DOT authorized auditors.

(Approved by the Office of Management and Budget under control number 3024-0063)

§ 326.4 Answers and replies to bumping applications.

(a) Any person may file an answer to an application filed under this part.

(b) To be considered by DOT, an answer should be filed not later than 30 days after the filing of the application to which it responds.

(c) An answer by the incumbent carrier may refute the fitness and reliability of the applicant to provide the essential air transportation, refute its ability to provide the service at the amount of compensation requested, deny that the applicant's proposed service represents a substantial improvement, and/or offer a counterproposal to that offered by the applicant. If the incumbent desires a hearing, it should request it at this time.

(d) An answer by representatives of the eligible point should state whether they consider the service pattern proposed by the applicant to be a substantial improvement in service and the reasons for their views.

(e) Any other carrier may submit a bumping application during the answer period. Such an application should include the information required by § 326.3(d).

(f) Any person may submit a reply to a counterproposal filed under paragraph (c) of this section or to another application filed under paragraph (e) of this section within 15 days of the end of the answer period.

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§ 326.5 Service of applications and answers.

(a) The application shall be served upon:

(1) The chief executive of the principal city or other unit of local government of the eligible point. The principal city is the one named, or previously named, in the section 401 certificate by virtue of which the point qualifies as an eligible point. For points in Alaska or Hawaii that are named as eligible points without having been listed on a section

401 certificate, the principal city is the most populous municipality at the point.

(2) The agency of the State, territory, or possession with jurisdiction over transportation by air in the area containing the eligible point. If there is no such agency, the application shall be served on the Governor of the State, territory, or possession.

(3) The manager of, or other individual with direct supervision over and responsibility for, the airport at the eligible point.

(4) Each air carrier providing scheduled passenger service at the eligible point.

(5) The DOT Regional Office for the region in which the eligible point is located.

(6) Any other person designated by the Department.

(b) Answers to applications and replies to answers shall be served on the persons listed in paragraph (a) of this section, on the applicant, and on the person that filed the answer to which the reply is directed.

§ 326.6 Department action.

(a) After an application is filed under this part and the answer and reply period has elapsed, a rate conference will be held with the applicant or applicants and with the incumbent carrier, if it has filed a counter proposal, to determine the reasonableness of the compensation requested. One or more of the following actions may also be taken:

(1) A conference may be held with the eligible point concerned to determine its view on the relative merits of the present and proposed service pattern.

(2) Additional information may be requested.

(3) The application may be consolidated with the incumbent carrier's rate renegotiation proceeding if the incumbent's rate term is close to expiration.

(4) Additional service and subsidy proposals may be solicited.

(b) After the Department completes its reviews and conferences, and obtains any necessary information, it will take one or more of the following actions:

(1) Issue an order to show cause proposing to grant the application;

(2) Deny the application if the applicant fails to meet the criteria set forth in § 326.7;

(3) Set the application for an oral evidentiary hearing under the following circumstances:

(i) There are material facts in dispute;

(ii) These facts are of decisional significance; and

(iii) The Department finds that the disputed facts can best be resolved in an oral evidentiary hearing.

(4) Set the application for oral arguments before the Department.

§ 326.7 Standards for decision.

(a) DOT will not grant an application under this part unless:

(1) It finds, or previously found, that the applicant is fit, willing, and able to provide scheduled air transportation;

(2) It finds that the applicant will provide the essential air transportation at the eligible point in a reliable manner; and

(3) If the incumbent carrier is receiving its subsidy under section 419 of the Act, the applicant shows by a preponderance of the evidence that its proposal will result in either of the following:

(i) A substantial improvement in the air service being provided the eligible point with no increase in subsidy; or

(ii) A substantial decrease in the amount of subsidy that will be required to provide essential air transportation at the eligible point.

(b) To be considered substantial, the proposed decrease in the amount of subsidy should be at least \$50,000 per year or 10 percent of the incumbent carrier's subsidy rate, whichever is greater.

(c) In deciding whether a proposed service pattern represents a substantial improvement in air service, DOT will consider the following factors:

(1) Which hub or hubs the applicant proposes to serve from the eligible point;

(2) The number of stops that the applicant will make between the designated hub and the eligible point;

(3) The size and type of aircraft, including whether they are pressurized, that the applicant intends to use at the eligible point;

(4) An increase in the number of

flights or seats that the applicant proposes to provide at the eligible point, if:

(i) The increased frequencies are combined with a change in aircraft so as not to result in the Department paying a subsidy for more than essential air transportation; or

(ii) A petition has been filed under § 325.10 of this chapter to raise the eligible point's essential air transportation level.

(5) Service-related advantages held by the applicant such as computerized reservation systems or joint fares.

(d) In addition to the factors described above, the Department, in evaluating an application, will consider the following:

(1) The desirability of developing an integrated linear system of air transportation whenever such a system most adequately meets the air transportation needs of the eligible point involved;

(2) The experience of the applicant in providing scheduled air service in the vicinity of the eligible point involved;

(3) The relative efficiency of the aircraft that the competing carriers use or propose to use;

(4) The relative financial strength of the competing carriers;

(5) The time necessary for the applicant to begin providing the service it proposes;

(6) The performance of the incumbent carrier in serving the eligible point involved;

(7) The amount of time that the incumbent carrier was on the subsidy rate to question;

(8) The effect of granting the bumping application on other points in the incumbent carrier's system;

(9) The availability of slots for the

applicant at the hub or hubs that it proposes to serve; and

(10) In Alaska, the experience of the applicant in providing scheduled air service, or significant patterns of nonscheduled air service under Part 298 of this chapter, in that State.

(e) In evaluating the standards described above, the Department will give great weight to the views of representatives of the eligible point involved.

§ 326.8 Transition from the incumbent carrier to the applicant.

(a) If an applicant is successful in its bid to replace an incumbent carrier and receive a subsidy for serving the eligible point, it shall notify DOT and the incumbent carrier of the date that it is prepared to begin service at the eligible point. It shall allow the incumbent 45 days to close down its operation at the eligible point, unless another date is agreed on.

(b) The incumbent carrier shall continue service at the eligible point until the successful applicant begins service there.

(c) The Department will continue to pay the subsidy to the incumbent carrier for at least 45 days after it grants the bumping application, unless the two carriers agree to a different date for the transfer of service. DOT will continue to pay the subsidy to the incumbent carrier thereafter until the successful applicant begins service at the eligible point.

§ 326.9 Conformity with Subpart A of Part 302.

Except where they are inconsistent, the provisions of Subpart A of Part 302 of this chapter shall apply to proceedings under this part.

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