

DOE Procedures for Administrative Adjudication of Civil Penalty Actions

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DOE Procedures for Administrative Adjudication of Civil Penalty Actions

1) Applicability.

These procedures apply to a civil penalty action in which formal administrative proceedings are authorized under the Energy Policy and Conservation Act (EPCA), as amended (42 U.S.C. § 6303(d)(2)). These procedures do not apply to the adjudication of the validity of any Department of Energy (DOE) rule or other requirement under the U.S. Constitution, the Administrative Procedure Act, or any other law.

2) Terms used herein.

The following definitions apply in these procedures:

Administrative law judge or *ALJ* means an individual appointed pursuant to the provisions of 5 U.S.C. § 3105.

Agency attorney means the Assistant General Counsel for Enforcement or an attorney that he or she designates. An agency attorney will not include—

- (1) Any attorney in the Office of the General Counsel who advises the DOE Decision Maker regarding an initial decision or any appeal to the DOE Decision Maker; or
- (2) Any attorney who is supervised in a civil penalty action by a person who provides such advice to the DOE Decision Maker in that action or a factually related action.

Attorney means any person who is eligible to practice law in and is a member in good standing of the bar of the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia and is not under any order suspending, enjoining, restraining, disbaring, or otherwise restricting him or her in the practice of law.

DOE Decision Maker means the Secretary, acting in the capacity of the Decision Maker on appeal, or any person to whom the Secretary has delegated the decision-making authority in a civil penalty action. As used in these procedures, the DOE Decision Maker is the official authorized to issue a final decision and order of the Secretary in a civil penalty action.

Ex parte communication means any off-the-record communication by one party, its affiliate, or its representative to the ALJ or DOE Decision Maker without the presence of the other party, its affiliate, or its representative.

Mail includes regular First-Class U.S. mail service, U.S. certified mail, U.S. registered mail, UPS, FedEx, and other commercial delivery services.

Party means the respondent or DOE.

Person means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or governmental authority. It includes a trustee, receiver, assignee, successor, or similar representative of any of those entities.

Personal delivery includes hand delivery or use of a contract or express messenger service, including

an overnight express courier service.

Pleading means a complaint, answer, motion, and any amendment of these documents permitted in these procedures as well as any other written or electronic submission to the ALJ or a party during the course of the hearing proceedings.

Respondent means the person named in a Notice of Proposed Civil Penalty, order, or complaint.

Secretary means the Secretary of DOE.

Verified email is the email address provided by the party. If a party does not provide an email address, then a verified email is an email account that has been shown to the satisfaction of the ALJ to be active and belonging to the recipient of an email.

3) Separation of functions and *ex parte* communication.

- a) An agency employee engaged in the performance of investigative or prosecutorial functions in a civil penalty action must not, in that case or a factually related case, participate or give advice in a decision by the ALJ or by the DOE Decision Maker on appeal, except as counsel or a witness in the proceedings.
- b) The General Counsel or an agency attorney not covered by paragraph (a) of this section may advise the DOE Decision Maker regarding an initial decision or any appeal in a civil penalty action to the DOE Decision Maker.
- c) The parties, their representatives, and other interested persons must not engage in *ex parte* communications on the merits of a case with the ALJ or DOE Decision Maker.

4) Appearances and rights of parties.

- a) At a prehearing conference or other procedural meeting convened by an ALJ, any party may appear and be heard in person, by telephone, or by video telecommunication, as determined by the ALJ.
- b) Any party, witness, attorney, or representative may appear and be heard in person or by video telecommunication.
- c) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party and may be examined by that attorney or representative in any proceeding governed by these procedures.
- d) An attorney or representative who represents a respondent and has not previously filed a pleading in the matter must file a notice of appearance in the action personally, by verified email address or other service allowed by the ALJ, except as otherwise provided, and must serve a copy of the notice of appearance on each party, in the manner provided in section 5, before participating in any proceeding governed by these procedures. The attorney or representative must include the name, address, telephone number, and email address of the attorney or representative in the notice of appearance.
- e) A respondent who is not represented by an attorney or representative must provide written notice of the respondent's name, address, telephone number, and e-mail address to the ALJ and the agency attorney.

5) Filing of documents and service.

- a) **General.** This section governs filing of documents under these procedures.
- b) **Type of service.** Absent exceptional circumstances, all submissions to the ALJ or Enforcement Docket Clerk, as provided in these procedures or otherwise, must be filed electronically by email at OHA.filings@hq.doe.gov. Absent exceptional circumstances, as determined by the ALJ, service of documents must be made electronically, by verified email. The ALJ may grant permission to file via mail, or personal delivery, and in such instances, any submissions made in hard copy will not be returned.
- c) **Date of filing.** Subject to the filing requirements of paragraph (b) of this section, the date of filing will be as follows:
 - 1) When sent by email, the date of transmission.
 - 2) If the ALJ grants permission to serve by personal delivery, the date of personal delivery.
 - 3) If the ALJ grants permission to serve or file by mail, the mailing date stated on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.
 - 4) The day of the event that triggers the deadline is not counted. All other days—including intermediate Saturdays, Sundays, federal holidays, or observed federal holidays—are counted, unless the period ends on a Saturday, Sunday, federal holiday, or observed federal holiday. In that circumstance, then the deadline falls on the next day that is not a Saturday, Sunday, federal holiday, or observed federal holiday.
- d) **Service of documents filed with the Enforcement Docket Clerk or ALJ.** A person must serve a copy of any document filed with the Enforcement Docket Clerk on each party and the ALJ. Service on a party's attorney of record or a party's designated representative is service on the party.
- e) **Additional time after service by mail.** Whenever a person is required to perform an act, to cease and desist therefrom, or to initiate a proceeding under these procedures within a prescribed period of time, and notice or performance is served solely by mail, 5 days will be added to the prescribed period.

6) Administrative law judges.

- a) **Powers of an ALJ.**
 - 1) In accordance with these procedures, an ALJ may:
 - i. Give notice of, and hold, prehearing conferences and hearings.
 - ii. Issue scheduling orders and other appropriate orders regarding discovery or other matters that come before them consistent with these procedures.
 - iii. Administer oaths and affirmations.

- iv. Issue subpoenas authorized by law.
- v. Rule on offers of proof.
- vi. Receive relevant and material evidence.
- vii. Regulate the course of the hearing in accordance with these procedures.
- viii. Hold conferences to settle or to simplify the issues on their own motion or by consent of the parties.
- ix. Rule on procedural motions and requests.
- x. Make findings of fact and conclusions of law, determine an appropriate civil penalty, and issue an initial decision.
- xi. Strike unsigned documents unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
- xii. Order payment of witness fees in accordance with section 28.

b) *Limitations on the power of the ALJ.*

1) The ALJ may not:

- i. Issue an order of contempt.
- ii. Award costs to any party.
- iii. Impose any sanction not specified in these procedures.
- iv. Adopt or follow a standard of proof or procedure contrary to that set forth in these procedures.
- v. Decide issues involving the validity of a DOE regulation, order, or other requirement under the U.S. Constitution, the Administrative Procedure Act, EPCA, or other law.

2) This section does not preclude an ALJ from issuing an order that bars a person from a specific proceeding based on a finding of obstreperous or disruptive behavior or for filing false pleadings to the ALJ in that specific proceeding while that proceeding continues for the parties not barred.

c) ***Disqualification.*** The ALJ may disqualify himself or herself at any time. In accordance with the filing requirements of section 5, a party may file a motion requesting that an ALJ be disqualified from the proceedings pursuant to section 18(f)(6).

7) Complaint.

a) ***Filing.*** The agency attorney will file a complaint with the Enforcement Docket Clerk to start the

hearing process.

b) **Contents.** A complaint must set forth the facts alleged, any statute, regulation, or order allegedly violated by the respondent, and the proposed civil penalty in sufficient detail to provide notice of any factual or legal allegation and proposed civil penalty.

8) Answer.

a) **Filing.** A respondent must file a written answer to the complaint in accordance with section 5 or may file a written motion pursuant to section 18 instead of filing an answer, not later than 30 days after service of the complaint. Subject to paragraph (c) of this section, the answer may be in the form of a letter but must be dated and signed by the person responding to the complaint. An answer may be typewritten, or legibly handwritten.

b) **Contents.** An answer must specifically state any affirmative defense that the respondent intends to assert at the hearing, including any additional test data or other information upon which the respondent bases such a defense. A person filing an answer may include a brief statement of any relief requested in the answer.

c) **Specific denial of allegations required.** A person filing an answer must admit, deny, or state that the person is without sufficient knowledge or information to admit or deny, each numbered paragraph of the complaint. Any statement or allegation contained in the complaint that is not specifically denied or noted as without sufficient knowledge or information to admit or deny in the answer may be deemed an admission of the truth of that allegation. A general denial of the complaint is deemed a failure to file an answer.

d) **Failure to file answer.** A person's failure to timely file an answer without good cause, as determined by the ALJ, will be deemed an admission of the truth of each allegation contained in the complaint.

9) Consolidation and separation of cases.

a) **Consolidation.** If two or more actions involve common questions of law or fact, the ALJ may do the following:

- 1) Order a joint hearing or trial on any or all such questions.
- 2) Order the consolidation of such actions.
- 3) Otherwise make such orders concerning the proceedings as may tend to avoid unnecessary costs or delay.

b) **Separate trials.** The ALJ, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, or of any separate issue, or any number of claims or issues.

10) Notice of hearing.

a) **Notice.** The ALJ must give each party at least 60 days' notice of the date, time, and location of the hearing. With the consent of the ALJ, the parties may agree to hold the hearing on an earlier date than

the date specified in the notice of hearing.

b) ***Date, time, and location of the hearing.*** The ALJ to whom the proceedings have been assigned must set a reasonable date, time, and location for the hearing. The ALJ must consider the need for discovery and any joint procedural or discovery schedule submitted by the parties when determining the hearing date. The ALJ may elect to conduct the hearing via video conferencing.

11) Extension of time.

a) ***Oral requests.*** The parties may agree to extend for a reasonable period the time for filing a document under these procedures. If the parties agree, the ALJ must grant one extension of time to each party. The party seeking the extension of time must submit a draft order to the ALJ to be signed by the ALJ. At their discretion, the ALJ may grant additional oral requests for an extension of time where the parties agree to the extension.

b) ***Written motion.*** A party must file a written motion for an extension of time not later than seven days before the document is due unless the party shows good cause for the late filing. The ALJ may grant the extension of time if the party shows good cause.

c) ***Request for continuance of hearing.*** Either party may request in writing a continuance of the date of a hearing, for good cause shown, no later than seven days before the scheduled date of the hearing. Good cause does not include a scheduling conflict involving the parties or their attorneys which by due diligence could have been foreseen.

d) ***Failure to rule.*** If the ALJ fails to rule on a written motion for an extension of time by the date the document was due, the motion for an extension of time is deemed granted for 20 days after the original date the document was to be filed. If the ALJ fails to rule on a request for continuance by the scheduled hearing date, the request is deemed granted for 10 days after the scheduled hearing date.

12) Intervention.

a) A person may file a motion for leave to intervene as a party in a civil penalty action. The person must file a motion for leave to intervene not later than 10 days before the hearing unless the person shows good cause for the late filing.

b) If the ALJ finds that intervention will not unduly broaden the issues or delay the proceedings, the ALJ may grant a motion for leave to intervene if the person will be bound by any order or decision entered in the action or the person has a property, financial, or other legitimate interest that may not be addressed adequately by the parties. The ALJ may determine the extent to which an intervenor may participate in the proceedings.

13) Amendment of pleadings.

a) ***Filing and service.*** A person may file an amendment to any document. A party must file the amendment with the ALJ and all parties to the proceeding.

b) ***Time.*** A party may amend its pleading once as a matter of course as follows:

- 1) Not later than 45 days before the scheduled date of a hearing, a party may amend a complaint or an answer without the consent of the ALJ.

- 2) Less than 45 days before the scheduled date of a hearing, the ALJ may allow amendment of a complaint or an answer only for good cause shown in a motion to amend.

c) **Responses.** The ALJ must allow a reasonable time, but not more than 20 days from the date of filing, for other parties to respond if an amendment to a complaint, answer, or other pleading has been filed with the ALJ.

14) Withdrawal of complaint or request for hearing.

At any time before or during a hearing, an agency attorney may withdraw a complaint or a respondent may withdraw a request for a hearing without the consent of the ALJ.

15) Waivers.

Waivers of any rights provided by statute or regulation must be in writing or by stipulation made at a hearing and entered into the record. The parties must set forth the precise terms of the waiver and any conditions.

16) No creation of substantive right.

Failure by the DOE to comply with timing requirements under these ALJ procedures does not create a substantive right for any party to overturn a decision or order issued hereunder.

17) Joint procedural or discovery schedule.

a) **General.** The parties may agree to submit a schedule for filing all prehearing motions, a schedule for conducting discovery in the proceedings, and a schedule that will govern all prehearing motions and discovery in the proceedings.

b) **Form and content of schedule.** If the parties agree to a joint procedural or discovery schedule, one of the parties must file the joint schedule with the ALJ, setting forth the dates to which the parties have agreed, and must serve a copy of the joint schedule on each party.

- 1) The joint schedule may include, but need not be limited to, requests for discovery, objections to discovery requests, responses to discovery requests to which there are no objections, submission of prehearing motions, responses to prehearing motions, exchange of exhibits to be introduced at the hearing, and a list of witnesses that may be called at the hearing.

- 2) Each party must sign any original joint schedule to be filed with the ALJ.

c) **Time.** The parties may agree to submit all prehearing motions and responses and may agree to close discovery in the proceedings under the joint schedule within a reasonable time before the date of the hearing, but not later than 15 days before the hearing.

d) **Order establishing joint schedule.** The ALJ must approve the joint schedule filed by the parties. One party must submit a draft order establishing a joint schedule to the ALJ to be signed by the ALJ and filed with the Enforcement Docket Clerk.

e) **Disputes.** The ALJ must resolve disputes regarding discovery or disputes regarding compliance

with the joint schedule as soon as possible so that the parties may continue to comply with the joint schedule.

f) ***Sanctions for failure to comply with joint schedule.*** If a party fails to comply with the ALJ's order establishing a joint schedule, the ALJ may direct that party to comply with a motion or discovery request or, limited to the extent of the party's failure to comply with a motion or discovery request, the ALJ may do the following:

- 1) Strike that portion of a party's pleadings;
- 2) Preclude prehearing or discovery motions by that party;
- 3) Preclude admission of that portion of a party's evidence at the hearing; and/or
- 4) Preclude that portion of the testimony of that party's witnesses at the hearing.

18) Motions.

a) ***General.*** A party applying for an order or ruling not specifically provided in these procedures must do so by motion. A party must comply with the requirements of this section when filing a motion. A party must serve a copy of each motion on each party.

b) ***Form and contents.*** A party must state the relief sought by the motion and the particular grounds supporting that relief. If a party has evidence in support of a motion, the party must attach any supporting evidence, including affidavits, to the motion.

c) ***Filing of motions.*** A motion made prior to the hearing must be in writing or orally on the record. Unless otherwise agreed by the parties or for good cause shown, a party must file any prehearing motion and must serve a copy on each party, not later than 45 days before the hearing. Motions introduced during a hearing may be made orally on the record unless the ALJ directs otherwise. When a motion is submitted orally, the ALJ may issue a bench decision deciding such a motion.

d) ***Response to motions.*** Any party may file a response, with affidavits or other evidence in support of the response, not later than 25 days after service of a written motion on that party. When a motion is made during a hearing, the response may be made at the hearing on the record, orally or in writing, within a reasonable time determined by the ALJ. At the discretion of the ALJ, the moving party may file a reply to the response.

e) ***Rulings on motions.*** The ALJ must rule on all motions as follows:

- 1) ***Discovery motions.*** The ALJ must resolve all pending discovery motions not later than 10 days before the hearing.
- 2) ***Prehearing motions.*** The ALJ must resolve all pending prehearing motions not later than 7 days before the hearing. If the ALJ issues a ruling or order orally, the ALJ must serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the ALJ must issue rulings and orders in writing and must serve a copy of the ruling or order on each party.
- 3) ***Motions made during the hearing.*** The ALJ may issue rulings and orders on motions made during the hearing orally. Oral rulings or orders on motions must be made on the record.

f) ***Specific motions.*** A party may file, but is not limited to, the following motions with the Enforcement Docket Clerk:

- 1) *Motion to dismiss for insufficiency.* A respondent may file a motion to dismiss the complaint for insufficiency instead of filing an answer. If the ALJ denies the motion to dismiss the complaint for insufficiency, the respondent must file an answer not later than 20 days after service of the ALJ's denial of the motion. A motion to dismiss the complaint for insufficiency must show that the complaint fails to state a violation of a DOE requirement. If the ALJ grants the motion to dismiss the complaint for insufficiency, the agency attorney may amend the complaint in accordance with section 13.
- 2) *Motion to dismiss.* A party may file a motion to dismiss, specifying the grounds for dismissal. If an ALJ grants a motion to dismiss in part, the non-moving party may appeal the ALJ's ruling on the motion to dismiss under section 19.
 - i. *Motion to dismiss a complaint.* A respondent may file a motion to dismiss a complaint instead of filing an answer. If the ALJ does not grant the motion to dismiss, the respondent must file an answer and must serve a copy of the answer on each party not later than 20 days after service of the ALJ's ruling or order on the motion to dismiss. If the ALJ grants the motion to dismiss and the proceedings are terminated without a hearing, the agency attorney may file an appeal pursuant to section 19. If required by the decision on appeal, the respondent must file an answer and must serve a copy of the answer on each party not later than 20 days after service of the decision on appeal.
 - ii. *Appropriateness of a motion to dismiss.* A motion to dismiss a complaint is appropriate if:
 - a. The complaint or request for a hearing is frivolous or without merit on its face; or
 - b. The issues presented in the complaint or request for a hearing have been rendered moot by settlement, subsequent events or substantially resolved.
- 3) *Motion for default judgment.* If a party fails to appear at the hearing, the opposing party may make an oral motion for default judgment. The ALJ must grant the motion for default judgment, without conducting the hearing, unless the ALJ determines that the party had good cause for failing to appear at the hearing. If the ALJ determines that the party had good cause for failing to appear at the hearing, the ALJ will reschedule the hearing. If the ALJ determines that the party did not have good cause for failing to appear at the hearing, the ALJ will issue an initial decision, in accordance with section 31, in favor of the moving party. That initial decision may be appealed in accordance with section 32.
- 4) *Motion to strike.* Any party may move to strike any insufficient allegation or defense, or any redundant, immaterial, or irrelevant matter in a pleading. A party must file a motion to strike before a response is required under these procedures or, if a response is not required, not later than 10 days after service of the pleading.
- 5) *Motion for decision.* A party may move for decision, regarding all or any part of the proceedings, at any time before the ALJ has issued an initial decision in the proceedings. A party may include with a motion for decision affidavits as well as any other evidence in

support of the motion. The ALJ must grant a party's motion for decision if the pleadings, depositions, answers to interrogatories, admissions, affidavits, matters that the ALJ has officially noticed, or evidence introduced during the hearing show that there is no genuine issue of material fact and that the party making the motion is entitled to a decision as a matter of law. The party moving for decision has the burden of showing that there is no genuine issue of material fact.

- 6) *Motion for disqualification of the ALJ.* A party may file a motion for disqualification at any time after the ALJ has been assigned to the proceedings but must make the motion as soon as practicable upon learning of the alleged basis for disqualification, and before the ALJ files an initial decision in the proceedings.
 - i. *Motion and supporting affidavit.* A party must state the grounds for disqualification, including, but not limited to, personal bias, pecuniary interest, or other factors supporting disqualification, in the motion for disqualification. A party must submit an affidavit with the motion for disqualification that sets forth, in detail, the matters alleged to constitute grounds for disqualification.
 - ii. *Answer.* If a party responds to a motion for disqualification, such response should be filed not later than 5 days after service of the motion for disqualification.
 - iii. *Decision on motion for disqualification.* The ALJ must render a decision on the motion for disqualification not later than 20 days after the motion has been filed. If the ALJ finds that the motion for disqualification and supporting affidavit show a basis for disqualification, the ALJ must withdraw from the proceedings immediately. If the ALJ finds that disqualification is not warranted, the ALJ must deny the motion and state the grounds for the denial on the record. If the ALJ fails to rule on a party's motion for disqualification within 20 days after the motion has been filed, the motion is deemed granted.
 - iv. *Appeal.* A party may appeal the ALJ's denial of the motion for disqualification in accordance with section 19.

19) Interlocutory appeals.

- a) **General.** Unless otherwise provided in these procedures, a party may not appeal a ruling or decision of the ALJ to the DOE Decision Maker until the initial decision has been entered on the record. A decision or order of the DOE Decision Maker on the interlocutory appeal does not constitute a final order for the purposes of judicial appellate review under 10 C.F.R. § 429.126.
- b) **Interlocutory appeal for cause.** If a party files a written request for an interlocutory appeal for cause with the ALJ, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the ALJ issues a decision on the request. If the ALJ grants the request, the proceedings are stayed until the DOE Decision Maker issues a decision on the interlocutory appeal. The ALJ must grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.
- c) **Interlocutory appeals of right.** If a party notifies the ALJ of an interlocutory appeal of right, the proceedings are stayed until the DOE Decision Maker issues a decision on the interlocutory appeal. A party may file an interlocutory appeal, without the consent of the ALJ, before an initial decision has

been entered in the following cases:

- 1) A ruling or order by the ALJ barring a person from the proceedings.
 - 2) Failure of the ALJ to dismiss the proceedings in accordance with section 14.
 - 3) A ruling or order by the ALJ in violation of section 6(b).
 - 4) A ruling or order by the ALJ regarding public access to a particular docket or documents.
- d) ***Procedure.*** Not later than 10 days after the ALJ's decision forming the basis of an interlocutory appeal of right or not later than 10 days after the ALJ's decision granting an interlocutory appeal for cause, a party must file a notice of interlocutory appeal, with an appeal brief and supporting documents, and the party must serve a copy of the notice, appeal brief, and supporting documents on each party. Not later than 10 days after such service, a party may file a response brief and supporting documents, if any, and the party must serve a copy of the response brief and supporting documents on each party. The DOE Decision Maker must render a decision on the interlocutory appeal, on the record and as a part of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.
- e) ***Frivolous appeals.*** The DOE Decision Maker may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals in a proceeding in which there have been frivolous, repetitive, or dilatory interlocutory appeals.

20) Discovery.

- a) ***Initiation of discovery.*** Any party may initiate discovery described in this section, without the consent or approval of the ALJ, at any time after a complaint has been filed in the proceedings.
- b) ***Methods of discovery.*** The following methods of discovery are permitted under this section: depositions on oral examination or written questions of any person; written interrogatories directed to a party; requests for production of documents or tangible items to any person; and requests for admission by a party. A party is not required to file written discovery requests and responses with the ALJ. In the event of a discovery dispute, a party must attach a copy of these documents in support of a motion made under this section.
- c) ***Service on the agency.*** A party must serve each discovery request directed to the agency or any agency employee on the agency attorney of record.
- d) ***Time for response to discovery requests.*** Unless otherwise directed by these procedures, agreed by the parties, or by order of the ALJ, a party must respond to a request for discovery, including filing objections to a request for discovery, not later than 30 days after service of the request.
- e) ***Scope of discovery.*** Subject to the limits on discovery set forth in paragraph (f) of this section, a party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding. A party may discover information that relates to the claim or defense of any party including the existence, description, nature, custody, condition, and location of any document or other tangible item and the identity and location of any person having knowledge of discoverable matter. A party may discover facts known, or opinions held, by an expert who any other party expects to call to testify at the hearing. A party may not object to a discovery request on the basis that the information

sought would not be admissible at the hearing if the information sought during discovery is reasonably calculated to lead to the discovery of admissible evidence.

f) **Limiting discovery.** The ALJ must limit the frequency and extent of discovery permitted by this section if a party shows that –

- 1) The information requested is cumulative or repetitious;
- 2) The information requested can be obtained from another less burdensome and more convenient source;
- 3) The party requesting the information has had ample opportunity to obtain the information through other discovery methods permitted under this section; or
- 4) The method or scope of discovery requested by the party is unduly burdensome or expensive.

g) **Confidential orders.** A party or person who has received a discovery request for information that is related to a trade secret, confidential or sensitive material, competitive or commercial information, proprietary data, or information on research and development, may file a motion for a confidential order with the ALJ and must serve a copy of the motion for a confidential order on each party.

- 1) The party or person making the motion must show that the confidential order is necessary to protect the information from disclosure to the public.
- 2) If the ALJ determines that the requested material is not necessary to decide the case, the ALJ must preclude any inquiry into the matter by any party.
- 3) If the ALJ determines that the requested material may be disclosed during discovery, the ALJ may order that the material may be discovered and disclosed under limited conditions or may be used only under certain terms and conditions.
- 4) If the ALJ determines that the requested material is necessary to decide the case and that a confidential order is warranted, the ALJ must provide the following:
 - i. An opportunity for review of the document by the parties off the record.
 - ii. Procedures for excluding the information from the record.
 - iii. An order that the parties must not disclose the information in any manner and the parties must not use the information in any other proceeding.

h) **Protective orders.** A party or a person who has received a request for discovery may file a motion for protective order and must serve a copy of the motion for protective order on each party. The party or person making the motion must show that the protective order is necessary to protect the party or the person from annoyance, embarrassment, oppression, or undue burden or expense. As part of the protective order, the ALJ may do the following:

- 1) Deny the discovery request.
- 2) Order that discovery be conducted only on specified terms and conditions, including a

designation of the time or place for discovery or a determination of the method of discovery.

3) Limit the scope of discovery or preclude any inquiry into certain matters during discovery.

i) ***Duty to supplement or amend responses.*** A party who has responded to a discovery request has a duty to supplement or amend the response, as soon as the information is known, as follows:

- 1) A party must supplement or amend any response to a question requesting the identity and location of any person having knowledge of discoverable matters.
- 2) A party must supplement or amend any response to a question requesting the identity of each person who will be called to testify at the hearing as an expert witness and the subject matter and substance of that witness's testimony.
- 3) A party must supplement or amend any response that was incorrect when made or any response that was correct when made but is no longer correct, accurate, or complete.

j) ***Depositions.*** The following procedures apply to depositions taken pursuant to this section:

- 1) *Form.* A deposition must be taken on the record and reduced to writing. The person being deposed must sign the deposition unless the parties agree to waive the requirement of a signature.
- 2) *Administration of oaths.* Within the United States, or a territory or possession subject to the jurisdiction of the United States, a party must take a deposition before a person authorized to administer oaths by the laws of the United States or authorized by the law of the place where the examination is held. Outside the United States, a party will take a deposition in any manner allowed by the Federal Rules of Civil Procedure (28 U.S.C. App.).
- 3) *Notice of deposition.* A party must serve a notice of deposition, stating the time and place of the deposition and the name and address of each person to be examined, on the person to be deposed, on the ALJ, and on each party not later than 7 days before the deposition. A party may serve a notice of deposition less than 7 days before the deposition only with consent of the ALJ and for good cause shown. If a subpoena duces tecum is to be served on the person to be examined, the party must attach a copy of the subpoena duces tecum that describes the materials to be produced at the deposition to the notice of deposition.
- 4) *Use of depositions.* An opposing party may use any part or all of a party's responses to depositions at a hearing authorized under these procedures to the extent that the response is relevant, material, and not repetitious. The deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition.

k) ***Interrogatories.*** A party, the party's attorney, or the party's representative may sign the party's responses to interrogatories. A party must answer each interrogatory separately and completely in writing. If a party objects to an interrogatory, the party must state the objection and the reasons for the objection. An opposing party may use any part or all of a party's responses to interrogatories at a hearing authorized under these procedures to the extent that the response is relevant, material, and not repetitious.

- 1) A party must not serve more than 30 interrogatories to each other party. Each subpart of an interrogatory will be counted as a separate interrogatory.
 - 2) Parties seeking to serve more than 30 interrogatories must file a motion for leave to serve additional interrogatories with the ALJ and must serve a copy of the motion on each party. The ALJ may grant up to 10 more interrogatories only if the party shows good cause for the party's failure to inquire about the information previously and that the information cannot reasonably be obtained using less burdensome discovery methods or be obtained from other sources.
- l) ***Requests for admission.*** A party may serve a written request for admission of the truth of any matter within the scope of discovery under this section or the authenticity of any document described in the request. A party must set forth each request for admission separately. A party must serve copies of documents referenced in the request for admission unless the documents have been provided or are reasonably available for inspection and copying.
- 1) ***Time.*** A party's failure to respond to a request for admission, in writing and signed by the attorney or the party, not later than 30 days after service of the request, is deemed an admission of the truth of the statement or statements contained in the request for admission. The ALJ may determine that a failure to respond to a request for admission is not deemed an admission of the truth if a party shows that the failure was due to circumstances beyond the control of the party or the party's attorney.
 - 2) ***Response.*** A party may object to a request for admission and must state the reasons for objection. A party may specifically deny the truth of the matter or describe the reasons why the party is unable to truthfully deny or admit the matter. If a party is unable to deny or admit the truth of the matter, the party must show that the party has made reasonable inquiry into the matter or that the information known to, or readily obtainable by, the party is insufficient to enable the party to admit or deny the matter. A party may admit or deny any part of the request for admission. If the ALJ determines that a response does not comply with the requirements of these procedures or that the response is insufficient, the matter is deemed admitted.
 - 3) ***Effect of admission.*** Any matter admitted or deemed admitted under this section is conclusively established for the purpose of the hearing and appeal.
- m) ***Motion to compel discovery.*** A party may move to compel discovery if a person refuses to answer a question during a deposition, if a party fails or refuses to answer an interrogatory, if a person gives an evasive or incomplete answer during a deposition or when responding to an interrogatory, or if a party fails or refuses to produce documents or tangible items. During a deposition, the proponent of a question may complete the deposition or may adjourn the examination before moving to compel if a person refuses to answer.
- n) ***Failure to comply with a discovery order or order to compel.*** If a party fails to comply with a discovery order or an order to compel, or makes false or misleading responses to any discovery request, the ALJ, limited to the extent of the party's failure to comply with the discovery order or motion to compel, may do the following:
- 1) Strike that portion of a party's pleadings;

- 2) Preclude prehearing or discovery motions by that party;
- 3) Preclude admission of that portion of a party's evidence at the hearing; and/or
- 4) Preclude that portion of the testimony of that party's witnesses at the hearing.

21) Evidence.

- a) **General.** A party is entitled to present the party's case or defense by oral, documentary, or demonstrative evidence, to submit rebuttal evidence, and to conduct any cross-examination that may be required for a full and true disclosure of the facts.
- b) **Admissibility.** A party may introduce any oral, documentary, or demonstrative evidence in support of the party's case or defense. The ALJ must admit any oral, documentary, or demonstrative evidence introduced by a party, but must exclude irrelevant, immaterial, or unduly repetitious evidence.
- c) **Hearsay evidence.** Hearsay evidence is admissible in proceedings governed by these procedures. The fact that evidence submitted by a party is hearsay goes only to the weight of the evidence and does not affect its admissibility.

22) Standard of proof.

The ALJ may issue an initial decision or may rule in a party's favor only if the decision or ruling is supported by a preponderance of the evidence contained in the record. In order to prevail, the party with the burden of proof must prove the party's case or defense by a preponderance of the evidence.

23) Burden of proof.

- a) Except in the case of an affirmative defense, the burden of proof is on DOE.
- b) Except as otherwise provided by statute or DOE's ALJ procedures, the proponent of a motion, request, or order has the burden of proof.
- c) A party who has asserted an affirmative defense has the burden of proving the affirmative defense.

24) Offer of proof.

A party whose evidence has been excluded by a ruling of the ALJ may offer the evidence for the record on appeal.

25) Public disclosure of evidence.

- a) The ALJ may order that any other information contained in the record be withheld from public disclosure, subject to 10 C.F.R. § 429.7. Any person may object to disclosure of information in the record by filing a written motion to withhold specific information with the ALJ and serving a copy of the motion on each party. The party must state the specific grounds for nondisclosure in the motion.
- b) The ALJ must grant the motion to withhold information in the record if, based on the motion and any response to the motion, the ALJ determines that disclosure would not be in the public interest, as

long as the information is not otherwise required to be made available to the public.

26) Expert or opinion witnesses.

An employee or contractor of DOE may not be called as an expert or opinion witness, for any party other than DOE, in any proceeding governed by these procedures. An employee of a respondent may not be called by an agency attorney as an expert or opinion witness for DOE in any proceeding governed by these procedures to which the respondent is a party.

27) Subpoenas.

a) ***Request for subpoena.*** Although the Office of the Assistant General Counsel for Enforcement has independent authority to issue subpoenas, any party may obtain a subpoena to compel the attendance of a witness at a deposition or hearing, or to require the production of documents or tangible items, from the ALJ who is assigned to the case. The party must complete the subpoena, stating the title of the action and the date and time for the witness's attendance or production of documents or items. The party who obtained the subpoena must serve the subpoena on the witness or the custodian of the documents or tangible items sought to be produced. Requests for subpoenas shall be liberally granted except where the ALJ finds that the issuance of subpoenas would result in evidence or testimony that is repetitious, incompetent, irrelevant, or immaterial to the issues in the case.

b) ***Motion to quash or modify the subpoena.*** A party, or any person upon whom a subpoena has been served, may file a motion to quash or modify the subpoena at or before the time specified in the subpoena for compliance. The applicant must describe, in detail, the basis for the application to quash or modify the subpoena including, but not limited to, a statement that the testimony, document, or tangible evidence is not relevant to the proceeding, that the subpoena is not reasonably tailored to the scope of the proceeding, or that the subpoena is unreasonable and oppressive. A motion to quash or modify the subpoena will stay the effect of the subpoena pending a decision by the ALJ on the motion.

c) ***Enforcement of subpoena.*** Upon a showing that a person has failed or refused to comply with a subpoena, a party may apply to the U.S. district court having jurisdiction to seek judicial enforcement of the subpoena in accordance with 42 U.S.C. § 6299.

28) Witness fees.

a) ***General.*** Unless otherwise authorized by the ALJ, the party who applies for a subpoena to compel the attendance of a witness at a deposition or hearing, or the party at whose request a witness appears at a deposition or hearing, must pay the witness fees described in this section.

b) ***Amount.*** Except for an employee of the agency who appears at the direction of the agency, a witness who appears at a deposition or hearing is entitled to the same fees and mileage expenses as are paid to a witness in a court of the United States in comparable circumstances.

29) Record.

a) ***Exclusive record.*** The request for hearing, complaint, answer, transcript of all testimony in the hearing, all exhibits received into evidence, and all motions, responses to motions, applications, requests, and rulings will constitute the exclusive record for decision of the proceedings and the basis for the issuance of any orders in the proceeding.

b) ***Examination and copying of record.***

Generally. Any non-party interested in reviewing or obtaining a copy of a record may do so only by submitting a Freedom of Information Act (FOIA) request to DOE under 5 U.S.C. § 552, et seq., 49 C.F.R. part 7, and any applicable DOE regulations. Portions of the record may be exempt from disclosure pursuant to FOIA.

30) Conduct of hearings before the ALJ.

a) ***ALJ power to conduct hearings.*** During the hearing, in addition to exercising the powers set forth in section 6(a), the ALJ may take sworn testimony, sequester witnesses, and control the dissemination or reproduction of any record or testimony taken pursuant to this part, including correspondence, or other relevant records or physical evidence including, but not limited to, information retained in computerized or other automated systems in possession of the subpoenaed person.

b) ***Arguments during the hearing.*** During the hearing, the ALJ must give the parties a reasonable opportunity to present arguments on the record supporting or opposing motions, objections, and rulings if the parties request an opportunity for argument. The ALJ may request written arguments during the hearing if the ALJ finds that submission of written arguments is necessary before the ALJ issues the ruling or order.

c) ***Final oral argument.*** At the conclusion of the hearing and before the ALJ issues an initial decision in the proceedings, the parties are entitled to submit oral proposed findings of fact and conclusions of law, exceptions to rulings of the ALJ, and supporting arguments for the findings, conclusions, or exceptions. At the conclusion of the hearing, a party may waive final oral argument.

d) ***Posthearing briefs.*** The ALJ may request written posthearing briefs before the ALJ issues an initial decision in the proceedings. The ALJ must give the parties a reasonable opportunity, not more than 30 days after receipt of the transcript, to prepare and submit the briefs.

31) Initial decision.

a) ***Contents.*** The ALJ must issue an initial decision after the conclusion of the hearing or after the submission of written posthearing briefs, if so ordered. In each written decision, the ALJ must include findings of fact and conclusions of law, and the grounds supporting those findings and conclusions, upon all material issues of fact; the credibility of witnesses; the applicable law; any exercise of the ALJ's discretion; the amount of any civil penalty found appropriate by the ALJ; and a discussion of the basis for any order issued in the proceedings. The ALJ is not required to provide a written explanation for rulings on objections, procedural motions, and other matters not directly relevant to the substance of the initial decision. If the ALJ refers to any previous unreported or unpublished initial decision, the ALJ must make copies of that initial decision available to all parties and the DOE Decision Maker.

b) ***Written decision.*** At the conclusion of the hearing, the ALJ may issue the initial decision orally on the record. The ALJ must issue a written initial decision not later than 60 days after the conclusion of the hearing or submission of the last posthearing brief. The ALJ must serve a copy of the written initial decision on each party and the DOE Decision Maker.

c) ***Order assessing civil penalty.*** Unless appealed pursuant to section 32, the initial decision issued by the ALJ will be considered final. DOE will issue an order assessing civil penalty if the ALJ finds that a violation occurred and determines that a civil penalty is warranted.

d) ***Effect of initial decision.*** An initial decision of an ALJ is persuasive authority in any other DOE regulatory civil penalty action, unless appealed and reversed by the DOE Decision Maker or a court of competent jurisdiction.

32) Appeal from initial decision.

a) ***Notice of appeal.*** Either party may appeal the initial decision by filing a notice of appeal with the Enforcement Docket Clerk. A party must file the notice of appeal not later than 10 days after entry of the oral initial decision on the record or, if there is no oral initial decision, after the service of the written initial decision on the parties and must serve a copy of the notice of appeal on each party. Upon filing of a notice of appeal, the effectiveness of the initial decision is stayed until a final decision and order of the DOE Decision Maker has been entered on the record.

b) ***Issues on appeal.*** A party may appeal only the following issues:

- 1) Whether each finding of fact is supported by a preponderance of the evidence;
- 2) Whether each conclusion of law is made in accordance with applicable law, precedent, and public policy; and
- 3) Whether the ALJ committed any prejudicial errors during the hearing that support the appeal.

c) ***Perfecting an appeal.*** Unless otherwise agreed by the parties, a party must perfect an appeal, not later than 50 days after entry of the oral initial decision on the record or service of the written initial decision on the party, by filing an appeal brief with Enforcement Docket Clerk.

- 1) ***Extension of time by agreement of the parties.*** The parties may agree to extend the time for perfecting the appeal with the consent of the DOE Decision Maker. If the DOE Decision Maker grants an extension of time to perfect the appeal, the DOE Decision Maker will serve a letter confirming the extension of time on each party.
- 2) ***Written motion for extension.*** If the parties do not agree to an extension of time for perfecting an appeal, a party desiring an extension of time may file a written motion for an extension with the DOE Decision Maker and must serve a copy of the motion on each party. The DOE Decision Maker may grant an extension if good cause for the extension is shown in the motion.

d) ***Appeal briefs.*** A party must file the appeal brief with the Enforcement Docket Clerk and must serve a copy of the appeal brief on each party.

- 1) In the appeal brief, a party must set forth, in detail, the party's specific objections to the initial decision or rulings, the basis for the appeal, the reasons supporting the appeal, and the relief requested in the appeal. If the party relies on evidence contained in the record for the appeal, the party must specifically refer in the appeal brief to the pertinent evidence contained in the transcript.

- 2) The DOE Decision Maker may dismiss an appeal, on the DOE Decision Maker's own initiative or upon motion of any other party, where a party has filed a notice of appeal but fails to perfect the appeal by timely filing an appeal brief.

e) **Response brief.** Unless otherwise agreed by the parties, any party may file a response brief not later than 35 days after the appeal brief has been served on that party. The party filing the response brief must serve a copy of the response brief on each party. If the party relies on evidence contained in the record for the response, the party must specifically refer to the pertinent evidence contained in the transcript in the response brief.

- 1) *Extension of time by agreement of the parties.* The parties may agree to extend the time for filing a response brief with the consent of the DOE Decision Maker. If the DOE Decision Maker grants an extension of time to file the response brief, the DOE Decision Maker will serve a letter confirming the extension of time on each party.
- 2) *Written motion for extension.* If the parties do not agree to an extension of time for filing a response brief, a party desiring an extension of time may file a written motion for an extension and will serve a copy of the motion on each party. The DOE Decision Maker may grant an extension if good cause for the extension is shown in the motion.

f) **Other briefs.** The DOE Decision Maker may allow any person to submit an amicus curiae brief in an appeal of an initial decision. A party may not file more than one appeal brief or response brief. A party may petition the DOE Decision Maker, in writing, for leave to file an additional brief and must serve a copy of the petition on each party. The party may not file the additional brief with the petition. The DOE Decision Maker may grant leave to file an additional brief if the party demonstrates good cause for allowing additional argument on the appeal. The DOE Decision Maker will allow a reasonable time for the party to file the additional brief.

g) **Oral argument.** The DOE Decision Maker has sole discretion to permit oral argument on the appeal. On the DOE Decision Maker's own initiative or upon written motion by any party, the DOE Decision Maker may grant the parties an opportunity for oral argument if the DOE Decision Maker finds that oral argument will contribute substantially to the development of the issues on appeal.

h) **Waiver of objections on appeal.** If a party fails to object to any alleged error regarding the proceedings in an appeal or a response brief, the party waives any objection to the alleged error. The DOE Decision Maker is not required to consider any objection in an appeal brief or any argument in the response brief if a party's objection is based on evidence contained in the record and the party does not specifically refer to the pertinent evidence from the record in the brief.

i) **The DOE Decision Maker's decision on appeal.** The DOE Decision Maker will review the briefs on appeal and the record of the proceeding before the ALJ to determine whether the appeal should be granted. The DOE Decision Maker may affirm, modify, or reverse the initial decision, make any necessary findings, or may remand the case for any proceedings that the DOE Decision Maker determines may be necessary.

- 1) The DOE Decision Maker may raise any issue, on the DOE Decision Maker's own initiative, that is required for proper disposition of the proceedings. The DOE Decision Maker will give the parties a reasonable opportunity to submit arguments on the new issues before making a decision on appeal. If an issue raised by the DOE Decision Maker requires the consideration of additional testimony or evidence, the DOE Decision Maker will remand the case to the ALJ

for further proceedings and an initial decision related to that issue. If the DOE Decision Maker raises an issue that is solely an issue of law, or the issue was addressed at the hearing but was not raised by a party in the briefs on appeal, the DOE Decision Maker need not remand the case to the ALJ for further proceedings but has the discretion to do so.

- 2) The DOE Decision Maker will issue the final decision and order on appeal in writing and will serve a copy of the decision and order on each party.
- 3) A final decision and order after appeal is binding precedent in any other civil penalty action unless reversed by a court of competent jurisdiction.

33) Judicial review of a final order.

For violations of a DOE standards or certification requirement, a party may petition for review of a final agency decision of the DOE Decision Maker only to the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia pursuant to 42 U.S.C. § 6303(d)(2)(B). A party seeking judicial review of a final order must file a petition for review not later than 60 days after the date of the final order has been served on the party.