### § 1502.26 Purpose; oral and written testimony; burden of proof.

(a) The objective of a formal evidentiary hearing is the fair determination of relevant facts consistent with the right of all interested persons to participate and the public interest in promptly settling controversial matters affecting the public health and welfare.

(b) Accordingly, the evidence at a hearing is to be developed to the maximum extent through written submissions, including written direct testimony, which may be in narrative or in question-and-answer form.

(1) Direct testimony will be submitted in writing, except on a showing that written direct testimony is insufficient for a full and true disclosure of relevant facts and that the participant will be prejudiced if unable to present oral direct testimony. If the proceeding involves particular issues, each party may determine whether, and the extent to which, each wishes to present direct testimony orally or in writing.

(2) Oral cross-examination of witnesses will be permitted if it appears that alternative means of developing the evidence are insufficient for a full and true disclosure of the facts and that the party requesting oral cross-examination will be prejudiced by denial of the request or that oral cross-examination is the most effective and efficient means to clarify the matters at issue.

(3) Witnesses shall give testimony under oath.

(c) A participant who proposes to substitute a new provision for a provision objected to has the burden of proof in relation to the new provision.

### § 1502.27 Participation of nonparties.

(a) A nonparty participant may—

(1) Attend all conferences (including the prehearing conference), oral proceedings, and arguments;

(2) Submit written testimony and documentary evidence for inclusion in the record;

(3) File written objections, briefs, and other pleadings; and

(4) Present oral argument.

(b) A nonparty participant may not—

(1) Submit written interrogatories; or

(2) Conduct cross-examination.

(c) A person whose petition is the subject of the hearing has the same right as a party.

(d) A nonparty participant will be permitted additional rights if the presiding officer concludes that the participant's interests would not be adequately protected otherwise or that broader participation is required for a full and true disclosure of the facts, but the rights of a nonparty participant may not exceed the rights of a party.

### § 1502.28 Conduct at oral hearings or conferences.

All participants in a hearing will conduct themselves with dignity and observe judicial standards of practice and ethics. They may not indulge in personal attacks, unseemly wrangling, or intemperate accusations or characterizations. Representatives of parties shall, to the extent possible, restrain clients from improprieties in connection with any proceeding. Disrespectful, disorderly, or contumacious language or conduct, refusal to comply with directions, use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct during any hearing shall constitute grounds for immediate exclusion from the proceeding by the presiding officer.

### § 1502.29 Time and place of prehearing conference.

A prehearing conference will commence at the date, time, and place announced in the notice of hearing, or in a later notice, or as specified by the presiding officer in a notice modifying a prior notice. At the prehearing conference, insofar as practicable at that time, the presiding officer will establish the methods and procedures to be used in developing the evidence, determine reasonable time periods for the conduct of the hearing, and designate the times and places for the production of witnesses for direct and cross-examination, if leave to conduct oral examination is granted on any issue.

### § 1502.30 Prehearing conference procedure.

(a) Participants in a hearing are to appear at the prehearing conference

prepared to discuss and resolve all matters specified in paragraph (b) of this section.

(1) To expedite the hearing, participants are encouraged to prepare in advance for the prehearing conference. Participants should cooperate with each other, and should request information and begin preparation of testimony at the earliest possible time. Failure of a participant to appear at the prehearing conference or to raise matters that reasonably could be anticipated and resolved at that time will not delay the progress of the hearing and constitutes a waiver of the rights of the participant regarding such matters as objections to the agreements reached, actions taken, or rulings issued by the presiding officer at or as a result of the prehearing conference and may be grounds for striking the participation under § 1502.16.

(2) Participants shall bring to the prehearing conference the following specific information, which will be filed with the Office of the Secretary under § 1502.23:

(i) Any additional information desired to supplement the submission filed under § 1502.25; the supplement may be filed if approved under § 1502.25.

(ii) A list of all witnesses whose testimony will be offered, orally or in writing, at the hearing, with a full curriculum vitae for each. Additional witnesses may be identified later, with the approval of the presiding officer, on a showing that the witness was not reasonably available at the time of the prehearing conference, that the relevance of the witness's views could not reasonably have been foreseen at that time, or for other good cause shown, as where a previously identified witness is unforeseeably unable to testify.

(iii) All prior written statements, including articles and any written statement signed or adopted, or a recording or transcription of an oral statement made, by persons identified as witnesses if—

(A) The statement is available without making a request to the witness;

(B) The statement relates to the subject matter of the witness's testimony; and

(C) The statement either was made before the time the person agreed to become a witness or has been made publicly available by the person.

(b) The presiding officer will conduct a prehearing conference for the following purposes:

(1) To determine the areas of factual disagreement to be considered at the hearing. The presiding officer may hold conferences off the record in an effort to reach agreement on disputed factual questions, subject to the *ex parte* limitations in § 1502.17(f).

(2) To identify the most appropriate techniques for developing evidence on issues in controversy and the manner and sequence in which they will be used, including, where oral examination is to be conducted, the sequence in which witnesses will be produced for, and the time and place of, oral examination. The presiding officer may consider, but is not limited to, the following techniques.

(i) Submission of narrative statements of position on factual issues in controversy.

(ii) Submission of evidence or identification of previously submitted evidence to support such statements, such as affidavits, verified statements of fact, data, studies, and reports.

(iii) Exchange of written interrogatories directed to particular witnesses.

(iv) Written requests for the production of additional documentation, data, or other relevant information.

(v) Submission of written questions to be asked by the presiding officer of a specific witness.

(vi) Identification of facts for which oral examination and/or cross-examination is appropriate.

(3) To group participants with substantially like interests for presenting evidence, making motions and objections, including motions for summary decision, filing briefs, and presenting oral argument.

(4) To hear and rule on objections to admitting information submitted under § 1502.25 into evidence.

(5) To obtain stipulations and admissions of facts.

(6) To take other action that may expedite the hearing.

(c) The presiding officer shall issue, orally or in writing, a prehearing order

reciting the actions taken at the prehearing conference and setting forth the schedule for the hearing. The order will control the subsequent course of the hearing unless modified by the presiding officer for good cause.

**§ 1502.31 Summary decisions.**

(a) After the hearing commences, a participant may move, with or without supporting affidavits, for a summary decision on any issue in the hearing. Any other participant may, within 10 days after service of the motion, which time may be extended for an additional 10 days for good cause, serve opposing affidavits or countermove for summary decision. The presiding officer may set the matter for argument and call for the submission of briefs.

(b) The presiding officer will grant the motion if the objections, requests for hearing, other pleadings, affidavits, and other material filed in connection with the hearing, or matters officially noticed, show that there is no genuine issue as to any material fact and that a participant is entitled to summary decision.

(c) Affidavits should set forth facts that would be admissible in evidence and show affirmatively that the affiant is competent to testify to the matters stated. When a properly supported motion for summary decision is made, a participant opposing the motion may not rest upon mere allegations or denials or general descriptions of positions and contentions; affidavits or other responses must set forth specific facts showing that there is a genuine issue of fact for the hearing.

(d) Should it appear from the affidavits of a participant opposing the motion that for sound reasons stated, facts essential to justify the opposition cannot be presented by affidavit, the presiding officer may deny the motion for summary decision, allow additional time to permit affidavits or additional evidence to be obtained, or issue other just order.

(e) If on motion under this section a summary decision is not rendered upon the whole case or for all the relief asked, and evidentiary facts need to be developed, the presiding officer will issue an order specifying the facts that appear without substantial controversy and directing further evidentiary proceedings. The facts so specified will be deemed established.

(f) A participant submitting or opposing a motion for summary decision may obtain interlocutory review by the Commission of a summary decision of the presiding officer.

**§ 1502.32 Receipt of evidence.**

(a) A hearing consists of the development of evidence and the resolution of factual issues as set forth in this subpart and in the prehearing order.

(b) All orders, transcripts, written statements of position, written direct testimony, written interrogatories and responses, and any other written material submitted in the proceeding comprise the administrative record of the hearing, and will be promptly placed on public display in the Office of the Secretary, except as ordered by the presiding officer.

(c) Written evidence, identified as such, is admissible unless a participant objects and the presiding officer excludes it on objection of a participant or on the presiding officer's own initiative.

(1) The presiding officer may exclude written evidence as inadmissible only if—

(i) The evidence is irrelevant, immaterial, unreliable, or repetitive;

(ii) Exclusion of part or all of the written evidence of a participant is necessary to enforce the requirements of this subpart; or

(iii) The evidence was not submitted as required by § 1502.25.

(2) Items of written evidence are to be submitted as separate documents, sequentially numbered, except that a voluminous document may be submitted in the form of a cross-reference to the documents filed under § 1502.25.

(3) Written evidence excluded by the presiding officer as inadmissible remains a part of the administrative record, as an offer of proof, for judicial review.

(d) Testimony, whether on direct or on cross-examination, is admissible as evidence unless a participant objects and the presiding officer excludes it.

(1) The presiding officer may exclude oral evidence as inadmissible only if—