

cases against the costs of allowing additional motions, prehearing procedures and the attendant delay in cases where a hearing in which all evidence can be presented and witness demeanor can be observed is warranted.

As noted in the Revision Comment to Rule 232, pretrial procedures developed under the Federal Rules of Civil Procedure, including summary judgment under Rule 56, must be viewed in context. The Federal Rules of Civil Procedure govern a judicial system that deals most frequently with disputes between private parties. Unlike in Commission proceedings, in the typical private party civil action there is no opportunity to conduct a pre-filing investigation with the use of subpoenas; no formal opportunity such as a Wells submission, see 17 CFR 202.5(c), for the opposing party to present reasons against the initiation of an action; and no panel of public officials, such as the Commission, that must authorize the filing of a complaint. In addition, because of the priority of criminal caseloads, there is a high premium on providing trial dates for civil matters. Thus, the rationales that justify prehearing summary disposition procedures under the Federal Rules of Civil Procedure do not apply equally to Commission administrative proceedings.

Also as noted in the Revision Comment to Rule 232, the statutory schedule for cease-and-desist proceedings provides no realistic opportunity for summary judgment procedures comparable to those allowed under the Federal Rules of Civil Procedure. It is the Commission's view, therefore, that procedures to allow for the disposition of a case prior to hearing have a potentially useful role in the administrative process, but one that is more limited than summary judgment under the Federal Rules of Civil Procedure.

It was also suggested that the Commission should permit the use of affidavits in support of a motion for summary disposition. The text of the proposed rule did not set forth any limitation on the filing of affidavits in connection with a dispositive motion. The comment to the proposed rule, however, stated that affidavits were not contemplated. After further consideration, the Commission has decided that affidavits or declarations should be allowed, subject to limitations on their length.

Typically, Commission proceedings that reach litigation involve basic disagreement as to material facts. Based on past experience, the circumstances when summary disposition prior to

hearing could be appropriately sought or granted will be comparatively rare. Consistent with the goal of various other rules to facilitate the hearing officer's control over the prehearing scheduling, the revised rule requires leave of the hearing officer prior to filing a motion for summary disposition at any time prior to completion of the interested division's case in chief. See Rules 221 and 222. Such leave shall be granted only for good cause shown, and if consideration of the motion will not delay the scheduled start of the hearing.

The Commission will monitor closely the use of the procedures for disposition prior to hearing to determine whether they operate as intended to create more streamlined proceedings and an elimination of needless hearings, or whether the availability of such procedures operates as a source of delay, expense or harassment.

#### *Rules Regarding Hearings*

##### **Rule 300. Hearings**

Hearings for the purpose of taking evidence shall be held only upon order of the Commission. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

##### **Rule 301. Hearings to Be Public**

All hearings, except hearings on applications for confidential treatment filed pursuant to Rule 190, hearings held to consider a motion for a protective order pursuant to Rule 322, and hearings on *ex parte* application for a temporary cease-and-desist order, shall be public unless otherwise ordered by the Commission on its own motion or the motion of a party. No hearing shall be nonpublic where all respondents request that the hearing be made public.

##### **Rule 302. Record of Hearings**

(a) *Recordation.* Unless ordered otherwise by the hearing officer or the Commission, all hearings shall be recorded and a written transcript thereof shall be prepared.

(b) *Availability of a Transcript.* Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings, and transcripts subject to a protective order pursuant to Rule 322, shall be available for purchase only by parties, provided, however, that any person compelled to submit data or evidence in a hearing may purchase a copy of his or her own testimony.

(c) *Transcript Correction.* Prior to the filing of post-hearing briefs or proposed findings and conclusions, or within such earlier time as directed by the

Commission or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation pursuant to Rule 324, or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

*Comment (b):* The Administrative Procedure Act (APA) provides that any person compelled to submit data or evidence in a non-investigatory proceeding may purchase a copy of his or her own testimony. See 5 U.S.C. 555(c). In addition, Section 11 of the Federal Advisory Committee Act (FACA) requires that an agency make available copies of transcripts of agency proceedings as defined in Section 551(12) of the APA, 5 U.S.C. § 555(c). See FACA, 5 U.S.C. App. (1988), 86 Stat. 770.

##### **Rule 310. Failure to Appear at Hearings: Default**

Any person named in an order instituting proceedings as a person against whom findings may be made or sanctions imposed who fails to appear at a hearing of which he or she has been duly notified may be deemed to be in default pursuant to Rule 155(a). A party may make a motion to set aside a default pursuant to Rule 155(b).

##### **Rule 320. Evidence: Admissibility**

The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

*Comment:* Rule 320 restates the Administrative Procedure Act (APA) standard for the reception of evidence. 5 U.S.C. 556(c)(3) and (d). While Section 556 of the APA applies only to proceedings which are "on the record" pursuant to 5 U.S.C. 554(a), Rule 320 applies to all proceedings, as defined in Rule 101(a), before the Commission or a hearing officer.

##### **Rule 321. Evidence: Objections and Offers of Proof**

(a) *Objections.* Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Commission, however, unless raised:

(1) pursuant to interlocutory review in accordance with Rule 400;