

required by statute to be conducted "on the record" after opportunity for hearing. See 5 U.S.C. §§ 554(a), 556(a). In contrast, "informal" adjudications are proceedings where the statutory requirement for an "opportunity for hearing" does not specifically require the hearing to be held "on the record." The Commission may, but is not required to, follow procedures mandated for "formal" adjudications under Section 556 in "informal" adjudications. Thus, in cases of "informal" adjudication, such as a proceeding as to whether a temporary cease-and-desist order should be entered, the respondent's opportunity to put on live witnesses at the hearing may be limited. See also Rule 191 (regarding adjudications not required to be determined on the record after notice and opportunity for hearing); Rules 510-513 (regarding temporary cease-and-desist orders).

Rule 340. Proposed Findings, Conclusions and Supporting Briefs

(a) *Opportunity to File.* Before an initial decision is issued, each party shall have an opportunity, reasonable in light of all the circumstances, to file in writing proposed findings and conclusions together with, or as a part of, its brief.

(b) *Procedure.* Proposed findings of fact must be supported by citations to specific portions of the record. If successive filings are directed, the proposed findings and conclusions of the party assigned to file first shall be set forth in serially numbered paragraphs, and any counter statement of proposed findings and conclusions must, in addition to any other matter, indicate those paragraphs of the proposals already filed as to which there is no dispute. A reply brief may be filed by the party assigned to file first, or, where simultaneous filings are directed, reply briefs may be filed by each party, within the period prescribed therefor by the hearing officer. No further briefs may be filed except with leave of the hearing officer.

(c) *Time for Filing.* In any proceeding in which an initial decision is to be issued:

(1) At the end of each hearing, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which proposed findings and conclusions and supporting briefs are to be filed. The party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth

in the order the reasons why the different period is necessary.

(2) The total period within which all such proposed findings and conclusions and supporting briefs and any counter statements of proposed findings and conclusions and reply briefs are to be filed shall be no longer than 90 days after the close of the hearing unless the hearing officer, for good cause shown, permits a different period and sets forth in an order the reasons why the different period is necessary.

Comment (a): Rule 340 is based on Section 557(c) of the Administrative Procedure Act, 5 U.S.C. § 557(c). By its terms, Section 557(c) applies only to proceedings "on the record" after opportunity to be heard. See Comment to Rule 326. Consistent with longstanding Commission practice, however, Rule 340 mandates an opportunity for submission of findings and conclusions in any case in which an initial decision is to be prepared, whether or not the proceeding is "on the record." The limitation in Rule 340 that the opportunity to submit proposed findings and conclusions be "reasonable in light of all the circumstances" grants the hearing officer or the Commission discretion to restrict the time allowed for filing findings and conclusions. For example, in emergency proceedings, an abbreviated period might be appropriate. Rule 340 does not apply to proceedings in which the Commission itself presides at the taking of evidence since no initial decision is issued in such circumstances. In such a case—for example, where a temporary cease-and-desist order is sought—the Commission has complete discretion whether to allow for post-hearing submissions.

The rule requires that each proposed finding must be supported by appropriate citations to the record. Filings that fail to meet this requirement may be subject to sanctions pursuant to Rule 180.

Rule 350. Record in Proceedings Before Hearing Officer; Retention of Documents; Copies

(a) *Contents of the Record.* The record shall consist of:

(1) the order instituting proceedings, each notice of hearing and any amendments;

(2) each application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(3) each stipulation, transcript of testimony and document or other item admitted into evidence;

(4) each written communication accepted by the hearing officer pursuant to Rule 210;

(5) with respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal under Rule 112, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(6) all motions, briefs and other papers filed on interlocutory appeal;

(7) all proposed findings and conclusions;

(8) each written order issued by the hearing officer or Commission; and

(9) any other document or item accepted into the record by the hearing officer.

(b) *Retention of Documents Not Admitted.* Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any such documents until the later of the date upon which a Commission order ending the proceeding becomes final, or the conclusion of any judicial review of the Commission's order.

(c) *Substitution of Copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this rule.

Rule 351. Transmittal of Documents to Secretary; Record Index; Certification

(a) *Transmittal From Hearing Officer to Secretary of Partial Record Index.* The hearing officer may, at any time, transmit to the Secretary motions, exhibits or any other original documents filed with or accepted into evidence by the hearing officer, together with an index of such documents. The hearing officer, may, by order, require the interested division or other persons to assist in promptly transporting such documents from the hearing location to the Office of the Secretary.

(b) *Preparation, Certification of Record Index.* Promptly after the close of the hearing, the hearing officer shall transmit to the Secretary an index of the originals of any motions, exhibits or any other documents filed with or accepted into evidence by the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, or if no initial decision is to be prepared, within 30 days of the close of the hearing, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any person may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any