

§ 1502.31

reciting the actions taken at the pre-hearing 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

16 CFR Ch. II (1-1-04 Edition)

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—

Consumer Product Safety Commission

§ 1502.35

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

(ii) Exclusion of part or all of the evidence is necessary to enforce the requirements of these procedures.

(2) If oral evidence is excluded as inadmissible, the participant may take written exception to the ruling in a brief to the Commission, without taking oral exception at the hearing. Upon review, the Commission may reopen the hearing to permit the evidence to be admitted if the Commission determines that its exclusion was erroneous and prejudicial.

(e) The presiding officer may schedule conferences as needed to monitor the progress of the hearing, narrow and simplify the issues, and consider and rule on motions, requests, and other matters concerning the development of the evidence.

(f) The presiding officer will conduct such proceedings as are necessary for the taking of oral testimony, for the oral examination of witnesses by the presiding officer on the basis of written questions previously submitted by the parties, and for the conduct of cross-examination of witnesses by the parties. The presiding officer shall exclude irrelevant or repetitious written questions and limit oral cross-examination to prevent irrelevant or repetitious examination.

(g) The presiding officer shall order the proceedings closed for the taking of oral testimony relating only to trade secrets and privileged or confidential commercial or financial information. Participation in closed proceedings will be limited to the witness, the witness's counsel, and Federal Government employees.

§ 1502.33 Official notice.

(a) Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of CPSC as an expert agency.

(b) If official notice is taken of a material fact not appearing in the evidence of record, a participant, on timely request, will be afforded an opportunity to show the contrary.

§ 1502.34 Briefs and arguments.

(a) Promptly after the taking of evidence is completed, the presiding officer will announce a schedule for the filing of briefs. Briefs are to be filed ordinarily within 45 days of the close of the hearing. Briefs must include a statement of position on each issue, with specific and complete citations to the evidence and points of law relied on. Briefs must contain proposed findings of fact and conclusions of law.

(b) The presiding officer may, as a matter of discretion, permit oral argument after the briefs are filed.

(c) Briefs and oral argument shall refrain from disclosing specific details of written and oral testimony and documents relating to trade secrets and privileged or confidential commercial or financial information, except as specifically authorized in a protective order issued by the presiding officer.

§ 1502.35 Interlocutory appeal from ruling of presiding officer.

(a) Except as provided in paragraph (b) of this section and in §§ 1502.13(b), 1502.16(e), 1502.31(f), and 1502.37(d) authorizing interlocutory appeals, rulings of the presiding officer may not be appealed to the Commission before the Commission's consideration of the entire record of the hearing.

(b) A ruling of the presiding officer is subject to interlocutory appeal to the Commission if the presiding officer certifies on the record or in writing that immediate review is necessary to prevent exceptional delay, expense, or prejudice to any participant or substantial harm to the public interest.

(c) When an interlocutory appeal is made to the Commission, a participant may file a brief with the Commission only if such is specifically authorized by the presiding officer or the Commission, and, if such authorization is granted, within the period the Commission directs. If a participant is authorized to file a brief, any other participant may file a brief in opposition, within the period the Commission directs. If no briefs are authorized, the appeal will be presented as an oral argument to the Commission. The oral argument will be transcribed. If briefs are authorized, oral argument will be