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otherwise specified by the Administrator or presiding officer in a subsequent notice. The preliminary conference may not commence until after expiration of the time for filing notices of participation under § 179.42. The presiding officer may specify that two or more such conferences shall be held.

§ 179.87 Procedures for preliminary conference.

Parties in a hearing must appear at the preliminary conference(s) prepared to present a position on the matters specified in § 179.85. A preliminary conference may be held by telephone, or other electronic means, if appropriate.

(a) To expedite the hearing, parties are encouraged to prepare in advance for the conference. Parties should cooperate with each other and should request information and begin preparation of testimony at the earliest possible time. Failure of a party to appear at the preliminary conference or to raise matters that could reasonably be anticipated and resolved at that time will not delay the progress of the hearing, and constitutes a waiver of the rights of the party regarding such matters as objections to the agreements reached, actions taken, or rulings issued. Such failure to appear may also be grounds for striking the party's participation under § 179.42(f).

(b) Each party shall bring to the preliminary conference the following specific information, which will be filed with the hearing clerk under § 179.80:

(1) Any additional information to supplement the submission which may have been filed under § 179.83, and/or which may be filed if approved under § 179.83(c).

(2) A list setting forth each person who has been identified as a witness whose oral or written testimony will be offered by the party at the hearing, with a full curriculum vitae for each and a summary of the expected testimony (including a list of the principal exhibits on which the witness will rely) or a statement as to when such a summary will be furnished. A party may amend its witness and document list to add, delete, or substitute witnesses or documents.

(c) The presiding officer may hold preliminary conferences off the record

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in an effort to reach agreement on disputed factual or procedural questions.

(d) The presiding officer shall issue and file under § 179.80 a written order reciting the actions taken at each preliminary 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.

§ 179.89 Motions.

A motion, unless made in the course of a preliminary conference or a transcribed oral hearing before the presiding officer, must be filed in the manner prescribed by § 179.80 and include a draft order. A response may be filed within 10 days of service of a motion. The moving party has no right to reply, except as permitted by the presiding officer. The presiding officer shall rule upon the motion.

§ 179.90 Summary decisions.

(a) After the hearing commences, a party may file a written motion, with or without supporting affidavits or brief, for a summary decision on any issue in the hearing. Any other party may, within 10 days after service of the motion, which time may be extended for an additional 10 days for good cause shown, serve opposing affidavits or brief or countermove for summary decision. The presiding officer may set the matter for argument and call for the submission of briefs if not submitted by the parties.

(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 disagreement as to any material fact bearing on the issue and that a party 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 party opposing the motion may not rest upon mere allegations or denials or general descriptions of positions and contentions; affidavits or other responses must demonstrate specifically

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that there is a genuine issue of material fact for the hearing.

(d) Should it appear from the affidavits of a party 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, order a continuance to permit affidavits or additional evidence to be obtained, or issue other just order.

(e) If a summary decision is not rendered upon all issues 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 party may obtain interlocutory review by the Administrator of a summary decision of the presiding officer.

§ 179.91 Burden of going forward; burden of persuasion.

(a) The party whose request for an evidentiary hearing was granted has the burden of going forward in the hearing with evidence as to the issues relevant to that request for a hearing.

(b) The party or parties who contend that a regulation satisfies the criteria of section 408 of the FFDCA has the burden of persuasion in the hearing on that issue, whether the proceeding concerns the establishment, modification, or revocation of a tolerance or exemption from the requirement for a tolerance.

[55 FR 50293, Dec. 5, 1990, as amended at 70 FR 33359, June 8, 2005]

§ 179.93 Testimony.

(a) The presiding officer will conduct such proceedings as are necessary for the taking of oral direct testimony and for the conduct of oral examination of witnesses by the parties. The presiding officer shall limit oral examination to prevent irrelevant, immaterial or unduly repetitious examination.

(b) Direct testimony shall be submitted in writing, except that the presiding officer may order direct testimony to be presented orally in those unusual cases where the memory or demeanor of the witness is of importance.

Written direct testimony shall be in the form of a verified statement of fact or opinion prepared by the witness, in narrative form or in question-and-answer form. Written direct testimony may incorporate exhibits. Such a verified statement or exhibit may not be admitted into evidence sooner than 14 days (or such other reasonable period as the presiding officer may order) after the witness has delivered to the presiding officer and each party a copy of the statement or exhibit. The admissibility of the evidence contained in such a statement is subject to the same rules as if such testimony had been given orally.

(c) Oral cross-examination of witnesses will be permitted. Each exhibit that a party intends to rely upon in cross-examining a witness shall be furnished to the other parties not later than 3 days (or such other reasonable period as the presiding officer may order) before such exhibit is used in the cross-examination.

(d) Witnesses shall give testimony under oath or affirmation.

§ 179.94 Transcripts.

(a) The hearing clerk shall make arrangements to have all oral testimony stenographically reported or recorded and transcribed, with evidence that is admitted in the form of written testimony or exhibits attached or incorporated as appropriate.

(b) Unless the presiding officer orders otherwise, parties shall have 15 days from the date that the transcript of particular oral testimony first becomes available to propose corrections in the transcript of that testimony. Corrections are permitted only for transcription errors. The presiding officer shall promptly order justified corrections.

(c) As soon as practicable after the taking of the last evidence, the presiding officer shall certify:

(1) That the original transcript is a true transcript of the oral testimony offered or received at the hearing, except in such particulars as the presiding officer specifies.

(2) That the written testimony and exhibits accompanying the transcript are all the written testimony and exhibits introduced at the hearing, with