of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 Twelfth Street, SW., Washington, DC 20554. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center, 445 Twelfth Street, SW., Washington, DC 20554. The complete text of this decision may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 Twelfth Street, SW., Room CY–B402, Washington, DC 20054, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under Louisiana, is amended by removing Channel 252A at Leesville and by adding New Llano, Channel 252C3.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–23458 Filed 10–19–04; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 04–3171; MB Docket No. 04–387; RM–11083]

Radio Broadcasting Services; Cedarville, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rulemaking filed by Jeffrey Cotton requesting the allotment of Channel 260A at Cedarville, California as that community's first local service. The coordinates for Channel 260A at Cedarville are 41–31–45 NL and 120–10–20 WL located at the center of the community.

DATES: Comments must be filed on or before November 29, 2004, and reply comments on or before December 14, 2004.

ADDRESSES: Secretary, Federal Communications Commission, 445 Twelfth Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner as follows: Jeffrey Cotton, Route 60–5b, Lake City, California 96115.

FOR FURTHER INFORMATION CONTACT: Helen McLean, Media Bureau, (202) 418–2738.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's *Notice of Proposed Rule Making,* MB Docket No. 04–387, adopted October 6, 2004, and released October 8, 2004. The full text of this Commission notice is available for inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY–A257, 445 Twelfth Street, SW., Washington, DC. This document may also be purchased from the Commission's duplicating contractors, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone 1–800–378–3160 or *http://www.BCPIWEB.com.*

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio, Radio broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334 and 336.

§ 73.202 [Amended]

2. Section 73.202(b), the Table of FM Allotments under California, is amended by adding Cedarville, Channel 260A.

Federal Communications Commission.

John A. Karousos,

Assistant Chief, Audio Division, Media Bureau.

[FR Doc. 04–23459 Filed 10–19–04; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Part 386

[FMCSA Docket No. FMCSA–1997–2299]

RIN 2126–AA15

Rules of Practice

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Supplemental notice of proposed rulemaking (SNPRM).

SUMMARY: FMCSA proposes to amend its rules of practice for motor carrier safety, hazardous materials, and other enforcement proceedings. These rules would increase the efficiency of the procedures, enhance due process and the awareness of the public and regulated community, and accommodate recent programmatic changes. The rules would apply to all motor carriers, other business entities, and individuals involved in motor carrier safety and hazardous materials administrative actions and proceedings with FMCSA.

DATES: Comments must be received on or before December 6, 2004.

ADDRESSES: You may submit comments, identified by DOT DMS Docket Number

FMCSA–1997–2299, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- Agency Web site: *http://dms.dot.gov.* Follow the instructions for submitting comments on the DOT electronic docket site.
- Fax: 1–202–493–2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number for this notice. All comments received will be posted without change to *http://dms.dot.gov,* including any personal information provided. Please see the Privacy Act heading for further information.

Docket: For access to the docket to read background documents including those referenced in this document, or to read comments received, go to *http://dms.dot.gov* and/or Room PL–401 on the Plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Privacy Act: Anyone may search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or of the person signing the comment, if submitted on behalf of an association, business, labor union, or other entity). You may review DOT's complete Privacy Act Statement in the **Federal Register** (65 FR 19477, Apr. 11, 2000). This statement is also available at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: Jackie Cho, Office of Chief Counsel, (202) 366–0834, Federal Motor Carrier Safety Administration, 400 Seventh Street SW., Washington, DC 20590. Office hours are from 8 a.m. to 5:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

History

On April 29, 1996, the Federal Highway Administration (FHWA), an operating administration of the DOT, published a notice of proposed rulemaking (NPRM) for Rules of Practice for Motor Carrier Proceedings; Investigations; Disqualifications and Penalties (1996 NPRM) (61 FR 18865). In the 1996 NPRM, the FHWA, the relevant portion of which is now the Federal Motor Carrier Safety Administration, proposed entirely eliminating the rules of practice contained in part 386 and replacing them with new rules of practice in a new part 363.

The 1996 NPRM was the first effort by the FHWA to comprehensively rewrite its rules of practice for motor carrier administrative proceedings since 1985. The 1996 NPRM was intended to be the forerunner of a comprehensive revision of the Federal Motor Carrier Safety Regulations (FMCSRs) following the completion of a zero-based review of those regulations then underway in the agency. The proposal would have placed the new regulations in previously unused parts of chapter III of title 49 of the Code of Federal Regulations (CFR) reserved for the FMCSRs. The proposed rulemaking was intended to make administrative actions and proceedings more efficient while enhancing the guarantee of due process to carriers, individuals, and other entities by substantially increasing awareness of the consequences of noncompliance with commercial motor vehicle safety and hazardous materials regulations.

On October 21, 1996, the FHWA published a supplemental notice of proposed rulemaking (SNPRM) (61 FR 54601), to broaden the scope of the 1996 NPRM to include proceedings arising under section 103 of the Interstate Commerce Commission Termination Act of 1995 (ICCTA) (Public Law 104–88, 109 Stat. 803, 852 (Dec. 29, 1995)). In the SNPRM, the FHWA proposed to adopt the term ''Commercial Regulations'' to refer to requirements imposed on motor carriers as a result of the transfer of functions from the former Interstate Commerce Commission (''ICC''). The SNPRM also extended the comment period to November 20, 1996. FHWA received 127 comments in response to the 1996 NPRM. No comments were received in response to the SNPRM. Comments relevant to those portions of the 1996 NPRM addressed in this SNPRM are discussed in the Discussion of Comments section of this document.

On February 16, 2000, FMCSA issued a final rule making technical amendments to part 386 and incorporated enforcement proceedings for Commercial Regulations into part 386 (65 FR 7753). This rule was intended to ensure all civil forfeiture and investigation proceedings instituted by FMCSA are governed by consistent procedures. In addition, FMCSA adopted some technical amendments which reflected recent organizational changes, removed obsolete statutory citations, and incorporated recent statutory changes which affected the civil penalty schedule.

Given the zero-based review as well as various program changes that have been made since FHWA issued the 1996 NPRM and SNPRM, FMCSA is publishing this additional SNPRM. Although the 1996 NPRM proposed significant reorganization to the FMCSRs,[1] this SNPRM only proposes changes to part 386, Rules of practice for motor carrier, broker, freight forwarder, driver and hazardous materials proceedings, including our occasional enforcement of the HMRs on shippers.

Statutory Authority

Congress delegated certain powers to regulate interstate commerce to the Department of Transportation in numerous pieces of legislation, most notably in section 6 of the Department of Transportation Act (DOT Act) (Public Law 85–670, 80 Stat. 931 (1966)). Section 55 of the DOT Act transferred the authority of the ICC to regulate the qualifications and maximum hours-of-service of employees, the safety of operations, and the equipment of motor carriers in interstate commerce to the FHWA. *See* 49 U.S.C. 104. This authority, first granted to the ICC in the Motor Carrier Act of 1935 (Public Law 74–255, 49 Stat. 543), now appears in chapter 315 of title 49, U.S.C. The regulations issued under this authority became known as the FMCSRs, appearing generally at 49 CFR parts 390–399, including the commercial regulations (49 CFR parts 360–379) and the Hazardous Materials Regulations (49 CFR parts 171–180). The administrative powers to enforce chapter 315 were also transferred from the ICC to the DOT in 1966, and appear in chapter 5 of title 49, U.S.C.

Between 1966 and 1999 a number of statutes added to the FHWA's authority. For a more detailed statutory background, see the preamble to the 1996 NPRM (61 FR 18866–67). The various statutory authorities authorize the enforcement of the FMCSRs and Hazardous Materials Regulations (HMRs) and provide both civil and criminal penalties for violations. In practice, when circumstances dictate that an enforcement action be instituted, civil penalties are more commonly sought than criminal sanctions. The

[1] The 1996 NPRM proposed replacing part 386 with part 363 and adding three new parts to title 49, CFR. These new parts were part 361, Administrative Enforcement, part 362, Safety ratings, and part 364, Violations, penalties, and collections.

administrative rules proposed in this rulemaking apply, among other things, to the administrative adjudication of civil penalties assessed for violations of the FMCSRs and the HMRs.

The Motor Carrier Safety Improvement Act of 1999 (MCSIA) (Public Law 106–159, 113 Stat. 1748 (Dec. 9, 1999)) established FMCSA as a new operating administration within the Department of Transportation, effective January 1, 2000. The staff and responsibilities previously assigned to FHWA, and reassigned to a new Office of Motor Carrier Safety within the Department, are now assigned to FMCSA.

Background

The goal of the 1996 proposal, which would have replaced part 386 with part 363, was to improve the then existing rules of procedure for motor carrier enforcement proceedings. Various external sources were consulted, notably the Model Adjudication Rules of the Administrative Conference of the United States (December 1993) and various procedural rules of other Federal agencies. In recognition of the importance of the historical context of the rules, the predecessors of the current rules, and their extensive amendments, were reviewed by the FHWA in hopes of identifying shortcomings and determining the underlying rationale for certain provisions, which may now seem unnecessary, unclear, or unavailing. For a detailed description of the findings of this review, see the preamble to the 1996 NPRM (61 FR 18872–75).

Discussion of Comments

In response to the 1996 NPRM, 127 comments were submitted to the docket. Because a number of the policy decisions reflected in this SNPRM are an outgrowth of the comments received on the rules of practice portion of the 1996 NPRM (essentially proposed part 363), those relevant comments are summarized below and reflected in the proposed revisions to part 386. Comments to the 1996 NPRM relating to other aspects of that proposal are not addressed in this preamble.

Service of Documents

Jewell Smokeless Coal disagreed with the wording in the preamble discussion of proposed § 363.302 (addressed in § 386.32 of current rule) regarding computation of time, which states ''service is complete upon mailing so that the date of the postmark would control.'' The commenter argued that the postal system is not always the most expedient way to disseminate important information such as serving documents, creating the danger that the timeframes allowed would expire before the intended recipient has the opportunity to reply. As an alternative, such documents should be sent by certified mail and the day the document was received should be the date service is complete. If the recipient fails to pick up the certified documents within 10 days from the date notified by the certified mail, the date the documents are returned to the sender should become the date service was completed.

The commenter also suggested that certificates of service should accompany all mailings, including the notice of violation (NOV) (proposed § 363.102, current § 386.11), the reply form (proposed § 363.103), and the notice of determination and letter of disqualification (proposed § 363.202, current § 386.11(a)).

FMCSA's Response. In addressing Jewell Smokeless Coal's comment regarding the inefficiency of service by U.S. Mail, new section 386.6 proposes to include commercial delivery service as well as facsimile transmission as alternate methods of completing service. We believe the date of receipt is not the most efficient way to compute time, especially if respondent fails to accept service.

As proposed in § 386.6(c), all documents shall be accompanied by a certificate of service. The requirement is currently contained in § 386.31(b).

Adjudication Procedure

Transportation Lawyer's Association (TLA) argued that proposed § 363.108(c)(2) would limit all potential affirmative answers to those actually raised, including those regarding jurisdiction. The commenter believed this to be wrong because the defense of lack of jurisdiction should be available anytime, as permitted by Rule 12(h)(3) of the Federal Rules of Civil Procedure.

FMCSA's Response. The content of proposed § 363.108(c)(2) is now in proposed § 386.14(d)(1)(B). Although the proposed provision requires respondents to submit all arguments relating to jurisdiction, limitation, and procedure in their reply, respondents are not precluded from raising jurisdictional arguments at a later time as per current § 386.36 redesignated as § 386.35, Motions to dismiss and motions for more definite statements.

TLA indicated that proposed § 363.108(c)(1) would establish that a general denial is sufficient grounds for a finding of default. The commenter objected to this provision, arguing that the burden of proof must be on the agency once the respondent denies the claims. A general denial should prompt the agency to file a Motion for Final Agency Order or provide the respondent with an opportunity to correct its answer, instead of becoming tantamount to default. Failure of the agency to meet its burden should result in a denial of the motion with finality.

FMCSA's Response. A general denial does not assist the decisionmaker in determining whether there are material issues of fact in dispute. Therefore, in proposed § 386.14(d)(1), the contents of a reply must include the grounds for contesting a claim.

TLA indicated that proposed § 363.109(h) (not currently addressed in the FMCSRs) would permit either an attorney or another person to represent a respondent before the Assistant Administrator or ALJ. The commenter emphasized that the agency should indicate, in its notices or regulations, that the seriousness of the potential penalties might recommend the employment of legal counsel.

FMCSA's Response. Recommending the employment of legal counsel would be beyond the scope of the agency's authority. In accordance with proposed § 386.4, the agency affords the respondent several options in representation because the respondent may or may not be able to afford legal counsel. The proposal in § 386.4, however, would not permit a representative to engage in the unauthorized practice of law in violation of standards set by each State for legal representation.

Jewell Smokeless Coal indicated that the Assistant Administrator should not be the only one with the power to refer a case to an ALJ under proposed § 363.109 (current § 386.16). The respondent should be allowed to refer a matter to an ALJ if he/she believes there are sufficient facts for such referral. The commenter also indicated that the respondent should have the option to participate or not to participate in the referral. If the respondent is comfortable with a lesser process (in order to avoid the potential expenses involved in adjudication), then he/she should be allowed to take it.

FMCSA's Response. The respondent may only request that a matter be referred to an ALJ for hearing. It is the Assistant Administrator who will decide whether a matter is to be referred to the ALJ. *See* current § 386.16(b).

Settlement Agreements

Proposed § 363.106(b)(2) would have required a settlement agreement to contain a finding of facts constituting the violations committed, while the current rule, § 386.16(c)(ii), requires ''a

brief statement of the violations.'' Commenters submitted that the current provision has been interpreted to mean alleged violations. Crete Carrier *et al.* sought assurance that the proposed 1996 requirement would not be construed as an admission, which could be used against them in litigation, *e.g.,* if a plaintiff claimed a willful violation of the regulations as an element of its claim for punitive damages in a crash involving a carrier, and then cited the settlement submission as evidence. The commenter also pointed to Federal Rules of Evidence 408, that evidence of payment of a disputed claim in connection with civil litigation is inadmissible in the proceeding to prove liability for the claim.

FMCSA's Response. In proposed § 386.22, there is no requirement that settlements contain admissions of the violation. The parties may negotiate whether admissions are a condition of the settlement agreement. Respondent's full payment as its reply to the notice of claim would constitute an admission of the violation.

With regard to the comment about the application of the Federal Rules of Evidence in civil penalty proceedings, proposed § 386.37 provides that where an evidentiary matter is not addressed in the agency's rules or the APA, the Federal Rules of Evidence will be controlling.

The International Brotherhood of Teamsters (IBT) indicated that employees or their selected representatives should be entitled to participate in settlement negotiations.

FMCSA's Response. A party would be able to choose its representative under proposed § 386.4.

TLA opposed proposed § 363.107 (not currently addressed in the FMCSRs), which would establish a 90-day limit for settlement negotiations if no resolution is achieved, because it provides an opportunity for FMCSA staff to avoid negotiating by causing delay or mere inaction.

FMCSA's Response. There is nothing in the proposed regulation that would allow the agency to delay the process. After the 90-day settlement period, the respondent can seek administrative adjudication or binding arbitration if it decides to not make payment.

Enforcement

Overnite Express and Silvereagle Arnold indicated that a carrier should be given opportunity to respond and correct the violation before a fine is imposed.

FMCSA's Response. The Field Administrator has a range of actions available to address violations, including administrative handling without resort to civil penalties. If a notice of claim is issued and civil penalty assessed, the respondent may always argue corrective action has been taken, as a means of mitigating the amount of the civil penalty.

The Administrative Claim Process

The majority of the proposed changes to this SNPRM are briefly discussed in the Section-by-Section Analysis portion of this preamble. Many of the proposed changes are technical in nature to eliminate inconsistencies or increase the efficiency of the procedures. For example, in proposed § 386.8, entitled ''Compution of time,'' we eliminated the word ''shall'' in the current regulations and replaced it with such words as ''will'' or ''must'' to provide more definite delivery times for motions and replies to the decisionmaker. Because these changes are not substantive in nature, we will not discuss them in the Section-by-Section Analysis.

We are proposing to change the time within which respondents must reply to the notice of claim. Current § 386.14 provides 15 days from the date of service of the notice of claim for respondent to reply. Under proposed § 386.14, the reply period would be 30 days from the date of service of the notice of claim.

This proposed revision reflects a change from the Agency's previous interpretation of 49 U.S.C 521(b)(1)(A), which states: ''The notice shall indicate that the violator may, within 15 days of service, notify the Secretary of the violator's intention to contest the matter.'' Our previous interpretation, contained in both the current part 386 and the Agency's civil penalty enforcement decisions, was that motor carriers charged with violations had only 15 days in which to contest those charges. We ask for comment as to whether the word ''may'' in the statute permits the Agency to expand the period of time for the motor carrier to contest the charges.

Proposed § 386.14 is taken from § 363.108 of the 1996 NPRM and proposes procedures for contested claims. The procedures would apply if settlement negotiations fail to result in a settlement agreement, or when the respondent chooses administrative adjudication. A contested claim would be resolved in an administrative proceeding adjudicated by a neutral third party provided by the agency. Depending on the choice of the respondent and the existence of a dispute of a material fact at issue in the case, the third party may be an informal hearing officer, a Department of Transportation Administrative Law Judge, or the Assistant Administrator (agency decisionmaker).

The content of the reply in proposed § 386.14(b) would be similar to what is currently required in replies under part 386. If the respondent fails to reply to the notice of claim, § 386.14(c) would provide that the Field Administrator may issue a notice declaring that the notice of claim has become the final agency order. The final agency order would become effective 5 days following service of the notice of final agency order.

If respondent serves a reply that does not meet the requirements of § 386.14, respondent may be found in default at the discretion of the Assistant Administrator. Default would have the same effect as a failure to reply. In both situations, a final agency order would issue without inquiry as to the charged violations.

FMCSA has proposed in § 386.16 to provide an informal oral hearing as a new adjudication option. Section 386.16(c)(2) describes the process we are proposing. Using a hearing officer, this process would provide expedited consideration of a civil penalty case without the formalities attendant to a hearing before an ALJ. The agency invites comment on the addition of the informal oral hearing option. We are particularly interested in comments regarding the efficacy of instituting such a process, hearing officer's qualifications, procedural rules that should govern the informal hearing process, and any other relevant issues commenters would like us to consider.

This SNPRM does not substantially change the current process for formal oral hearings. An overview of the formal oral hearing process follows:

1. Within 30 days of service of the notice of claim, respondent submits a reply in which it elects to pay (payment must be included), to negotiate, to adjudicate, or to submit to binding arbitration.

2. If the respondent requests administrative adjudication, it must submit a reply that conforms to § 386.14(a)(1). If respondent requests a formal oral evidentiary hearing and the Assistant Administrator concludes there is a disputed issue of material fact, the Assistant Administrator refers the matter to the Department's Office of Hearings to be assigned to an ALJ.

3. An administrative law judge will preside over the hearing and findings of fact and conclusions of law and issue a decision. Under the Administrative Procedure Act (5 U.S.C. 557), an ALJ decision under this procedure is considered an initial decision and a

decision of the Assistant Administrator is considered an agency decision.

4. Also, if respondent initially chooses negotiation and negotiation fails, the respondent can request a hearing and the foregoing process applies.

Section-by-Section Analysis

This section-by-section analysis describes the changes to current part 386 being proposed by this SNPRM. For the convenience of the reader, it references relevant sections in proposed part 363 of the 1996 NPRM and also specifically states current sections for which there are no proposed changes.

Subpart A—Scope of Rules; Definitions

The title of Subpart A would be revised to Scope of Rules; Definitions and General Provisions to reflect the inclusion of several preliminary procedural rules.

Definitions (§ 386.2)

Proposed § 386.2 would add, revise, and remove definitions in current § 386.2 to reflect our proposed revisions of part 386.

Separation of Functions (§ 386.3)

FMCSA is proposing to add § 386.3 to delineate the separation of functions between enforcement staff and the agency decisionmaker.

Appearances and Rights of Parties (§ 386.4)

FMCSA is proposing to add § 386.4, which includes current § 386.50 in its entirety, and the additional procedural requirement to file a notice of appearance in the action before participating in the proceedings.

Form of Filings and Extensions of Time (§ 386.5)

FMCSA is proposing to add § 386.5, which incorporates current § 386.33, and establishes length and content limits, and other administrative requirements and details for filing documents. In addition, the time period for responses to motions for continuance would be changed from 7 to 20 days, to remain consistent with the proposed change of the general requirement for serving all motions and responses.

Service (§ 386.6)

FMCSA is proposing to add § 386.6, which incorporates current § 386.31, and adds the following elements: (1) It specifies that the agency must ensure service of the notice of claim; (2) it includes commercial delivery services and facsimile (with consent of the parties) as additional options for effecting service; and (3) it specifies other administrative provisions regarding service.

Filing of Documents (§ 386.7)

Proposed § 386.7 contains details relating to the filing of documents to establish standards relating to form and content.

Computation of Time (§ 386.8)

Proposed § 386.8 contains current § 386.32 in its entirety. This provision has been moved to Subpart A to locate it with other preliminary procedural requirements. The text has been edited but no substantive changes are intended.

Commencement of Proceedings (§ 386.11, 1996 NPRM proposed as § 363.103)

Section 386.11 describes the commencement of proceedings. The proposed revisions do not affect the driver qualification proceedings in paragraph (a). Proposed paragraph (b) removes references to notice of investigation (NOI) and introduces a new document, the notice of violation. As proposed, FMCSA would use the notice of violation as a means of notifying any person subject to the rules in this part that the agency has received information indicating that the person has violated provisions of the FMCSRs, HMRs, or Commercial Regulations, without assessing a civil penalty. This information may come from investigations, audits, or any other source of information. The notice of violation would address issues such as: Specific alleged violations and actions that a person might take to remedy problems identified by the agency; and other relevant information. The notice of violation would not be used to assert civil penalties.

The content of current § 386.11(b) would be redesignated as paragraph (c).

Complaint (§ 386.12, 1996 NPRM Proposed as § 363.102)

FMCSA is proposing to remove paragraphs (a) and (b) and to redesignate paragraphs (c)–(e) as (a)–(c). This change is proposed to make it consistent with the elimination of the notice of investigation.

Petition To Review and Request for Hearing: Driver Qualification Proceedings (§ 386.13)

FMCSA is not proposing any changes to the language in current § 386.13.

Reply (§ 386.14, 1996 NPRM Proposed as §§ 363.103)

The title of this section would be revised to Reply. Proposed paragraph (a) changes the time period for a reply to the notice of claim from 15 days to 30 days. Proposed paragraph (b) provides the contents of a reply to a notice of claim. Respondent may choose to pay the civil penalty, enter into settlement negotiations, request administrative adjudication, or seek binding arbitration. Proposed paragraph (c) describes what happens in the event of respondent's failure to reply. Proposed paragraph (d) describes the contents of a reply when requesting administrative adjudication. The reply must include admission or denial of each allegation, all affirmative defenses, including those relating to jurisdiction, limitations, and procedure, and state whether or not respondent seeks a hearing or chooses to submit evidence without a hearing.

Action on Replies to the Notice of Claim (§ 386.16)

The title of this section would be revised to Action on replies to the notice of claim. Proposed paragraph (a), Settlement negotiations, provides a 90-day period for settlement negotiations unless either party seeks to discontinue negotiations earlier. If negotiations fail to produce a settlement agreement, respondent must serve a reply under § 386.14(b)(1), (3), or (4).

Proposed paragraph (b), Requests to submit written evidence without oral hearing, changes the sequence and time during which the parties must serve all written evidence. The Field Administrator will have 45 days following service of respondent's reply in which to submit evidence and argument. The respondent will then have 30 days following service of the Field Administrator's submission to serve its own evidence and argument.

Proposed paragraph (c), Requests for hearing, provides that the Assistant Administrator will determine whether there exists a dispute of material fact at issue in the case that warrants a hearing. If a respondent requests a formal or informal oral hearing, the Field Administrator must serve a notice of consent or objection within 20 days of service of respondent's reply. If he/she objects, the Field Administrator must serve a motion for final agency order within 30 days of service of the objection. Respondent must serve its response to the Field Administrator's motion within 30 days of service.

If the Field Administrator objects to the request for an informal oral hearing, he or she must serve the objection, the

notice of claim, and respondent's reply. Based on these documents, the Assistant Administrator will determine whether there exists a dispute of a material fact and whether to grant or deny the request for an informal hearing. If the hearing is granted, a hearing officer will be assigned to the matter, and no further motions or discovery will be permitted. At the conclusion of the hearing, the hearing officer will issue a report to the Assistant Administrator with findings of fact and recommended disposition. Respondent waives its right to a formal oral hearing by participating in an informal hearing. If an informal oral hearing is denied, the Field Administrator must serve a motion for final agency order to which respondent will have an opportunity to answer. After reviewing the record, the Assistant Administrator may refer the matter to an Administrative Law Judge, assign the matter for informal oral hearing, or issue a final agency order based upon the submissions.

Proposed § 386.16(c)(2)(B) reserves the Assistant Administrator's authority to refer any matter for formal oral hearing even in instances where respondent has requested an informal oral hearing.

Intervention (§ 386.17)

FMCSA is not proposing any changes to the language in current § 386.17.

Payment of the Claim (§ 386.18)

Current part 386 does not specifically address payment of claims. This SNPRM proposes to add new § 386.18, Payment of claim.

Proposed paragraphs (a) and (b) state that payment may be made at any time before the issuance of a final agency order. If however, payment is not served upon the agency within 30 days of service of the notice of claim, the notice of claim becomes the final agency order.

Proposed paragraph (c) makes it clear that, unless the parties otherwise agree in writing, respondent's payment of the full claim amount as its reply to the notice of claim constitutes an admission of all facts alleged, waives respondent's opportunity to further contest the claim, and will result in the notice of claim becoming the final agency order. This is important because certain future agency enforcement actions may be based on, and certain consequences may flow from, prior and continued violations of the safety regulations. Therefore, compliance with proposed paragraph (c) will identify the implications of prior enforcement actions as related to maximum civil penalty cases under section 222 of the MCSIA. *See* 49 U.S.C. 521 note.

Subpart C—Consent Orders

The title of Subpart C would be revised to be Settlement Agreements.

Compliance Order (§ 386.21)

Current § 386.21 would be deleted in its entirety.

Consent Order (§ 386.22)

The title of this section would be revised to Settlement agreements and their contents. Proposed paragraph (a) describes the contents for settlement agreements and the binding effect they have on the parties. Proposed paragraph (b) addresses settlement agreements before the case comes before the agency decisionmaker. Proposed paragraph (c) sets forth procedures for settling a case pending before the agency decisionmaker. Proposed paragraph (d) describes procedures for settling a civil forfeiture case pending before and agency hearing officer.

Content of Consent Order (§ 386.23)

This section would be deleted in its entirety.

Subpart D—General Rules and Hearings

Service (§ 386.31, 1996 NPRM Proposed as § 363.303)

This section would be deleted in its entirety as superseded by § 386.6.

Computation of Time (§ 386.32, 1996 NPRM proposed as § 363.302)

This section would be deleted in its entirety as superseded by § 386.8.

Extension of Time (§ 386.33, 1996 NPRM proposed as § 363.304)

This section would be deleted in its entirety as superseded by § 386.5.

Official Notice (§ 386.34)

This section would be revised to streamline the use of official notice by the Assistant Administrator and Administrative Law Judge and redesignated as § 386.31.

Motions (§ 386.35)

Current paragraph (c) of § 386.35 would be amended to allow 20 days rather than 7 days for a reply to be served after a motion that is applying for an order or ruling not otherwise covered in part 386. This section would then be redesignated as § 386.34.

Motions To Dismiss and Motions for a More Definite Statement (§ 386.36, 1996 NPRM Proposed as § 363.108(c)(4))

This section would be redesignated as § 386.35.

We would add a new § 386.36, entitled Motions for Final Agency Order to describe the procedures governing motions for final agency order.

Discovery Methods (§ 386.37, 1996 NPRM proposed as § 363.109)

The contents of current § 386.37 remain, with the exception of the last sentence, and will now be located in proposed paragraph (a). Proposed paragraph (b) would be included to clarify that where an evidentiary matter is not addressed in the agency's rules or the APA, the Federal Rules of Evidence will be controlling.

Scope of Discovery (§ 386.38)

FMCSA is not proposing any changes to the language in current § 386.38.

Protective Orders (§ 386.39)

FMCSA is not proposing any changes to the language in current § 386.39.

Supplementation of Responses (§ 386.40)

FMCSA is not proposing any changes to the language in current § 386.40.

Stipulations Regarding Discovery (§ 386.41)

FMCSA is not proposing any changes to the language in current § 386.41.

Written Interrogatories to Parties (§ 386.42)

This revised section includes the substance of current § 386.42 and adds provisions regarding page limits and time periods in which to exchange interrogatories.

Production of Documents and Other Evidence (§ 386.43)

FMCSA is not proposing any changes to the language in current § 386.43.

Request for Admissions (§ 386.44)

FMCSA is not proposing any changes to the language in current § 386.44.

Motion To Compel Discovery (§ 386.45)

FMCSA is not proposing any changes to the language in current § 386.45.

Depositions (§ 386.46)

This revised section provides procedures governing depositions in civil penalty proceedings. Depositions would only be allowed after appointment of an ALJ. Prior to assignment of an ALJ, either party could petition the Assistant Administrator to conduct depositions on a showing of good cause. Proposed paragraph (e) includes a witness limit of no more than 5 witnesses without leave from the agency decisionmaker, and the deposition itself may not exceed 8 hours for any one witness. Current § 386.46(e)

would now be redesignated as proposed § 386.46(f).

Use of Deposition at Hearings (§ 386.47)

FMCSA is not proposing any changes to the language in current § 386.47.

Medical Records and Physicians' Reports (§ 386.48)

FMCSA is not proposing any changes to the language in current § 386.48.

Form of Written Evidence (§ 386.49)

FMCSA is not proposing any changes to the language in current § 386.49.

Appearances and Rights of Witnesses (§ 386.50)

This section would be deleted in its entirety as superseded by § 386.4.

Amendment and Withdrawal of Proceedings (§ 386.51, 1996 NPRM Proposed as § 363.109(i))

Proposed § 386.51(b) would revise current § 386.51(b) by allowing a party to withdraw his or her pleadings more than 15 days prior to the scheduled hearing without the approval of the Assistant Administrator or the Administrative Law Judge. Withdrawal within the 15 days prior to the scheduled hearing would still require approval of the decisionmaker. The decisionmaker would grant the request for withdrawal unless it would result in injustice, irreparable harm, or prejudice to the non-moving party. This proposed change would make paragraph (b) of this section consistent with the requirements in paragraph (a) of this section.

Appeals From Interlocutory Rulings (§ 386.52, 1996 NPRM Proposed as § 363.307)

This revised section would set forth detailed procedures governing interlocutory appeals. It delineates interlocutory appeals for cause and defines all instances of interlocutory appeals of right. This section also notes that decisions regarding interlocutory appeals may not be appealed to the Assistant Administrator until the decision has been entered on the record. Decisions by the Assistant Administrator on interlocutory appeals do not constitute final agency orders for purposes of judicial review.

Subpoena, Witness Fees (§ 386.53)

FMCSA is not proposing any changes to the language in current § 386.53.

Administrative Law Judges (§ 386.54, 1996 NPRM Proposed as § 363.305)

This section would eliminate existing paragraph (a). This section would enumerate the powers of the ALJs, as well as the limitations on those powers. It would also provide for the disqualification of ALJs.

Prehearing Conferences (§ 386.55)

FMCSA is not proposing any changes to the language in current § 386.55.

Hearings (§ 386.56)

FMCSA is not proposing any changes to the language in current § 386.56.

Proposed Findings of Fact, Conclusions of Law (§ 386.57)

FMCSA is not proposing any changes to the language in current § 386.57.

Burden of Proof (§ 386.58)

FMCSA is not proposing any changes to the language in current § 386.58.

Decision (§ 386.61)

FMCSA is not proposing any changes to the language in current § 386.61.

Review of Administrative Law Judge's Decision (§ 386.62)

FMCSA is not proposing any changes to the language in current § 386.62.

Decision on Review (§ 386.63)

FMCSA is not proposing any changes to the language in current § 386.63.

Reconsideration (§ 386.64, 1996 NPRM proposed as § 363.114)

As proposed, most of the existing text in § 386.64 would become paragraph (a). We would also add a new provision stating that a petition for reconsideration stays only the payment of a civil penalty. No other aspects of the final agency order would be stayed unless ordered by the Assistant Administrator. The revised section also includes proposed new paragraphs (b)–(e). Proposed paragraph (b) would codify current case law regarding petitions for reconsideration of final agency orders issued due to default by the respondent. This change would clarify that the only issue that will be considered under the petition for reconsideration of a final agency order based on default is whether a default occurred. Having this information in the regulations should relieve parties, as well as the decisionmaker, of the burden of addressing other issues in these petitions for reconsideration. Proposed paragraphs (c)–(e) provide timelines for serving answers and when a decision must be made by the Assistant Administrator.

Failure To Comply With Final Agency Order (§ 386.65)

FMCSA is not proposing any changes to the language in current § 386.65.

Motions for Rehearing or for Modification (§ 386.66)

This section would be deleted in its entirety and all motions served in accordance with proposed § 386.34.

Appeal (§ 386.67, 1996 NPRM Proposed as § 363.115)

Section 386.67 would be revised to adopt the changes proposed for § 363.115 in the 1996 NPRM. The heading for § 386.67 would be changed from ''Appeal'' to ''Judicial review.'' Current § 386.67 would be divided into two paragraphs, (a) and (b). The word ''hearings'' would be replaced with ''administrative adjudication'' and in the second half of the section, ''final agency order'' would replace ''order.'' The effect of these changes would be to liberally interpret 49 U.S.C. 521(b)(8) to allow judicial review for contested claims resulting in a final agency order, but not for those claims that are resolved through settlement agreement or in which respondent failed to timely reply. The statute provides that judicial review is only available after a hearing. FMCSA believes, however, its interpretation is appropriate in this instance because these proposed rules provide for resolution of contested claims in an administrative adjudication without formal hearing.

Subpart F—Injunctions and Imminent Hazards

FMCSA is not proposing any changes to the language in current §§ 386.71–386.72.

Subpart G—Penalties

FMCSA is not proposing any changes to the language in current §§ 386.81–386.84.

Appendices

FMCSA is not proposing any changes to the language in current appendix A or appendix B.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

FMCSA has determined that this action is not a significant regulatory action within the meaning of Executive Order 12866 or significant within the meaning of Department of Transportation regulatory policies and procedures. The proposals contained in this document would not result in an annual effect on the economy of $100 million or more, or lead to a major increase in costs or prices, or have significant adverse effects on the United States economy. This proposal would

augment, replace, or amend existing procedures and practices. Moreover, the agency's inclusion of an informal hearing process would add flexibility and less expense for smaller businesses. Any economic consequences flowing from the procedures in the proposal are primarily mandated by statute. A regulatory evaluation is not required because of the ministerial nature of this action.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the agency has evaluated the effects of this SNPRM on small entities. No economic impacts of this rulemaking are foreseen, as the rule would impose no additional substantive burdens that are not already required by the regulations to which these procedural rules would serve. Therefore, FMCSA certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities.

Executive Order 13132 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. The rules proposed herein in no way preempt State authority or jurisdiction, nor do they establish any conflicts with existing State role in the regulation and enforcement of commercial motor vehicle safety. It has therefore been determined that the SNPRM does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose a Federal mandate resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

National Environmental Policy Act

This rulemaking is categorically excluded from environmental studies under paragraph 6.u. of FMCSA Environmental Order 5610.1C.

Executive Order 13211 (Energy Supply, Distribution, or Use)

This action is not a significant energy action within the meaning of section 4(b) of the Executive Order because as a procedural action it is not economically significant and will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 13045 (Protection of Children)

This proposed action is not economically significant and does not concern an environmental risk to health or safety that would disproportionately affect children. The agency has determined that this rule is not a ''covered regulatory action'' as defined under Executive Order 13045. First, this rule is not economically significant under Executive Order 12866 because FMCSA has determined that the changes in this rulemaking would not have an impact of $100 million or more in any one year. Second, the agency has no reason to believe that the rule would result in an environmental health risk or safety risk that would disproportionately affect children.

Executive Order 12630 (Taking of Private Property)

This proposed rule would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation of Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This proposed rule does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980. 44 U.S.C. 3501 *et seq.*

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 386

Administrative practice and procedure, Brokers, Freight forwarders, Hazardous materials transportation, Highway safety, Motor carriers, Motor vehicle safety, Penalties.

Issued on: October 13, 2004.

Annette M. Sandberg,

Administrator.

In consideration of the foregoing, FMCSA proposes to amend 49 CFR part 386, as follows:

PART 386—RULES OF PRACTICE FOR MOTOR CARRIER, BROKER, FREIGHT FORWARDER, AND HAZARDOUS MATERIALS PROCEEDINGS

1. The authority citation for part 386 continues to read as follows:

Authority: 49 U.S.C. 13301, 13902, 31132–31133, 31136, 31502, 31504; sec. 204, Pub. L. 104–88, 109 Stat. 803, 941 (49 U.S.C. 701 note); sec. 217, Pub. L. 105–159, 113 Stat. 1748, 1767; and 49 CFR 1.73.

2. Revise the heading of Subpart A to read as follows:

Subpart A—Scope of Rules; Definitions and General Provisions

3. Amend § 386.2 by removing the definitions for *Compliance Order* and *Consent Order* in their entirety.

4. Amend § 386.2 by revising definitions for *Administration* and *Final agency order*; and by adding definitions for *Administrative adjudication, Agency, Agency Counsel, Decisionmaker, Default, Department, FMCSRs, Formal hearing, Hearing officer, HMRs, Informal hearing, Interstate commerce, Mail, Notice of Claim, Notice of Violation, Person, Reply, Secretary, Service, State, and Submission of written evidence without hearing* to read as follows:

§ 386.2 Definitions.

* * * * *

Administration means the Federal Motor Carrier Safety Administration.

Administrative adjudication means a process or proceeding to resolve contested claims in conformity with the Administrative Procedure Act, 5 U.S.C. 554–558.

Agency means the Federal Motor Carrier Safety Administration.

Agency Counsel means the attorney who prosecutes a civil penalty matter on behalf of the Field Administrator.

* * * * *

Decisionmaker means the Assistant Administrator of the Federal Motor Carrier Safety Administration, acting in the capacity of the decisionmaker or any person to whom the Assistant Administrator has delegated his/her

decisionmaking authority in a civil penalty proceeding. As used in this subpart, the agency decisionmaker is the official authorized to issue a final decision and order of the agency in a civil penalty proceeding.

Default means any failure to reply in the time required or failure to submit an adequate reply in accordance with the requirements of this part, which may lead to a final agency order or additional penalties.

Department means the Department of Transportation.

* * * * *

Final agency order means a notice of final agency action issued pursuant to this part by either the appropriate agency Field Administrator (for default judgments under § 386.15), or the agency Assistant Administrator, typically requiring payment of a civil penalty by a broker, freight forwarder, driver, shipper, or motor carrier.

FMCSRs means the Federal Motor Carrier Safety Regulations.

Formal hearing means the full opportunity by respondent to present relevant discovery, facts, and evidence, including the right of cross-examination of witnesses and the preparation of a written record.

Hearing officer means a neutral agency employee designated by the Assistant Administrator to preside over an informal hearing.

HMRs means Hazardous Materials Regulations.

Informal hearing means a full opportunity by respondent to present relevant facts and evidence before a hearing officer, who then prepares findings of fact and recommendations to the decisionmaker.

Interstate commerce means trade, traffic, or transportation in the United States—

(1) Between a place in a State and a place outside of such State (including a place outside of the United States);

(2) Between two places in a State through another State or a place outside of the United States; or

(3) Between two places in a State as part of trade, traffic, or transportation originating or terminating outside the State or the United States.

Mail means U.S. first class mail, U.S. registered or certified mail, or use of a commercial delivery service.

* * * * *

Notice of Claim (NOC) means a document alleging a violation of the FMCSRs, HMRs, or Commercial Regulations, for which a proposed civil penalty has been assessed.

Notice of Violation (NOV) means a document alleging a violation of the FMCSRs, HMRs, or Commercial Regulations, for which a warning or other corrective action, other than payment of a civil penalty, is recommended.

Person means any individual, partnership, association, corporation, business trust, or any other organized group of individuals.

Reply means a written response to a notice of claim, admitting or denying the allegations contained within the Notice of Claim. In addition, the reply provides the mechanism for determining whether the respondent seeks to pay, settle, contest, or seek binding arbitration of the claim. *See* § 386.14. If contesting the allegations, the reply must also set forth all known affirmative defenses and factors in mitigation to the claim.

* * * * *

Secretary means the Secretary of Transportation.

Service means to cause delivery of a document, motion, or pleading.

State means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, and the Virgin Islands.

Submission of written evidence without hearing means the right of respondent to present written evidence and legal argument to the agency decisionmaker, or his/her representative, in lieu of an oral hearing.

5. Add § 386.3 to Subpart A to read as follows:

§ 386.3 Separation of functions.

(a) Civil penalty proceedings, including hearings, will be prosecuted by agency counsel who represents the Field Administrator.

(b) An agency employee, including those listed in paragraph (c) of this section, engaged in the performance of investigative or prosecutorial functions in a civil penalty action may not, in that case or a factually-related case, discuss or communicate the facts or issues involved with the agency decisionmaker, administrative law judge, hearing officer or others listed in paragraph (d) of this section, except as counsel or a witness in the public proceedings.

(c) The Deputy Chief Counsel, Assistant Chief Counsel for Enforcement and Litigation, attorneys on their staff, and field enforcement attorneys serve as enforcement counsel in the prosecution of all cases brought under this part.

(d) The Chief Counsel, the Special Counsel to the Chief Counsel, attorneys serving as Adjudications Counsel, and attorneys on the staff of the Chief Counsel advise the decisionmaker regarding civil penalty proceedings under this part.

6. Add § 386.4 to Subpart A to read as follows:

§ 386.4 Appearances and rights of parties.

(a) Any party may be heard either in person, by counsel, or by other representatives, as the party elects.

(b) Any party may be accompanied, represented, or advised by an attorney or representative designated by the party. An attorney or representative who represents a party must file a notice of appearance in the action, in the manner provided in § 386.7 of this subpart, and will serve a copy of the notice of appearance on each party, in the manner provided in § 386.6 of this subpart, before participating in any proceeding governed by this subpart. The attorney or representative will include his/her name, address, telephone number, and facsimile number in the notice of appearance.

7. Add § 386.5 to Subpart A to read as follows:

§ 386.5 Form of filings and extensions of time.

(a) *Length and content.* Except for the Notice of Claim and Reply, motions, briefs, and other filings may not exceed 20 pages except as permitted by Order following a motion to exceed the page limitation based upon good cause shown. Exhibits or attachments in support of the relevant filing are not included in the page limit.

(b) *Paper and margins.* Briefs must be printed on 8½″ by 11″ paper with a one-inch margin on all four sides of text, to include pagination and footnotes.

(c) *Spacing, type, and font minimal.* Briefs will use the following line format: single spacing for the caption and footnotes, and double-spacing for the main text. All printed matter must appear in at least 12-point type.

(d) *Extensions of time.* Only those requests showing good cause will be granted. No motion for continuance or postponement of a hearing date filed within 15 days of the date set for a hearing will be granted unless accompanied by an affidavit showing extraordinary circumstances warrant a continuance. Unless directed otherwise by the Assistant Administrator, Administrative Law Judge or Hearing Officer before whom a matter is pending, the parties may stipulate to reasonable extensions of time by filing the stipulation in the official docket and serving copies on all parties on the certificate of service. All requests for extensions of time must be filed with:

(1) The Assistant Administrator if the matter is pending before the agency decisionmaker; or

(2) The Hearing Officer if the matter has been assigned to a hearing officer for informal hearing; or

(3) The Administrative Law Judge if the matter has been called for formal hearing; or

(4) The Field Administrator if the matter is not yet before the agency decisionmaker.

8. Add § 386.6 to Subpart A to read as follows:

§ 386.6 Service.

(a) *General.* All documents must be served upon the party or the party's registered agent. If a notice of appearance has been filed in the specific case in question accordance with § 386.4, service is to be made on the party's attorney of record or their designated representative.

(b) *Type of service.* A person may serve documents by personal delivery utilizing governmental or commercial entities, U.S. mail, commercial mail delivery, and upon prior written consent of the parties, facsimile. Written consent for facsimile service must specify the facsimile number where service will be accepted. When service is made by facsimile, a copy will also be served by any other method permitted by this section. Facsimile service occurs when transmission is complete.

(c) *Certificate of service.* A certificate of service will accompany all documents served in an administrative proceeding. It must consist of a certificate of personal delivery or a certificate of mailing, facsimile, or commercial delivery service, signed by the person making the personal delivery or mailing the document, the date the service occurred, and must include a list of persons to be served in accordance with § 386.7.

(d) *Date of service.* A document will be considered served on the date of personal delivery; or if mailed, the mailing date shown on the certificate of service, the date shown on the postmark if there is no certificate of service, or other mailing date shown by other evidence if there is no certificate of service or postmark.

(e) *Service by the administrative law judge.* The administrative law judge will serve a copy of each document including, but not limited to, notices of prehearing conferences and hearings, rulings on motions, decisions, and orders, upon each party to the proceedings by personal delivery or by mail, provide a courtesy copy to the agency decisionmaker via the agency's adjudications counsel, and forward the original to DOT Dockets.

(f) *Valid service.* A properly addressed document, sent in accordance with this subpart, which was returned, not claimed, or refused, is deemed to have been served in accordance with this subpart. The service will be considered valid as of the date and the time the document was mailed, or the date personal delivery of the document was refused. Service by delivery after 5 p.m. is deemed to have been made on the next day that is not a Saturday, Sunday, or legal holiday.

(g) *Presumption of service.* There shall be a presumption of service if the document is served where a party or a person customarily receives mail.

9. Add § 386.7 to Subpart A to read as follows:

§ 386.7 Filing of documents.

(a) *Address and method of filing.* A person serving or tendering a document for filing must personally deliver or mail one copy of each document to all parties and counsel or their designated representative of record if represented. If the matter has been transferred to the DOT Docket, the original of all documents subsequently served in the matter must also be filed as follows: U.S. DOT Dockets (FMCSA), 400 7th Street, SW., Room PL–401, Washington, DC 20590, Attention: Hearing Docket Clerk. A person will serve a copy of each document on each party in accordance with § 386.6 of this subpart.

(b) *Form.* Each document must be typewritten or legibly handwritten.

(c) *Contents.* Unless otherwise specified in this part, each document must contain a short, plain statement of the facts on which the person's case rests and a brief statement of the action requested in the document.

10. Add § 386.8 to Subpart A to read as follows:

§ 386.8 Computation of time.

(a) *Generally.* In computing any time period set out in these rules or in an order issued hereunder, the time computation begins with the day following the act, event, or default. The last day of the period is included unless it is a Saturday, Sunday, or legal Federal holiday in which case the time period will run to the end of the next day that is not a Saturday, Sunday, or legal Federal holiday. All Saturdays, Sundays, and legal Federal holidays except those falling on the last day of the period will be computed.

(b) *Date of entry of orders.* In computing any period of time involving the date of the entry of an order, the date of entry is the date the order is served.

(c) *Computation of time for delivery by mail.* (1) Service of all documents is deemed effected at the time of mailing.

(2) Documents are not deemed filed until received by the docket clerk.

(3) Whenever a party has a right or a duty to act or to make any response within a prescribed period after service by mail, or on a date certain after service by mail, 5 days will be added to the prescribed period.

11. Amend § 386.11 by revising paragraphs (b) and (c) to read as follows:

§ 386.11 Commencement of proceedings.

* * * * *

(b) *Notice of violation.* The agency may issue a notice of violation as a means of notifying any person subject to the rules in this part that it has received information (*i.e.*, from an investigation, audit, or any other source) wherein it has been alleged that the person has violated provisions of the FMCSRs, HMRs, or Commercial Regulations. The notice of violation serves as an informal mechanism to address compliance deficiencies. If the alleged deficiency is not addressed to the satisfaction of the agency, formal enforcement action may be taken in accordance with paragraph (c) of this section. The notice of violation will address the following issues, as appropriate:

(1) The specific alleged violations.

(2) Any specific actions that the agency determines are appropriate to remedy the identified problems.

(3) The means by which the notified person can inform the agency that it has received the notice of violation and either has addressed the alleged violation or does not agree with the agency's assertions in the notice of violation.

(4) Any other relevant information.

(c) *Civil penalty proceedings.* These proceedings are commenced by the issuance of a notice of claim.

(1) Each notice of claim contains the following:

(i) A statement setting forth the facts alleged.

(ii) Any regulation allegedly violated by the respondent.

(iii) The proposed civil penalty and notice of the maximum amount authorized to be claimed under statute.

(iv) The time, form and manner whereby the respondent may pay, contest or otherwise seek resolution of the claim.

(2) In addition to the information required by paragraph (c)(1) of this section, the notice of claim may contain such other matters as the agency deems appropriate.

(3) In proceedings for collection of civil penalties for violations of the motor carrier safety regulations under the Motor Carrier Safety Act of 1984, the agency may require the respondent to post a copy of the notice of claim in such place or places and for such duration as the agency may determine appropriate to aid in the enforcement of the law and regulations.

§ 386.12 [Amended]

12. Remove § 386.12(a) and (b) in their entirety. Then redesignate current § 386.12 (c) through (e) as proposed § 386.12 (a) through (c) respectively.

13. Revise § 386.14 to read as follows:

§ 386.14 Reply.

(a) *Time for reply to the notice of claim.* Respondent must reply to the notice of claim in writing within 30 days following service. The reply is to be served in accordance with § 386.6 upon the service center who issued the notice.

(b) *Contents of reply.* The respondent must reply to the notice of claim within the time allotted by choosing one of the following:

(1) Paying the full amount claimed in the notice of claim in accordance with § 386.18 of this part;

(2) Entering into settlement negotiations (while preserving the right to contest the claim at a later date). This option is not available if the notice of claim is based upon an enhanced penalty pursuant to the Motor Carrier Safety Improvement Act of 1999 (MCSIA) § 222, 49 U.S.C. 521 note;

(3) Contesting the claim by requesting administrative adjudication pursuant to paragraph (d) of this section; or

(4) Seeking binding arbitration in accordance with the agency's program. Although the amount of the proposed penalty may be disputed, referral is contingent upon an admission of liability that the violations occurred.

(c) *Failure to reply to the notice of claim.* (1) Respondent's failure to reply in accordance with paragraph (a) may result in the issuance of a notice of final agency order by the Field Administrator. The notice will declare respondent to be in default and further declare the notice of claim, including the civil penalty assessed in the notice of claim, to be the final agency order in the proceeding. The final agency order will be effective five days following service of the notice of final agency order.

(2) The default constitutes an admission of all facts alleged in the notice of claim and a waiver of respondent's opportunity to contest the claim. Under very limited circumstances, the default may be reviewed by the Assistant Administrator in accordance with § 386.64(b) where a respondent can demonstrate excusable neglect, a meritorious defense, and due diligence in seeking relief.

(3) Failure to pay the civil penalty as directed in a final agency order constitutes a violation of that order subjecting the respondent to an additional penalty as prescribed in subpart G of this part.

(d) *Request for administrative adjudication.* The respondent may, contest the claim and request administrative adjudication pursuant to paragraph (b)(3) of this section. An administrative adjudication is a process to resolve contested claims before the Assistant Administrator, Administrative Law Judge, or agency hearing officer.

(1) *Contents.* In addition to the general requirements of this section, the reply must state the grounds for contesting the claim and must raise any affirmative defenses the respondent intends to assert. Specifically, the reply:

(i) Must admit or deny each separately stated and numbered allegation of violation in the claim. A statement that the person is without sufficient knowledge or information to admit or deny will have the effect of a denial. Any allegation in the claim not specifically denied in the reply is deemed admitted. A mere general denial of the claim is insufficient and may result in a default being entered by the agency decisionmaker upon motion by Claimant.

(ii) Must include all affirmative defenses, including those relating to jurisdiction, limitations, and procedure.

(iii) Must state which one of the following respondent seeks:

(A) To submit written evidence without hearing.

(B) An informal oral evidentiary hearing.

(C) A formal oral evidentiary hearing.

14. Revise § 386.16 to read as follows:

§ 386.16 Action on replies to the notice of claim.

(a) *Settlement negotiations.*

(1) Settlement negotiations must be concluded within 90 days of service of the notice of claim. If a settlement has not been reached prior to the end of this period, agency counsel will file a notice of impasse, which automatically triggers respondent's obligation to proceed under § 386.14(b)(1),(3), or (4).

(2) Either party may, at any time, discontinue settlement negotiations by filing a notice with the other party. Respondent must, within 30 days following service of the notice, serve a reply under § 386.14(b)(1),(3), or (4).

(3) Nothing in this subsection is intended to prohibit the parties from entering into settlement negotiations at any time during the administrative adjudication process. If however the matter is before the agency decisionmaker, settlement between the parties is contingent upon approval of the agency decisionmaker pursuant to § 386.22(c).

(b) *Requests to submit written evidence without oral hearing.* Where respondent has elected to submit written evidence in accordance with § 386.14(d)(1)(D)(i):

(1) Agency counsel must, not later than 45 days following service of respondent's reply, serve all written evidence and argument in support of the notice of claim to the Assistant Administrator via DOT Dockets in accordance with §§ 386.6 and 386.7. The submission must include all pleadings, notices, and other filings in the case to date.

(2) Respondent will, not later than 30 days following service of agency counsel's written evidence and argument, serve its written evidence and argument with the Assistant Administrator via DOT Dockets in accordance with §§ 386.6 and 386.7.

(3) All written evidence submitted by the parties must conform to the requirements of § 386.49.

(4) Following submission of evidence and argument as outlined in this section, the Assistant Administrator may issue a final decision and order based on the evidence and arguments submitted, or may issue any other order as may be necessary to adjudicate the matter.

(c) *Requests for hearing.*

(1) If a request for an oral hearing has been filed, the Assistant Administrator will determine whether there exists a dispute of a material fact at issue in the matter. If so, the matter will be set for hearing in accordance with respondent's reply. If it is determined that there does not exist a dispute of a material fact at issue in the matter, the Assistant Administrator may issue a decision based on the written record.

(2) If a respondent requests a formal or informal oral evidentiary hearing in its reply, the Field Administrator must serve upon the Assistant Administrator and respondent a notice of consent or objection to the request within 20 days of service of respondent's reply.

(3) *Requests for formal oral hearing.* If the Field Administrator objects to a request for formal oral hearing, he/she must serve a motion for final agency order pursuant to § 386.36 within 30 days of service of the objection. The motion must set forth the reasons why claimant is entitled to judgment as a matter of law. Respondent must, within

30 days of service of the objection and motion, submit and serve a response to rebut movant's objection. After reviewing the record, the Assistant Administrator will either set the matter for hearing by referral to a Department of Transportation Administrative Law Judge or issue a final agency order based upon the submissions.

(4) *Requests for informal oral hearing.*

(i) If the Field Administrator objects to a request for an informal oral hearing, he/she must serve the objection, a copy of the Notice of Claim, and a copy of respondent's reply, on the respondent and Assistant Administrator, pursuant to paragraph (c)(2) of this section. Based upon the notice of claim, the reply, and the objection, the Assistant Administrator will issue an order granting or denying the request for informal hearing.

(A) *Informal hearing granted.* If the request for informal oral hearing is granted by the Assistant Administrator, a hearing officer will be assigned to hear the matter and will set forth the date, time and location for hearing. No further motions will be entertained, and no discovery will be allowed. At hearing, all parties may present evidence, written and oral, to the hearing officer following which, the hearing officer will issue a report to the Assistant Administrator containing findings of fact and recommending a disposition of the matter. By participating in an informal hearing, respondent waives its right to a formal oral hearing.

(B) *Informal hearing denied.* If the request for informal oral hearing is denied, the Field Administrator must serve a motion for final agency order pursuant to § 386.36 within 30 days. The motion must set forth the reasons why claimant is entitled to judgment as a matter of law. Respondent must, within 30 days of service of the objection and motion, submit and serve a response to rebut movant's objection. After reviewing the record, the Assistant Administrator will set the matter for formal hearing by referral to a Department of Transportation Administrative Law Judge, will assign the matter for informal oral hearing, or will issue a final agency order based upon the submissions.

(ii) Nothing in this section shall limit the Assistant Administrator's authority to refer any matter for formal oral hearing, even in instances where respondent seeks only an informal oral hearing.

15. Add § 386.18 to Subpart B to read as follows:

§ 386.18 Payment of the claim.

(a) Payment of the full amount claimed may be made at any time before issuance of a final agency order. After the issuance of a final agency order, claims are subject to interest, penalties, and administrative charges in accordance with 4 CFR part 103.

(b) If respondent elects to pay the full amount in its reply, payment must be postmarked within 30 days following service of the notice of claim. Failure to serve payment within 30 days of service of the notice of claim will constitute a default and may result in the notice of claim, including the civil penalty assessed by the notice of claim, becoming the final agency order in the proceeding pursuant to § 386.14(c).

(c) Unless objected to in writing, payment of the full amount in its reply constitutes an admission by the respondent of all facts alleged in the notice of claim. Payment waives respondent's opportunity to further contest the claim, and will result in the notice of claim becoming the final agency order.

16. Revise heading of Subpart C to read as follows:

Subpart C—Settlement Agreements

§ 386.21 [Removed]

17. Remove § 386.21.

18. Revise § 386.22 to read as follows:

§ 386.22 Settlement agreements and their contents.

(a) *Settlement agreements.*

(1) When negotiations produce an agreement as to the amount or terms of payment of a civil penalty or the terms and conditions of an order, a settlement agreement shall be drawn and signed by the respondent and the Assistant Administrator or designee. Such settlement agreement must contain the following:

(i) The statutory basis of the claim;

(ii) A brief statement of the violations;

(iii) The amount claimed and the amount paid;

(iv) The date, time, and place and form of payment;

(v) A statement that the agreement is not binding on the agency until executed by the Assistant Administrator or his/her designee;

(vi) A statement that failure to pay in accordance with the terms of the agreement which has been adopted as a Final Order will result in the loss of any reductions in penalties for claims found to be valid, and the original amount claimed will be due immediately; and

(vii) A statement that the agreement is the final agency order.

(2) A settlement agreement may contain any conditions, actions, or provisions agreed by the parties to redress the violations cited in the notice of claim or notice of violation.

(3) An executed settlement agreement is a final agency order and is binding on the respondent and the agency according to its terms. The respondent's consent to a settlement agreement that has not been executed by the Assistant Administrator or his/her designee may not be withdrawn for a period of 30 days after it is executed by the respondent.

(b) *Civil forfeiture proceedings not before agency decisionmaker.* When a respondent has agreed to a settlement at any time prior to the case coming before the agency decisionmaker, the parties may execute an appropriate agreement for disposing of the case. The agreement does not require approval by the agency decisionmaker.

(c) *Civil forfeiture proceedings before agency decisionmaker.* When a respondent has agreed to a settlement of a civil forfeiture before a final order has been issued, the parties may execute an appropriate agreement for disposing of the case by consent for the consideration of the Assistant Administrator. The agreement is filed with the Assistant Administrator who may accept it, reject it and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the Assistant Administrator accepts the agreement, he/she shall enter an order in accordance with its terms.

(d) *Civil forfeiture proceedings before administrative law judge.* When a respondent has agreed to a settlement of a civil forfeiture before the hearing is concluded, the parties may execute an appropriate agreement for disposing of the case by consent for the consideration of the ALJ. The agreement is filed with the ALJ who may accept it, reject it and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the ALJ accepts the agreement, he/she shall enter an order in accordance with its terms.

(e) *Civil forfeiture proceedings before agency hearing officer.* When a respondent has agreed to a settlement of a civil forfeiture before the hearing is concluded, the parties may execute an appropriate agreement for disposing of the case for the consideration of the hearing officer. The agreement is filed with the hearing officer who, within 20 days of receipt will make a report and recommendation to the Assistant Administrator who may accept it, reject it and direct that proceedings in the case continue, or take such other action as he/she deems appropriate. If the

Assistant Administrator accepts the agreement, he/she will enter an order in accordance with its terms.

§ 386.23 [Removed]

19. Remove § 386.23 in its entirety.

20. Revise § 386.31 to read as follows:

§ 386.31 Official notice.

The Assistant Administrator or administrative law judge may take official notice of any fact not appearing in evidence in the record. Where the decision rests on a material and disputable fact of which the agency has taken official notice, a party is entitled to an opportunity to demonstrate the contrary. If a final agency order has been issued, the request will be in accordance with § 386.64 of this part. If official notice is taken prior to the issuance of a final agency order, the request must comply with § 386.63 of this part.

§ 386.32 [Removed]

21. Remove § 386.32 in its entirety.

§ 386.33 [Removed]

22. Remove § 386.33 in its entirety.

§ 386.34 [Removed]

23. Remove § 386.34 in its entirety.

§ 386.35 [Redesignated as § 386.34]

24. Redesignate § 386.35 as § 386.34.

25. Amend redesignated § 386.34(c) by removing the number ''7'' and adding, in its place, the number ''20.''

§ 386.36 [Redesignated as § 386.35]

26. Redesignate § 386.36 as § 386.35.

27. Add new § 386.36.

§ 386.36 Motions for final agency order

(a) *Generally.* Unless otherwise provided in this section, the motion and answer will be governed by § 386.34. If the matter is pending before a Field Administrator when the motion is made, the filing is to be served in accordance with §§ 386.6 and 386.7. Movant's filing must contain a motion and memorandum of law, which may be separate or combined and must include all responsive pleadings, notices, and other filings in the case to date. Upon filing, the matter is officially transferred from the service center to the agency decisionmaker who will then preside over the matter.

(b) *Form and content.* The motion will state with particularity the grounds upon which it is based and the substantial matters of law to be argued. The judgment sought will be rendered forthwith if, after reviewing the record in a light most favorable to the non-moving party, shows no genuine issue exists as to any material fact.

(c) *Answer to Motion.* The non-moving party will, within 30 days of service of the motion for final order, submit and serve a response to rebut movant's motion.

28. Revise § 386.37 to read as follows:

§ 386.37 Discovery methods.

(a) Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; written interrogatories; production of documents or other evidence for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Except as otherwise provided in these rules, in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, or by the Assistant Administrator or Administrative Law Judge, the Federal Rules of Evidence apply in all administrative adjudications.

29. Revise § 386.42 to read as follows:

§ 386.42 Written interrogatories to parties.

(a) Without leave, any party may serve upon any other party written interrogatories to be answered by the party to whom the interrogatories are directed; or, if that party is a public or private corporation or partnership or association or governmental agency, by any officer or agent, who will furnish the information available to that party. Interrogatories may be served on the claimant after commencement of the action and on any other party with or after service of the process and initial pleading upon that party.

(b) A maximum number of interrogatories served will not exceed 30, including all subparts, unless the Assistant Administrator or Administrative Law Judge permits a larger number on motion and for good cause shown. Other interrogatories may be added without leave, so long as the total number of approved and additional interrogatories does not exceed 30.

(c) Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to, in which event the grounds for objection shall be stated and signed by the party, or counsel for the party if represented making the response. The party to whom the interrogatories are directed shall serve the answers and any objections within 30 days after the service of the interrogatories, except that a respondent may serve upon claimaint its answers or objections within 45 days after service of the notice of claim or within such shortened or longer period as the Assistant Administrator or the administrative law judge may allow.

(d) Motions to compel may be made in accordance with § 386.45.

(e) A copy of the interrogatories, answers, and all related pleadings must be served on the Assistant Administrator or, in cases that have been called to a hearing, on the administrative law judge, and upon all parties to the proceeding.

(f) An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the Assistant Administrator or administrative law judge may order that such an interrogatory need not be answered until after designated discovery has been completed or until a prehearing conference or other later time.

30. Revise § 386.46 to read as follows:

§ 386.46 Depositions.

(a) *When, how, and by whom taken.* The deposition of any witness may be taken at reasonable times subsequent to the appointment of an Administrative Law Judge. Prior to appointment of an Administrative Law Judge, a party may petition the Assistant Administrator, in accordance with § 386.37, for leave to conduct a deposition based on good cause shown. Depositions may be taken by oral examination or upon written interrogatories before any person having power to administer oaths.

(b) *Application.* Any party desiring to take the deposition of a witness must indicate to the witness and all other parties the time when, the place where, and the name and post office address of the person before whom the deposition is to be taken; the name and address of each witness; and the subject matter concerning which each such witness is expected to testify.

(c) *Notice.* A party desiring to take a deposition must give notice to the witness and all other parties. Notice must be in writing. Notice of the deposition must be given not less than 20 days from when the deposition is to be taken if the deposition is to be held within the continental United States and not less than 30 days from when the deposition is to be taken if the deposition is to be held elsewhere unless a shorter time is agreed to by the parties or by leave of the Assistant Administrator or Administrative law judge by motion for good cause shown.

(d) *Taking and receiving in evidence.* Each witness testifying upon deposition must be sworn, and any other party must be given the right to cross-examine. The questions propounded and the answers to them, together with all objections made, must be reduced to writing; read by or to, and subscribed by the witness; and certified by the person

administering the oath. The person who took the deposition must seal the deposition in an envelope and mail it by certified mail to the Assistant Administrator or the Administrative Law Judge, if one has been appointed. Subject to objections to the questions and answers as were noted at the time of taking the deposition and which would have been valid if the witness were personally present and testifying, the deposition may be read and offered in evidence by the party taking it as against any party who was present or represented at the taking of the deposition or who had due notice of it.

(e) *Witness limit.* No party may seek deposition testimony of more than 5 witnesses per side without leave of the decisionmaker or Administrative Law Judge for good cause shown. Individual depositions are not to exceed 8 hours for any one witness.

(f) *Motion to terminate or limit examination.* During the taking of a deposition, a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, oppression of a deponent or party or improper questions propounded. The deposition will then be adjourned. The objecting party or deponent must however, immediately move for a ruling on his or her objections to the deposition conduct or proceedings before the Assistant Administrator or Administrative Law Judge, who then may limit the scope or manner of the taking of the deposition.

§ 386.50 [Removed]

31. Remove § 386.50 in its entirety.

32. Amend § 386.51 by revising paragraph (b) to read as follows:

§ 386.51 Amendment and withdrawal of pleadings.

* * * * *

(b) A party may withdraw his/her pleading any time more than 15 days prior to the hearing by serving a notice of withdrawal on the Assistant Administrator or the Administrative Law Judge. Within 15 days prior to the hearing a withdrawal may be made only at the discretion of the Assistant Administrator or the Administrative Law Judge. The withdrawal will be granted absent a showing of injustice, prejudice, or irreparable harm to the non-moving party.

33. Revise § 386.52 to read as follows:

§ 386.52 Appeals from interlocutory rulings.

(a) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the Administrative Law Judge to the Assistant Administrator until the Administrative Law Judge's decision has been entered on the record. A decision or order of the Assistant Administrator on the interlocutory appeal does not constitute a final agency order for the purposes of judicial review under § 386.67.

(b) *Interlocutory appeal for cause.* If a party files a written request for an interlocutory appeal for cause with the Administrative Law Judge, or orally requests an interlocutory appeal for cause, the proceedings are stayed until the Administrative Law Judge issues a decision on the request. If the Administrative Law Judge grants the request, the proceedings are stayed until the Assistant Administrator issues a decision on the interlocutory appeal. The Administrative Law Judge must grant an interlocutory appeal for cause if a party shows that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party.

(c) *Interlocutory appeals of right.* If a party notifies the Administrative Law Judge of an interlocutory appeal of right, the proceedings are stayed until the Assistant Administrator issues a decision on the interlocutory appeal. A party may file an interlocutory appeal with the Assistant Administrator, without the consent of the Administrative Law Judge, before the Administrative Law Judge has made a decision, in any of the following situations:

(1) A ruling or order by the Administrative Law Judge barring a person from the proceedings.

(2) Failure of the Administrative Law Judge to dismiss the proceedings in accordance with § 386.51(b).

(3) A ruling or order by the Administrative Law Judge in violation of § 386.54(b).

(4) Denial by the Administrative Law Judge of a motion to disqualify under § 363.54(c).

(d) *Procedure.* A party must file a notice of interlocutory appeal, with any supporting documents, with the Assistant Administrator, and serve copies on each party and the Administrative Law Judge, not later than 10 days after the Administrative Law Judge's decision forming the basis of an interlocutory appeal of right or not later than 10 days after the Administrative Law Judge's decision granting an interlocutory appeal for cause, whichever is appropriate. A party must file a reply brief, if any, with the Assistant Administrator and serve a copy of the reply brief on each party, not later than 10 days after service of the appeal brief. The Assistant Administrator will render a decision on the interlocutory appeal, on the record and as a party of the decision in the proceedings, within a reasonable time after receipt of the interlocutory appeal.

(e) The Assistant Administrator may reject frivolous, repetitive, or dilatory appeals, and may issue an order precluding one or more parties from making further interlocutory appeals, and may order such further relief as required.

34. Revise § 386.54 to read as follows:

§ 386.54 Administrative Law Judge.

(a) *Powers of an Administrative Law Judge.* In accordance with the rules in this subchapter, an Administrative Law Judge may do the following:

(1) Give notice of and hold prehearing conferences and hearings.

(2) Administer oaths and affirmations.

(3) Issue subpoenas authorized by law.

(4) Rule on offers of proof.

(5) Receive relevant and material evidence.

(6) Regulate the course of the administrative adjudication in accordance with the rules of this subchapter.

(7) Hold conferences to settle or simplify the issues by the consent of the parties.

(8) Dispose of procedural motions and requests, except motions that under this part are made directly to the Assistant Administrator.

(9) Issue orders permitting inspection and examination of lands, buildings, equipment, and any other physical thing and the copying of any document.

(10) Make findings of fact and conclusions of law, and issue decisions.

(b) *Limitations on the power of the Administrative Law Judge.* The Administrative Law Judge is bound by the procedural requirements of this part and the precedent opinions of the agency. If the Administrative Law Judge imposes any sanction not specified in this part, a party may file an interlocutory appeal of right with the Assistant Administrator pursuant to § 386.52. This section does not preclude an Administrative Law Judge from barring a person from a specific proceeding based on a finding of obstreperous or disruptive behavior in that proceeding.

(c) *Disqualification.* The Administrative Law Judge may disqualify himself or herself at any time, either at the request of any party or upon his or her own initiative. Assignments of Administrative Law Judges are made by the Chief Administrative Law Judge upon the request of the Assistant Administrator.

Any request for a change in such assignment, including disqualification, will be considered only for good cause which would unduly prejudice the proceeding.

35. Revise § 386.64 to read as follows:

§ 386.64 Reconsideration.

(a) Within 20 days following the issuance of the Assistant Administrator's final agency order, any party may petition the Assistant Administrator for reconsideration of his/her findings of fact, conclusions of law, or final agency order. If a civil penalty was imposed, the filing of a petition for reconsideration stays only the payment of the penalty. No other aspects of the final agency order are stayed unless the Assistant Administrator so orders.

(b) In the event a Notice of Final Agency Order is issued by a Service Center as a result of the respondent's failure to file any reply in accordance with § 386.14, the only issue that will be considered upon reconsideration is whether a default has occurred under § 386.14(c).

(c) Either party may serve an answer to a petition for reconsideration within 30 days of the service date of the petition.

(d) Following the close of the 30-day period, the Assistant Administrator will rule on the petition.

(e) The ruling on the petition will be the final agency order. A petition for reconsideration of the Assistant Administrator's ruling will not be permitted.

§ 386.66 [Removed]

36. Remove § 386.66.

37. Revise § 386.67 to read as follows:

§ 386.67 Judicial review.

(a) Any aggrieved person, who, after an administrative adjudication, is adversely affected by a final agency order issued under 49 U.S.C. 521 may, within 30 days, petition for review of the order in the United States Court of Appeals in the circuit where the violation is alleged to have occurred, or where the violator has its principal place of business or residence, or in the United States Court of Appeals for the District of Columbia Circuit.

(b) Judicial review will be based on a determination of whether or not the findings and conclusions in the final agency order were supported by substantial evidence or otherwise in accordance with law. No objection that has not been raised before the agency will be considered by the court, unless reasonable grounds existed for failure or neglect to do so. The commencement of proceedings under this section will not, unless ordered by the court, operate as a stay of the final agency order of the agency.

38. In Appendix A to Part 386:

Revise section I, remove and reserve section II, and revise section III to read as follows:

Appendix A to Part 386—Penalty Schedule; Violations of Notices and Orders

I. Notice to Abate

Violation—Failure to cease violations of the regulations in the time prescribed in the notice. (The time within to comply with a notice to abate shall not begin to run with respect to contested violations, *i.e.*, where there are material issues in dispute under § 386.14, until such time as the violation has been established.)

Penalty—reinstatement of any deferred assessment or payment of a penalty or portion thereof.

* * * * *

III. Final Order

Violation—Failure to comply with final agency order.

Penalty—Automatic waiver of any reduction in the original claim found to be valid, and immediate restoration to the full amount assessed in the notice of claim.

* * * * *

[FR Doc. 04–23393 Filed 10–18–04; 8:53 am]

BILLING CODE 4910–EX–P