

§ 1.249

(7) In proceedings in which consent agreements may be negotiated (see § 1.93), the parties shall be prepared to state at the initial prehearing conference whether they are at that time willing to enter negotiations leading to a consent agreement.

(d) This paragraph applies to broadcast proceedings only.

(1) At the prehearing conference prescribed by this section, the parties to the proceeding shall be prepared to discuss the advisability of reducing any or all phases of their affirmative direct cases to written form.

(2) In hearings involving applications for new, improved and changed facilities and in comparative hearings involving only applications for new facilities, where it appears that it will contribute significantly to the disposition of the proceeding for the parties to submit all or any portion of their affirmative direct cases in writing, the presiding officer may, in his discretion, require them to do so.

(3) In other broadcast proceedings, where it appears that it will contribute significantly to the disposition of the proceeding for the parties to submit all or any portion of their affirmative direct cases in writing, it is the policy of the Commission to encourage them to do so. However, the phase or phases of the proceeding to be submitted in writing, the dates for the exchange of the written material, and other limitations upon the effect of adopting the written case procedure (such as whether material ruled out as incompetent may be restored by other competent testimony) is to be left to agreement of the parties as approved by the presiding officer.

(4) In broadcast comparative cases involving applicants for only new facilities, oral testimony and cross examination will be permitted only where, in the discretion of the presiding judge, material issues of decisional fact cannot be resolved without oral evidentiary hearing procedures or the public interest otherwise requires oral evidentiary proceedings.

(e) An official transcript of all conferences shall be made.

(f) The presiding officer may, upon the written request of a party or parties, approve the use of a speakerphone

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as a means of attendance at a prehearing conference if such use is found to conduce to the proper dispatch of business and the ends of justice.

[28 FR 12425, Nov. 22, 1963, as amended at 33 FR 463, Jan. 12, 1968; 36 FR 14133, July 30, 1971; 37 FR 7507, Apr. 15, 1972; 41 FR 14873, Apr. 8, 1976; 43 FR 33251, July 31, 1978; 56 FR 793, Jan. 9, 1991]

§ 1.249 Prehearing statement.

Immediately upon convening the formal hearing in any proceeding, the presiding officer shall enter upon the record a statement reciting all actions taken at the prehearing conferences, and incorporating into the record all of the stipulations and agreements of the parties which are approved by him, and any special rules which he may deem necessary to govern the course of the proceeding.

[28 FR 12425, Nov. 22, 1963. Redesignated at 33 FR 463, Jan. 12, 1968]

HEARING AND INTERMEDIATE DECISION

§ 1.250 Discovery and preservation of evidence; cross-reference.

For provisions relating to prehearing discovery and preservation of admissible evidence, see §§ 1.311 through 1.325.

[33 FR 463, Jan. 12, 1968]

§ 1.251 Summary decision.

(a)(1) Any party to an adjudicatory proceeding may move for summary decision of all or any of the issues set for hearing. The motion shall be filed at least 20 days prior to the date set for commencement of the hearing. The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

(2) With the permission of the presiding officer, or upon his invitation, a motion for summary decision may be filed at any time before or after the commencement of the hearing. No appeal from an order granting or denying a request for permission to file a motion for summary decision shall be allowed. If the presiding officer authorizes a motion for summary decision

after the commencement of the hearing, proposed findings of fact and conclusions of law on those issues which the moving party believes can be resolved shall be attached to the motion, and any other party may file findings of fact and conclusions of law as an attachment to pleadings filed by him pursuant to paragraph (b) of this section.

(b) Within 14 days after a motion for summary decision is filed, any other party to the proceeding may file an opposition or a countermotion for summary decision. A party opposing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing, that he cannot, for good cause, present by affidavit or otherwise facts essential to justify his opposition, or that summary decision is otherwise inappropriate.

(c) Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

(d) The presiding officer may, in his discretion, set the matter for argument and call for the submission of proposed findings, conclusions, briefs or memoranda of law. The presiding officer, giving appropriate weight to the nature of the proceeding, the issue or issues, the proof, and to the need for cross-examination, may grant a motion for summary decision to the extent that the pleadings, affidavits, materials obtained by discovery or otherwise, admissions, or matters officially noticed, show that there is no genuine issue as to any material fact and that a party is otherwise entitled to summary decision. If it appears from the affidavits of a party opposing the motion that he cannot, for good cause shown, present by affidavit or otherwise facts essential to justify his opposition, the presiding officer may deny the motion, may order a continuance to permit affidavits to be obtained or discovery to be had, or make such other order as is just.

(e) If all of the issues (or a dispositive issue) are determined on a motion for summary decision no hearing (or further hearing) will be held. The presiding officer will issue a Summary Decision, which is subject to appeal or review in the same manner as an Initial Decision. See §§1.271 through 1.282. If some of the issues only (including no dispositive issue) are decided on a motion for summary decision, or if the motion is denied, the presiding officer will issue a memorandum opinion and order, interlocutory in character, and the hearing will proceed on the remaining issues. Appeal from interlocutory rulings is governed by §1.301.

(f) The presiding officer may take any action deemed necessary to assure that summary decision procedures are not abused. He may rule in advance of a motion that the proceeding is not appropriate for summary decision, and may take such other measures as are necessary to prevent any unwarranted delay.

(1) Should it appear to the satisfaction of the presiding officer that a motion for summary decision has been presented in bad faith or solely for the purpose of delay, or that such a motion is patently frivolous, he will enter a determination to that effect upon the record.

(2) If, on making such determination, the presiding officer concludes that the facts warrant disciplinary action against an attorney, he will certify the matter to the Commission with his findings and recommendations, for consideration under §1.24.

(3) If, on making such determination, the presiding officer concludes that the facts warrant a finding of bad faith on the part of a party to the proceeding, he will certify the matter to the Commission, with his findings and recommendations, for a determination as to whether the facts warrant addition of an issue as to the character qualifications of that party.

[37 FR 7507, Apr. 15, 1972, as amended at 42 FR 56508, Oct. 26, 1977]

§ 1.253 Time and place of hearing.

(a) The Commission will specify the day on which and the place at which any hearing is to commence.