NEBRASKA ADMINISTRATIVE CODE

TITLE 442, NEBRASKA ADMINISTRATIVE CODE, CHAPTER 12

TAX EQUALIZATION AND REVIEW COMMISSION

DISCOVERY RULES

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NEBRASKA ADMINISTRATIVE CODE

TITLE 442 — TAX EQUALIZATION AND REVIEW COMMISSION

CHAPTER 12 — DISCOVERY RULES

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CHAPTER 12 DISCOVERY RULES

EXPLANATORY STATEMENT

The discovery rules which follow are based on the Discovery Rules for All Civil Cases promulgated by the Nebraska Supreme Court. Following the title of each section below the number of the Nebraska Supreme Court Discovery Rules for All Civil Cases is listed in parentheses for ease of comparison with the Supreme Court Rules. Discovery may be had in any proceeding before the Commission as follows:

001 General Provisions Governing Discovery (Rule 26)

001.01 Discovery Methods. 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 things or permission to enter upon land or other property for inspection and other purposes; and requests for admission. Unless the Commission orders otherwise under subdivision 001.03 of this rule, the frequency of use of these methods is not limited.

001.02 Scope of Discovery. Unless otherwise limited by order of the Commission in accordance with these rules, the scope of discovery is as follows:

001.02A In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in an appeal or petition, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books,

documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

001.02B Hearing Preparation: Materials. Subject to the provisions of subdivision 001.02C of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision 001.02A of this rule and prepared in anticipation of a petition or appeal or for hearing by or for another party or by or for that other party's representative (including his or her legal counsel, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation for a hearing and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Commission shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of legal counsel or other representative of a party concerning the petition or appeal.

A party may obtain without the required showing a statement concerning a petition or appeal or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the petition or appeal or its subject matter previously made by that person. If the request is refused, the person may move for a Commission order. The provisions of subsection 011.01C apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a

stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

001.02C Hearing Preparation: Experts. Discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subdivision 001.02A of this rule and acquired or developed in anticipation of an appeal or petition or for hearing may be obtained only as follows:

001.02C1a A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at hearing, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

001.02C1b Upon motion, the Commission may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision 001.02C3 of this rule, concerning fees and expenses as the Commission may deem appropriate.

001.02C2 A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of an appeal or petition or preparation for hearing and who is not expected to be called as a witness at hearing, only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

001.02C3 Unless manifest injustice would result,

001.02C3a the Commission shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections 001.02C1a and 001.02C2 of this rule; and

_____001.02C3b with respect to discovery obtained under subdivision 001.02C1a of this rule the Commission may require, and with respect to discovery obtained under subdivision 001.02C2 of this rule the Commission shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

001.03 Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the Commission may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

001.03A that the discovery not be had;

001.03B that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

001.03C that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

001.03D that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

001.03E that discovery be conducted with no one present except

persons designated by the Commission;

001.03F that a deposition after being sealed be opened only by order of the Commission;

001.03G that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

001.03H that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the Commission.

If the motion for a protective order is denied in whole or in part, the Commission may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of 011.01C apply to the award of expenses incurred in relation to the motion.

001.04 Sequence and Timing of Discovery. Unless the Commission upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

001.05 Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired, except as follows:

001.05A A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to

001.05A1 the identity and location of persons having knowledge of discoverable matters, and

001.05A2 the identity of each person expected to be called as an expert witness at hearing, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

001.05B A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which

001.05B1 the party knows that the response was incorrect when made, or

001.05B2 the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

001.05B3 A duty to supplement responses may be imposed by order of the Commission or by agreement of the parties.

001.06 Service of Discovery Papers. Except as otherwise ordered by the Commission, every discovery paper and every motion relating to discovery and response thereto required to be served upon a party shall be served upon each of the parties not in default for failure to appear.

001.07 Filing of Discovery Materials. Discovery materials that do not require action by the Commission shall not be filed with the Commission. All such materials, including notices of deposition, depositions, certificates of filing a deposition, interrogatories, answers and objections to interrogatories, requests for documents or to permit entry upon land and responses or objections to such requests, requests for admissions and responses or objections to such requests, subpoenas for depositions or other discovery and returns of service of subpoenas, and related notices shall be maintained by the parties.

Discovery materials shall be filed with the Commission only when ordered by

the Commission or when required by law. If the original of a deposition is not in the possession of a party who intends to offer it in evidence at a hearing, that party may give notice to the party in possession of it that the deposition will be needed at the hearing. Upon receiving such notice the party in possession of the deposition shall either make it available to the party who intends to offer it or produce it at the hearing.

002 Persons Before Whom Depositions May Be Taken (Rule 28)

002.01 Within This State. Within this State depositions may be taken before a notary public, or any person appointed by the Commission. A person so appointed has power to administer oaths and take testimony.

002.02 Elsewhere Within the United States. Within other states of the United States or within a territory or insular possession subject to the jurisdiction of the United States depositions may be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the Commission. A person so appointed has power to administer oaths and take testimony.

002.03 In Foreign Countries. In a foreign country, depositions may be taken

002.03A on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or

002.03B before a person commissioned by the Commission, and a person so commissioned shall have the power by virtue of his or her commission to administer any necessary oath and take testimony, or

002.03C pursuant to a letter rogatory.

002.03C1 A commission or a letter rogatory shall be issued on

application and notice on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

002.04 Disqualification for Interest. The officer before whom the deposition is taken and the person recording the testimony shall not be a relative, employee, or legal counsel for any of the parties, nor a relative or employee of such legal counsel, nor financially interested in the action.

003 Stipulations Regarding Discovery Procedure (Rule 29). Unless the Commission orders otherwise, the parties may by written or otherwise recorded stipulation:

003.01 Provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and

003.02 Modify the procedures provided by these rules for other methods of discovery.

004 Depositions Upon Oral Examination (Rule 30)

004.01 When Depositions May Be Taken. After filing a petition or appeal,

any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of the Commission, granted with or without notice, must be obtained only if the petitioner or appellant seeks to take a deposition prior to the expiration of thirty days after service of notice in lieu of summons, except that leave is not required:

004.01A If a defendant or appellee has served a notice of taking a deposition or otherwise sought discovery, or

004.01B If special notice is given as provided in subdivision 004.02B of this rule.

The attendance of witnesses may be compelled by subpoena.

004.02 Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization.

004.02A A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the petition or appeal. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

004.02B Leave of the Commission is not required for the taking of a deposition by a petitioner or appellant if the notice:

004.02B1 States that the person to be examined is about to go out of the State of Nebraska and will be unavailable for

examination in the State of Nebraska unless his or her deposition is taken before expiration of the thirty-day period, and

004.02B2 Sets forth facts to support the statement.

Legal counsel for petitioner or appellant shall sign the notice, and his or her signature constitutes a certification by him or her that to the best of his or her knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when the party was served with notice under subdivision 004.02B the party was unable through the exercise of diligence to obtain legal counsel to represent the party at the taking of the deposition the deposition may not be used against the party.

004.02C The Commission may for cause shown enlarge or shorten the time for taking the deposition.

004.02D The notice required by subdivision 004.02A shall state the manner in which the testimony will be recorded and preserved. The Commission may make any order necessary to assure that the record of the testimony will be accurate and trustworthy.

004.02E The notice to a party may be accompanied by a request made in compliance with subsection 008 for the production of documents and tangible things at the taking of the deposition. The procedure of subsection 008 shall apply to the request.

004.02F A party may in the party's notice and in a subpoena name as the witness a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he

or she will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision 004.02F does not preclude taking a deposition by any other procedure authorized in these rules.

004.02G The parties may stipulate in writing or the Commission may upon motion order that a deposition be taken by telephone.

004.02H1 A party taking a deposition may have the testimony recorded by videotape. The notice of deposition shall specify that a videotape deposition is to be taken.

004.02H2 Upon the request of any of the parties, the officer before whom a videotape deposition is taken shall provide, at the cost of the party making the request, a copy of the deposition in the form of a videotape, an audio recording, or a written transcript.

004.02H3 When the videotape deposition has been taken, the videotape shall be shown immediately to the witness for examination, unless such showing and examination are waived by the witness and the parties. Any changes in form or substance which the witness desires to make shall be recorded on the videotape with a statement by the witness on such tape of the reasons given by him or her for making such changes.

004.02H4 The officer before whom the videotape deposition is taken shall cause to be attached to the original videotape recording a certificate that the witness was duly sworn or affirmed by him or her and that the videotape recording is a true record of the testimony given by the witness. If the witness has not waived the right to a showing and examination of the videotape

deposition, the witness shall also sign the certification.

004.03 Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the hearing under the provisions of Neb. Rev. Stat. §77-5016. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his or her direction and in his or her presence, record the testimony of the witness. The testimony shall be recorded in accordance with subdivision 004.02D of this rule. If requested by one of the parties, the testimony shall be transcribed. All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

004.04 Motion to Terminate or Limit Examination. At any time during the taking of the deposition on motion of a party or of the witness and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the witness or party, the Commission may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subsection 001.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the Commission. Upon demand of the objecting party or witness the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of subsection 011.01C apply to the award of expenses incurred in relation to the motion.

004.05 When the testimony is fully transcribed the deposition shall be

submitted to the witness for examination and shall be read to or by him or her, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 006.03D the Commission holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

004.06 Certification; Delivery; Storage.

004.06A The officer shall certify on the deposition that the witness was truly sworn by him or her and that the deposition is a true record of the testimony of the witness. Unless otherwise ordered by the Commission, he or she shall then deliver the deposition to the party taking the deposition, who must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he or she may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he or she affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each

party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the originals be annexed to the deposition, pending final disposition of the case.

004.06B Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the witness.

004.06C The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

004.07 Failure to Attend or to Serve Subpoena; Expenses.

004.07A If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or through legal counsel pursuant to the notice the Commission may order the party giving the notice to pay to such other party the reasonable expenses incurred by the party and his or her legal counsel in attending.

004.07B If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or through legal counsel because the party expects the deposition of that witness to be taken, the Commission may order the party giving the notice to pay to such other party the reasonable expenses incurred by the party and his or her legal counsel in attending.

005 Depositions Upon Written Questions (Rule 31)

005.01 Serving Questions; Notice. After filing of a petition or appeal, any party may take the testimony of any person including a party by deposition upon written questions. The attendance of witnesses may

be compelled by subpoena.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

005.01A The name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or her or the particular class or group to which he or she belongs, and

005.01B The name or descriptive title and address of the officer before whom the deposition is to be taken.

A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 004.02F.

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The Commission may for cause shown enlarge or shorten the time.

005.02 Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by subsection 004.03, 004.05, and 004.06, to take the testimony of the witness in response to the questions and to prepare, certify, and deliver the deposition, attaching thereto the copy of the notice and the questions received by him or her.

005.03 The party taking the deposition shall give prompt notice to all other parties that it has been delivered by the officer before whom taken.

006 Use of Depositions in Hearings (Rule 32)

006.01 Use of Depositions. Any part or all of a deposition, so far as admissible under Neb. Rev. Stat. § 77-5016 applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions.

006.01A Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by Neb. Rev. Stat. § 77-5016.

006.01B The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under subsection 004.02F or 005.01, to testify on behalf of a public or private corporation, partnership or association, or governmental agency which is a party may be used by an adverse party for any purpose.

006.01C The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Commission finds:

006.01C1 That the witness is dead; or

006.01C2 That the witness is at a greater distance than one hundred miles from the place of hearing, or out of the state, or beyond the subpoena power of the Commission, unless it appears that the absence of the witness was procured by the party offering the deposition; or

006.01C3 That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

006.01C4 That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

006.01C5 That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally before the Commission, to allow the deposition to be used; or

006.01C6 Upon application and notice prior to the taking of the deposition, that circumstances exist such as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally before the Commission, to allow the deposition to be used.

006.01D If only part of a deposition is offered in evidence by a party, an adverse party may require the party to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts relevant to the issues.

Substitution of parties does not affect the right to use depositions previously taken.

006.02 Objections to Admissibility. Subject to the provisions of subdivision 006.03C of this rule objection may be made at a hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying; or if the Commission directs, such objections may be heard and determined prior to hearing.

006.03 Effect of Errors and Irregularities in Deposition.

006.03A As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

006.03B As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

006.03C As to Taking of Deposition.

006.03C1 Objections to the competency of a witness or to the competency or relevancy of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. In a deposition recorded and preserved by nonstenographic means such objections shall be made to the Commission before the hearing, or such objections will be waived, unless otherwise ordered by the Commission.

006.03C2 Errors and irregularities occurring at the oral examination in the manner of taking the deposition in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

006.03C3 Objections to the form of written questions submitted

under Section 005 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ten days after service of the last questions authorized.

006.03D As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or recorded, or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under sections 004 and 005 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

007 Interrogatories to Parties (Rule 33)

007.01 Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of the Commission, be served upon the petitioner or appellant after filing of a petition or appeal and upon any other party after service of the notice in lieu of summons upon that party. Unless otherwise permitted by the Commission for good cause shown no party shall serve upon any other party more than fifty interrogatories. Each question, subquestion, or subpart shall count as one interrogatory.

Each interrogatory shall be repeated and answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the legal counsel or party making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty

days after the service of the interrogatories, except that a defendant or appellee may serve answers or objections within forty-five days after service of the notice in lieu of summons upon that defendant or appellee. The Commission may allow a shorter or longer time. The party submitting the interrogatories may move for an order under subsection 011.01 with respect to any objection to or other failure to answer an interrogatory.

007.02 Scope; Use at Hearing. Interrogatories may relate to any matters which can be inquired into under subsection 001.02, and the answers may be used to the extent permitted by Neb. Rev. Stat. § 77-5016.

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 Commission may order that such an interrogatory need not be answered until after designated discovery has been completed or until a ~~rehearing~~prehearing conference or other later time.

007.03 Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

008 Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes (Rule 34)

008.01 Scope. Any party may serve on any other party a request:

008.01A To produce and permit the party making the request, or someone acting on the party's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of subsection 001.02 and which are in the possession, custody, or control of the party upon whom the request is served; or

008.01B To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of subsection 001.02.

008.02 Procedure. The request may, without leave of the Commission, be served upon the petitioner or appellant after filing of the petition or appeal and upon any other party after service of the notice in lieu of summons upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within thirty days after the service of the request, except that a defendant or appellee may serve a response within forty-five days after service of the notice in lieu of summons upon that defendant or appellee. The Commission may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted

as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under subsection 011.01 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

008.03 Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

009 Discovery From a Nonparty Without a Deposition (Rule34A)

009.01 Procedure.

009.01A Scope. Any party may, by subpoena without a deposition:

009.01A1 require the production for inspection and copying of designated books, papers, documents, or tangible things (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated if necessary by the owner or custodian into reasonably usable form) that are in the possession, custody, or control of a person who is not a party and within the scope of subsection 001.02; or

009.01A2 obtain entry upon designated land or other property within the scope of subsection 001.02 that is in the possession or control of a person who is not a party for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any

designated object or operation thereon.

009.01B Notice. A party intending to serve a subpoena pursuant to this rule shall give notice in writing to every other party to the petition or appeal at least 10 days before the subpoena will be issued. The notice shall state the name and address of the person who will be subpoenaed, the time and place for production or inspection, and that the subpoena will be issued on or after a stated date. A designation of the materials sought to be produced shall be attached to or included in the notice.

Such notice may be given by a party other than a petitioner or appellant at any time. Such notice may not be given by a petitioner or appellant until the time at which subsection 004.01 would permit a petitioner or appellant to take a deposition.

009.01C Issuance. A subpoena may be issued pursuant to this rule by a request to the chairperson of the Commission, at any time after all parties have been given the notice required by subsection 009.01B. The subpoena shall identify all parties who were given notice that it would be issued and the date upon which each of them was given notice. A subpoena pursuant to this rule shall include or be accompanied by a copy of this rule.

009.01D Time, manner, and return of service. A subpoena pursuant to this rule shall be served either personally by any person not interested in the petition or appeal or by registered or certified mail not less than 10 days before the time specified for compliance. The person making personal service shall make a return showing the manner of service to the party for whom the subpoena was issued.

009.02 Protection of Other Parties.

009.02A Objection Before Issued. Before the subpoena is requested or issued any party may serve a written objection on the party who gave notice that it would be issued. The objection shall specifically identify any intended production or inspection that is protected by an applicable privilege, that is not within the scope of discovery, or that would be unreasonably intrusive or oppressive to the party. No subpoena shall demand production or inspection of any material or premises identified in the objection. If the objection specifically objects that the person served with the subpoena should not have the option to deliver or mail copies of documents or things directly to a party, the subpoena shall not be issued unless all parties to the petition or appeal mutually agree on the method for delivery of the copies.

009.02B Order. The party who gave notice that a subpoena would be issued may apply to the Commission for an order with respect to any discovery for which another party has served a written objection. Upon hearing after notice to all parties the Commission may order that the subpoena be issued or not issued or that discovery proceed in a different manner, may enter any protective order authorized by subsection 001.03, and may award expenses as authorized by subsection 011.01C.

009.02C Protective Order. After a subpoena has been issued any party may move for a protective order under subsection 001.03.

009.03 Protection of the Person Served with a Subpoena.

009.03A Avoiding Burden and Expense. A party or legal counsel who obtains discovery pursuant to this rule shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The Commission shall enforce this duty and impose upon the party or legal counsel in breach of this duty an appropriate sanction, which may include, but is not

limited to, lost earnings of the person subject to the subpoena.

009.03B Responding to the Subpoena.

009.03B1 A person served with a subpoena pursuant to this rule shall permit inspection and copying either where the documents or tangible things are regularly kept or at some other reasonable place designated by that person. If the subpoena states that the person served has an option to deliver or mail legible copies of documents or things instead of inspection, that person may condition the preparation of the copies on the advance payment of the reasonable cost of copying.

009.03B2 A person served with a subpoena pursuant to this rule may, within 10 days after service of the subpoena, serve upon the party for whom the subpoena was issued a written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party for whom the subpoena was issued shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the Commission. If an objection has been made, the party for whom the subpoena was issued may, upon notice to all other parties and the person served with the subpoena, move the Commission for an order to compel compliance with the subpoena. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from complying with the command.

010 Requests for Admission (Rule 36)

010.01 Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending petition

or appeal only, of the truth of any matters within the scope of subsection 001.02 set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of the Commission, be served upon the petitioner or appellant after commencement of the petition or appeal and upon any other party with or after service of the notice in lieu of summons upon that party.

Each matter of which an admission is requested shall be separately set forth by the party making the request, and shall be repeated by the responding party in the answer or objection thereto. The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the Commission may allow, the party to whom the request is directed, serves upon the party requesting the admission, a written answer or objection addressed to the matter, signed by the party or by the party's legal counsel, but, unless the Commission shortens the time, a defendant or appellee shall not be required to serve answers or objections before the expiration of forty-five days after service of the notice in lieu of summons upon the defendant or appellee. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that reasonable inquiry has been made and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request; the party may, subject to the provisions of subsection 011.03, deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the Commission determines that an objection is justified, it shall order that an answer be served. If the Commission determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The Commission may, in lieu of these orders, determine that final disposition of the request be made at a pre-hearing conference or at a designated time prior to hearing. The provisions of subsection 011.01C apply to the award of expenses incurred in relation to the motion.

010.02 Effect of Admission. Any matter admitted under this rule is conclusively established unless the Commission on motion permits withdrawal or amendment of the admission. The Commission may permit withdrawal or amendment when the presentation of the merits of the petition or appeal will be subserved thereby and the party who obtained the admission fails to satisfy the Commission that withdrawal or amendment will prejudice the party in maintaining the party's petition or appeal or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending petition or appeal only and is not an admission by that party for any other purpose.

011 Failure to Make Discovery: Sanctions (Rule 37)

011.01 Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

011.01A Motion. If a deponent fails to answer a question propounded or submitted under sections 004 or 005, or a corporation or other entity fails to make a designation under subsection 004.02F or 005.01, or a party fails to answer an interrogatory submitted under section 007, or if a party, in response to a request for inspection submitted under section 008, fails to respond that inspection will be permitted as requested or fails

to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before the proponent applies for an order.

If the Commission denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to subsection 001.03.

011.01B Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

011.01C Award of Expenses of Motion. If the motion is granted, the Commission may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or legal counsel advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, unless the Commission finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the Commission may, after opportunity for hearing, require the moving party or the legal counsel advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, unless the Commission finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the Commission may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

011.02 Failure to Comply With Order.

011.02A Sanctions. If a party or an officer, director, or managing agent of a party or a person designated under subsection 004.02F or 005.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subsection 011.01 of this rule, the Commission may make such orders in regard to the failure as are just, and among others the following:

011.02A1 An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the petition or appeal in accordance with the claim of the party obtaining the order;

011.02A2 An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence;

011.02A3 An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the petition or appeal or any part thereof, or rendering a judgment by default against the disobedient party;

011.02A4 Where a party has failed to comply with an order as are listed in subsections 011.02A1, 011.02A2, and 011.02A3, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the Commission may require the party failing to obey the order or the legal counsel advising the party, or both to pay the reasonable expenses caused by the failure,

unless the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

011.03 Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under section 010, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, may, within 30 days of so proving, apply to the Commission for an order requiring the other party to pay the party's reasonable expenses incurred in making that proof. The Commission may make the order unless it finds that:

011.03A The request was held objectionable pursuant to subsection 010.01, or

011.03B The admission sought was of no substantial importance, or

011.03C The party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

011.03D There was other good reason for the failure to admit.

011.04 Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under subsection 004.02F or 005.01 to testify on behalf of a party fails

011.04A To appear before the officer who is to take his or her deposition, after being served with a proper notice, or

011.04B To serve answers or objections to interrogatories submitted under section 007, after proper service of the interrogatories, or

011.04C To serve a written response to a request for inspection

submitted under section 008, after proper service of the request,

the Commission on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections 011.02A1, 011.02A2, and 011.02A3 of this rule.

In lieu of any order or in addition thereto, the Commission may require the party failing to act or the legal counsel advising the party, or both to pay the reasonable expenses, caused by the failure, unless the Commission finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by subsection 001.03.