

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Midcontinent Independent System Operator, Inc.

Docket Nos. ER14-1242-006  
ER14-2860-000  
ER14-2862-003  
(Consolidated)

ORDER ESTABLISHING RULES FOR CONDUCT OF THE HEARING

(Issued July 21, 2015)

1. These Rules for Conduct incorporate by reference all Notices to the Public issued by the Chief Administrative Law Judge.<sup>1</sup>

**I. DISCOVERY**

2. Unless otherwise agreed by the participants and the Presiding Judge, the participants shall abide by the Discovery Time Standards posted at <http://www.ferc.gov/legal/admin-lit/time-dis.asp>.

3. Discovery requests, discovery responses, and any objections to discovery requests shall not be provided to the Presiding Judge.

4. Parties must make **serious** good-faith efforts to resolve discovery disputes prior to filing a motion to compel. Those efforts must be delineated in any discovery motion and answer thereto.

5. Parties are strongly discouraged from introducing discovery responses, including deposition transcripts, in lieu of cross-examination.

6. Objections to discovery requests must be made within five (5) business days of the date of service of the discovery request.

7. Non-disclosure certificates shall not be provided to the Presiding Judge.

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<sup>1</sup> Notices to the Public are available at <http://www.ferc.gov/legal/admin-lit.asp>. On December 12, 2014, the Chief Judge issued a Notice to the Public detailing procedures for handling exhibits and developing an electronic hearing record. The procedures and rules detailed in that Notice are adopted in this proceeding.

## II. MOTIONS TO COMPEL

8. If a party determines negotiations regarding production of a document or other discovery are no longer fruitful, the withholding party shall promptly notify requesting party. Notification of withholding party's final decision not to produce the requested information shall be in writing. The time for filing a motion to compel under the Discovery Time Standards will begin to run only upon such written service.

9. A motion to compel shall attach the pertinent parts of the discovery request and objections. If a dispute is still unresolved by further negotiations after a motion to compel is filed, an answer to such motion shall be due. The answer and any oral argument shall be set in accordance with the Discovery Time Standards.

## III. HANDLING OF EXHIBITS AND PRE-FILED TESTIMONY

10. All exhibits must have an alpha-numeric designation, indicating by no more than three (3) letters, the sponsor and the sequential number of that party's exhibits. All exhibits shall be marked with a permanent and party-specific designation (*e.g.*, "S-1" for Staff Exhibit #1). **Temporary exhibit numbers (referencing sponsoring witnesses' initials, *etc.*) shall not be used.** The parties shall not "reserve" numbers, but instead shall assign all numbers in consecutive sequence. Intervenors should not identify their exhibits with the letter "I" since the proceeding may involve multiple intervenors. All pre-filed exhibits will conform to this numbering methodology.

11. The **pre-filed testimony** of each witness shall be marked as a separate exhibit and shall be prefaced with a summary of the main points and supporting exhibits. The summary will generally not become part of the evidentiary record. The offering party may, however, have it included with the evidentiary record by a statement to that effect. The correspondingly filed electronic versions of all documents must be searchable. *See* ¶ 64, *infra*.

12. Participants must pre-file testimony in electronic format through FERC's e-Filing system. Participants must include in their submission all supporting exhibits for the witness's pre-filed testimony. Additionally, one (1) hard courtesy copy of the pre-filed testimony, cross-examination exhibits, and other exhibits shall be provided. The courtesy copy must be individually tabbed on the right side and three-hole punched. The number of each exhibit must be marked on its tab. The pre-filed exhibits are to be submitted in three-ring binders that must be *horizontally* labeled on the spine and cover.<sup>2</sup> Labels must identify which exhibit numbers are contained within the binder.

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<sup>2</sup> *I.e.*, the wording should appear horizontally when the binder stands upright.

13. Participants will provide the court reporter one (1) copy of pre-filed testimony in DVD or CD format at the beginning of the hearing. Cross-examination and other hearing exhibits must be emailed to the court reporter at the following address: info@acefederal.com. The court reporter will also have access to the Shared folder (discussed below in ¶ 25).

14. If minor corrections to pre-filed testimony must be made, the participants are encouraged to make such corrections at the hearing using an *errata* sheet. That sheet should also be e-filed. If an *erratum* to an exhibit is required, it must be filed as a new exhibit with a new exhibit number. If it is absolutely necessary to substitute pages for an entire exhibit already marked or admitted during the hearing, the following shall apply. The moving party must obtain the originally marked or admitted exhibit from the court reporter and replace it with the substitute exhibit. This will require prior recording of the moving party's intent to substitute the exhibit and the reason for the substitution. It will also require agreement by all parties for the substitution and approval from the Presiding Judge on the record. *Errata* must indicate all changes in red-line format. The party proffering the *errata* is responsible to see this procedure is followed.

15. **Procedures where substantial changes have been made since the time testimony was originally pre-filed.** All parties sponsoring such exhibits must provide the Presiding Judge and his clerk with copies of their final set of exhibits in loose-leaf form. Those copies shall be serially numbered, individually paginated, three-hole punched, and submitted in three-ring binders at least **two (2) weeks** prior to hearing's commencement. Additional copies need not be provided at the hearing, other than the e-copy required for the court reporter.

16. **At least one (1) week prior** to hearing commencement, parties sponsoring exhibits **must submit an initial index of all exhibits** to be offered through their own witnesses. They shall also provide copies to the other parties. The index should include seven columns. The first three columns should be filled in: (1) the exhibit number; (2) a brief description of the exhibit; and (3) the sponsoring party. The remaining four columns should be labelled as follows: (4) "Admitted, Rejected, or Withdrawn (& Transcript Page Reference)." (5) "Date Identified." (6) "Date Admitted or Rejected." and (7) "Privileged, Protected, CEII, or None." See *Appendix A* attached as an example. It is the responsibility of the parties to keep their exhibit lists current and accurate.

17. To ensure every exhibit will be identified in the transcript **index**, the identification must contain an appropriate **title for the document**. This may be accomplished either through an identification statement by sponsoring counsel or by the Presiding Judge's own identifying statement.

18. Under no circumstances will an exhibit be moved into evidence that is marked as follows: **"protected," "privileged," "Critical Energy Infrastructure Information (CEII),"** or any other restrictively-designated material, unless the exhibit is so designated

on the record.<sup>3</sup> Once an exhibit is identified on the record as “protected,” “privileged,” “CEII,” *etc.*, it must be approved by the Presiding Judge and admitted or rejected as such. *Caveat*: I am of the opinion that any party wishing to proffer “protected,” “privileged,” “CEII,” or any other restrictively-designated material has an **EXTREMELY HEAVY BURDEN**. Such burden extends not only to proving relevance and materiality, but showing an item is actually privileged or confidential, *etc.* (*See e.g.*, 18 C.F.R. § 388.112 and Commission Order No. 630.) Instead, I suggest preparing a redacted version that makes your point without including restricted matter.

19. If restrictively-designated material must be admitted, every such exhibit shall indicate the restriction on the cover page and at the top of each individual page of the exhibit. Each instance of restrictively-designated material must be noted by surrounding the protected language with a red box. Furthermore, the following designations in upper-case, boldface type must occur before and after the restricted information. “**START OF PROTECTED MATERIAL**” and “**END OF PROTECTED MATERIAL.**”

20. Exhibits containing “protected” or other restrictively-designated material shall also have a public, redacted version admitted that must be clearly marked as “*PUBLIC.*” Some exhibits might be “protected” in their entirety, precluding production of a public, redacted version. In these instances, a sheet of paper indicating such must be admitted in place of a public version.

21. The following applies to the *PUBLIC* version of an exhibit previously marked as “protected,” “privileged,” “CEII,” *etc.* in whole or in part. In such cases, every page of the exhibit that is so marked shall be stamped by the submitting party as “*PRIVILEGE LIFTED.*”

22. For exhibits that have not been filed prior to the hearing, counsel shall **provide an empty three-ring binder** to the Presiding Judge. This will facilitate exhibits used by that party during the course of cross examination to be placed in the binder. The binder should include pre-numbered tabs sufficient to separate all exhibits. Each binder must be labeled *horizontally* on its cover and spine with the Party’s name and docket number of the case. The label shall also identify the nature of the contents of the binder, *e.g.*, “Cross-Examination Exhibits of Party X -Volume 1 of 1.” All cross-examination exhibits shall be three-hole punched. At the conclusion of the examination of a witness, counsel shall provide a three-hole punched table of all exhibits used in the examination of each witness.

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<sup>3</sup> The Commission’s long-standing practice has been to refer to confidential materials, including confidential business trade secrets, as privileged. The Commission’s use of the term privileged for these materials does not detract from a filing party’s ability to assert a common law evidentiary privilege. See Filing of Privileged Materials and Answers to Motions, Order No. 769, FERC Stats. & Regs. ¶ 31,337, at 31,747 (2012).

23. If an exhibit contains copyrighted material, the party sponsoring the exhibit is responsible for obtaining advanced permission of the copyright owner. If the copyright owner is a participant in this action, such permission shall be deemed granted. Permission shall include the right to use and reproduce that material in this proceeding. It shall also include permission to reproduce the material in all publications arising from this proceeding. These publications include the initial decision of the Presiding Judge and Orders of the Commission. In the event that such permission is restricted, the exhibit will include a legend at the bottom of the first page. The legend shall identify the copyright date, the copyright owner, and the nature of the restriction. In the absence of such legend, it is assumed that any use of such material in this proceeding is a “fair use.” Such fair use shall be in accordance with 17 U.S.C. § 107 (2012) or permitted under an agreement the participant obtained with the copyright owner.

24. Participants will use a Commission-approved network for exhibits at the hearing. The network permits participants to upload exhibits during the hearing. It is separate from the Commission’s network.

25. Participants will place the exhibits they plan to introduce into the record in their participant-specific folder on the network before the hearing. Once an exhibit is identified on the record, the identifying participant will “drag and drop” a copy of the exhibit from the participant’s folder to the Shared folder. Participants will see only their respective, participant folder and the Shared folder. The Judge can see all folders.

26. Participants may project exhibits onto a screen during the hearing. Even so, privileged or other restricted versions of exhibits shall only be projected when the hearing is in closed session. Participants wishing to project such images must request the closed session.

27. When the Presiding Judge is to rule on **late-filed exhibits** presented after the hearing is concluded, the following procedures are to be followed. The proffering participants will provide one (1) hard copy to the judge. The copy for the court reporter will be filed electronically.

28. **Provide Clarity in Pre-Filed Testimony and Other Documents.**

(a) **Acronyms.** Generally, you should avoid acronyms. Where you must use acronyms, include an **appendix** of acronyms or other abbreviations at the back of *each* document. In the body of a document, list out the phrase that forms the basis of every acronym when you first use it. If you (the witness or attorney) use a term only a few times in a document, spell it out each time and omit the acronym.

(b) **Short sentences and paragraphs.** *Sentences* must be restricted to *around 20 words*. *Paragraphs* must be limited to no more than *8 sentences*, ideally ranging between 3 and 8 sentences.

(c) **Be concise.** Your sentences should contain only one idea. Paragraphs should contain only one topic. Avoid double negatives. Avoid redundancy.

Anyone having difficulty following these guidelines should review my suggestions for persuasive-legal writing starting at page 7 of the following link: [http://www.eba-net.org/sites/default/files/Summer%202014%20Newsletter\\_0.pdf](http://www.eba-net.org/sites/default/files/Summer%202014%20Newsletter_0.pdf).

#### IV. MOTIONS TO STRIKE

29. Parties must file any Motion to Strike pre-filed testimony and exhibits no later than ten (10) business days prior to submission of responsive testimony. For rebuttal testimony, Motions to Strike must occur no later than ten (10) business days prior to the start of the hearing.

#### V. EXAMINATION OF WITNESSES

30. No later than one (1) week prior to hearing commencement, participants shall provide the Presiding Judge with a Joint Witness List. That list will indicate the anticipated order witnesses will be called to testify.

31. Except in extraordinary circumstances, no telephone appearances regarding any matter to be captured or reflected in the record of the hearing will be permitted. Circumstances will be deemed “extraordinary” only with the prior approval of the Presiding Judge.

32. Examination shall be strictly limited to the scope of prior relevant testimony. Direct testimony includes any rebuttal testimony by the witness.

33. Redirect examination shall be strictly limited to matters brought out on cross-examination.

34. Succeeding cross-examiners will not engage in repetitive cross-examination. Thus, counsel who intend to cross-examine a witness **must** be present in the hearing room during the entire preceding cross-examination of that witness.

35. Friendly cross-examination may be permitted in those instances where the Presiding Judge would find it useful in fully developing the evidence.

36. Counsel will be permitted to further examine a witness, within the scope of questions asked of that witness by the Presiding Judge.

37. Cross-examination shall not be used as a substitute for discovery. Questions during cross-examination used to educate a party about the substance of another party's pre-filed testimony are prohibited. Also prohibited are any other questions posed to elicit information that could have been obtained in discovery.

38. Requests for clarification of a question may only come from the witness or the Presiding Judge.

39. Regarding exhibits a party seeks to introduce during cross-examination, counsel must establish proper foundation with the witness before it will be admitted into the record.

## VI. BRIEFS AND JOINT STATEMENTS

40. No later than **two (2) weeks** prior to the date scheduled for hearing, the participants shall provide the Presiding Judge with a **Joint Statement of Issues**. The Joint Statement of Issues shall include a **synopsis of each participant's position** as to each individual issue. The issues to be tried are limited to those included in the Joint Statement and any amendments thereto permitted by the Presiding Judge. At this time the participants shall also submit a **Joint Statement of Stipulated Facts**. Furthermore, they shall submit a **Joint Statement of Contested Facts (with Explanations)**, if necessary. Every issue or fact in each of the respective Joint Statements shall be numbered *seriatim* (e.g., 1, 2, 3, *etc.*). For example, Joint Statement of Issues (JSI) 1 through 3; Joint Statement of Facts (JSF) 1 through 23, *etc.*

41. Also, no later than **two (2) weeks** prior to the date scheduled for hearing, each party will submit a **pre-hearing brief**. Pre-hearing briefs shall be a maximum of twenty (20) pages. **All** briefs should address each issue listed in the Joint Statement of Issues, unless otherwise noted by a specific statement to that effect. All issues should be appropriately numbered and titled, and addressed in sequential order, thereby allowing for comparison of the issues. *I.e.*, briefing issues must mirror each of the stipulated issues. See also, guidelines for clarity in ¶ 28, *supra*.

42. Briefs will be filed in *Microsoft® Word* format on the due date (*see* ¶ 64) and use *Times New Roman* 13-point font. Participants should submit hyperlink-formatted briefs that include hyperlinks to exhibits, transcripts, and cases. Participants who submit hyperlinked briefs must do so within the two (2) weeks after reply briefs are due. Both the initial and the reply briefs can be included in one CD containing the hyperlinked briefs. Briefs may be served on other participants through e-Filing. In addition, a single-sided hard copy of each brief shall be provided to the Presiding Judge in accordance with ¶ 64, *infra*.

43. Footnotes and citations must be accurate and relevant and must support the proposition for which they are asserted. References to evidence must not be overly broad,

such as: *Direct Testimony of X at pages 27 through 39*. Instead, provide exact page and line number(s) to support each point. References to evidence in **post-hearing briefs** must include exhibit number, page, line(s) or section(s), **and** descriptions. For instance, if referring to *Exh. S-5 at 2(g)*, also include the description; *e.g., X's Response to Y's Data Request #Y-X 4-19 of Oct. 12, 20--*.

## VII. CONDUCT AT THE HEARING

44. Persons attending the hearing are free to come and go as they wish, provided the hearing is not disturbed.
45. No reading of extraneous material will be permitted.
46. Cell phones and other mobile devices must be turned off or set to silent notification. Persons answering cell-phone calls must do so outside of the hearing room. In some instances, mobile devices may interfere with the audio system in the hearing room. If this occurs, attendees will be asked to turn them off completely.
47. Guest wireless-internet access in the Commission's hearing rooms is available upon request for proceeding participants. Requests must be made at least two weeks before the proceeding and should be directed to the Presiding Judge's law clerk via email. The request must identify the duration of the requested access and include the requester's: (1) name, (2) affiliation, (3) phone number, and (4) email address. Upon approval, the requester will receive an email including the necessary password information.
48. The following should also occur through contact with my law clerk, at least two (2) weeks before hearing. Participants must provide MAC addressees for the two (2) laptops they plan to use during the hearing to access the network and their electronic exhibits. Only one (1) laptop will be required to upload exhibits, but the addresses for two (2) are needed in the event there are technical difficulties.
49. Participants will be required to read, sign, and submit an Interconnection Service Agreement two (2) weeks prior to the start of the hearing dependent upon the data transmission method request for use of electronic exhibits during the hearing. The Interconnection Service Agreement is necessary to allow participants access to the network during the hearing for cybersecurity purposes. Contact my legal assistant for details.
50. Participants should be prepared, in the event the technology fails, to continue the hearing without interruptions.
51. Food and drinks, other than water, are not permitted in the hearing room.

52. No cross conversation between opposing counsel will be permitted. Rather, if counsel has anything to say to opposing counsel, such statement **must** be made through the Presiding Judge. Quiet consultation between co-counsel and assistants or their witnesses is allowed.

53. When a witness is sworn, everyone else in the hearing room must be seated and quiet.

54. Argument or objection may only be made by counsel prior to a ruling. Once a ruling is made, no further discussion of the matter will be permitted.

55. Requests for special accommodations, if necessary, should be made in advance of the hearing, when practically possible.

### **VIII. WAIVER**

56. The hearing will be conducted in conformance with these rules. In the rare instance where inflexible adherence to the rules will result in an injustice, counsel may petition the Presiding Judge for relief. Alternatively, the Presiding Judge may grant relief *sua sponte*.

57. It is counsel's responsibility to make the Presiding Judge aware of infractions by making a timely objection. Failure to make a timely objection could result in waiver of the rule.

### **IX. FILING OF THE OFFICIAL RECORD**

58. Within seven (7) days of the end of the hearing, participants will file (via e-Filing) a **Joint Exhibit List** in the format provided in *Appendix A*. The Joint Exhibit List will include the following for each exhibit. (1) The exhibit number. (2) A brief description of the exhibit. (3) The sponsoring party. (4) Its status (admitted, rejected, or withdrawn, and containing transcript page references). (5) The date the exhibit was marked for identification. (6) The date admitted or rejected and (7) its protected, privileged, CEII, or no designation classification. The Joint Exhibit List will also include the docket number and case name in the header of the document.

59. If an exhibit is **partially rejected**, the pages, or portions that were admitted must be specified in the Joint Exhibit List for that exhibit.

60. The following is to occur within seven (7) days of the end of the hearing. Each sponsoring party will file (via e-Filing) the "Official Copies" of each exhibit that was

offered into evidence and admitted or rejected.<sup>4</sup> Withdrawn exhibits, however, shall not be e-Filed. Exhibits will not be altered in any way after they are admitted, without leave of the Presiding Judge. Any admitted or rejected exhibit e-Filed at this time must include the marking “**Official Copy**” on the first page. Filers will also add the text “**Official Copy**” in the description of the document in the e-Filing interface to distinguish between the pre-filed and official copies. Exhibits should be filed in searchable format.

61. Parties will provide one (1) courtesy copy of the official exhibits and the Joint Exhibit List to the Presiding Judge on a digital media in searchable format. Privileged, Protected or similarly-restricted exhibits will be provided on a medium that is separate from the non-protected exhibits and marked accordingly. The exhibit list should contain hyperlinks to the referenced exhibit.

## **X. SUBMISSION OF DOCUMENTS**

62. One (1) hard courtesy copy of any document filed with the Commission Secretary pursuant to 18 C.F.R. §§ 385.2001–385.2012 in this proceeding should be provided to Judge Haubner. The courtesy copy should be sent to the Presiding Judge via overnight mail delivery on the same day the document is filed with the Commission Secretary. Please note: **Courier deliveries are prohibited.**

63. Exhibits filed in native format electronically must be provided on CD. The disc must be marked with the docket number and exhibit numbers and two (2) copies of each disc containing the exhibits will be provided to both the court reporter and the Presiding Judge. Multiple exhibits may be admitted on one disk.

64. Copies of all motions, briefs, and other documents (excluding testimony and exhibits) must also be provided directly to the Presiding Judge electronically at [Michael.Haubner@ferc.gov](mailto:Michael.Haubner@ferc.gov) and must be searchable. Any protected materials transmitted electronically must be encrypted. The text of such motions, briefs, and other documents must be provided in *Microsoft® Word* format. Exhibits or other attachments may be provided in PDF or *Microsoft® Excel* format, as appropriate. **Submission** of documents **by 3:00 p.m.** on the due date is highly encouraged.

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<sup>4</sup> By filing the “Official Copies,” participants are certifying to the best of their knowledge that those are exact copies of corresponding exhibits as offered into evidence and admitted.

65. Please contact my law clerk, Veronica Bradley, at 202-502-8107 or [Veronica.Kennedy@ferc.gov](mailto:Veronica.Kennedy@ferc.gov), with any questions. Additionally, my legal assistant, Ms. Jazmin Thompson, may be reached at 202-502-6215 or via email at [Jazmin.Thompson@ferc.gov](mailto:Jazmin.Thompson@ferc.gov).

SO ORDERED.

Michael J. Haubner  
Presiding Administrative Law Judge

