

## Part 5 - Discovery

### **§ 5.1 Generally**

(a) Consistent with the limitations and procedures set forth in this part, parties shall fully disclose to each other, upon request, all information (including data, records, objects, and documents) relevant and material to a proceeding in which they are participating and any information likely to lead to such information. The provisions of this part apply to formal proceedings, and do not limit any other authority of the Commission or its staff to obtain information from a utility company, or other entity.

(b)[In addition to]To the maximum extent possible, [methods of service otherwise acceptable,] discovery requests and responses pursuant to this Part [may]shall be served [by telecopier machine on any party consenting to be so served. Any such party may waive the conditions specified in [section] § 3.5(g) of this Title related to confirmation and mailing] electronically.

### **§ 5.2 Informal discovery**

(a) Parties are encouraged to communicate and exchange information informally, including by telephone or by meeting, and to use the formal procedures provided for below only as necessary.

(b) Material or information provided by one party to another through informal discovery need not, for that reason alone, be made available to third parties. Nevertheless, no party may refer to, introduce into evidence, or otherwise use at a hearing, except in its pre-filed written testimony or in response to cross-examination, any information obtained through informal discovery unless that party first shows that all other active parties received or had a reasonable opportunity to receive that response reasonably in advance of the hearing at which such use is proposed.

### **§ 5.3 Interrogatories**

(a) After a proceeding is commenced and until any cut-off point that the presiding officer may set, any party may serve written interrogatories on any other party. Each interrogatory shall be clear and concise, and, to the degree possible, employ technical terms in the way they are usually employed in Commission proceedings; encompass only questions related to each other; and be [typed] presented on a separate page. Each party's interrogatories (and document requests pursuant to [section] § 5.4 of this Part) shall be numbered consecutively throughout the proceeding. A copy of every interrogatory shall be served on each party, and on the presiding officer, if he or she so requests.

(b) An individual knowledgeable as to the content of each response to an interrogatory may be required to testify as to its truth or accuracy. If the name of that individual is not set forth on the response, it shall be provided promptly by the responding party upon request.

(c) Except as provided below, a party to whom an interrogatory is directed shall answer each question separately in writing, and shall set forth the question immediately before its answer. Answers shall be served on the requesting party within 10 days following service of the interrogatory, and a copy shall be served on any presiding officer or party who so requests.

(d) If the interrogated party cannot prepare a response within 10 days, it shall, within the 10 days, so inform the interrogating party and state when the response will be forthcoming. Any ensuing dispute over timing of the response shall be submitted to the presiding officer for resolution.

(e) Any objection to an interrogatory shall be made in writing and served on all parties and the presiding officer within 10 days of service of the interrogatory. The interrogatory need not be answered while the objection remains pending. If the presiding officer overrules the objection, the answer to the interrogatory shall be served within five days following the issuance of the ruling or within 10 days following service of the interrogatory, whichever is later.

### **§ 5.4 Requests for documents**

(a) After a proceeding is commenced and until any cut-off point that the presiding officer may set, any party may serve a written request for documents (including writings, drawings, and electronically stored information) on any other party. The request shall describe the documents sought with reasonable particularity, though the description may be by clearly defined category rather than by item. A copy of every request shall be served on each party, and on the presiding officer, if he or she so requests.

(b) Except as provided below, a party to whom a request for a document is addressed shall furnish a copy of the document to the requesting party within 10 days of service of the request. A copy of each document shall be provided to any presiding officer or party who so requests. [Nothing in this rule, however, shall require a party to translate stored data from one medium to another] Electronic service of a copy of the document satisfies this obligation.

(c) If the party from which a document is sought cannot provide a copy within 10 days, it shall, within the 10 days, so inform the requesting party and state when the copy will be forthcoming. Any ensuing dispute over timing of the response shall be submitted to the presiding officer for resolution.

(d) Any objection to a document request shall be made in writing and served on all parties and the presiding officer within 10 days of service of the request. The document need not be supplied while the objection remains pending. If the presiding officer overrules the objection, the document shall be supplied within [five] 5 days following the issuance of the ruling or within [ten] 10 days following service of the request, whichever is later.

(e) If a requested document is voluminous, the responding party may permit the requesting party to examine the document at the responding party's office and then supply a copy of only so much of the document as the requesting party finds it needs. The times, locations, and conditions for such examination shall be reasonable, and the presiding officer shall [~~insure~~ensure] that responding parties do not use this option to impose unfair burdens on requesting parties or otherwise hinder discovery.

## **§ 5.5 Requests for admissions**

(a) After a proceeding is commenced and until any cut-off point that the presiding officer may set, any party may serve on any other party a request to admit the genuineness of a document, the accuracy or fairness of representation of photographs, drawings, or maps, or the truth of any statement of fact. A copy of every request shall be served on each party and the presiding officer, if he or she so requests.

(b) Responses to requests for admission shall be served within 10 days of service of the request. A copy of the response shall be served on each party and on the presiding officer.

(c) Any request for admission not denied within 10 days will be deemed granted, except in extraordinary circumstances where the failure to deny within that time is shown to be justified.

(d) Admissions made or deemed to be made will be applicable only to the proceeding in which they are requested.

#### **§ 5.6 Other discovery**

The presiding officer, on request or by his or her own motion, may authorize other forms of discovery, including oral depositions and inspection of sites, facilities, or original documents. A party requesting such procedures shall show that the likely benefits cannot otherwise be obtained and outweigh the associated costs.

#### **§ 5.7 Supplementation of responses**

A party shall promptly amend a previous discovery response if, during the course of the proceeding, it learns that the previous response was incorrect when made or, though correct when made, is no longer so in a material respect.

#### **§ 5.8 Scope of discovery**

(a) Discovery requests should be tailored to the particular proceeding and commensurate with the importance of the issues to which they relate. They should be limited to materials or information that:

(1) the requesting party expects to use in cross-examination or in preparing its case;

(2) are not already possessed by or readily available to that party; and

(3) are not conveniently obtainable elsewhere. Unduly broad requests will not be allowed.

(b) Discovery that is unreasonably cumulative, repetitive, or duplicative will not be allowed.

(c) In general, a party will not be required to develop information or prepare a study for another party. In unusual circumstances, however, where a party from [whom]which discovery is sought uniquely possesses the information needed for a study and the ability to prepare the study (for example, computerized data and a program for manipulating them), a request to develop information may be granted if the information appears material and the request, considered on its own and in the context of other similar requests in the proceeding, does not appear unduly burdensome or costly. The presiding officer may condition the granting of such a request on the requesting party's agreement to bear specified costs of performing the study. In no event would a party preparing a study for another be required to testify in support of the study or be constrained in its presentation of its own position on that account.

(d) Claims of evidentiary privilege may be raised by parties in their objections to discovery requests. In resolving claims that information is privileged or exempt from discovery, the presiding officer shall be guided but not bound by the Civil Practice Law and Rules and case law pursuant to it and may conduct in camera examinations, issue protective orders, and adopt other measures suited to the particular situation.

(e) Claims that information is exempt from discovery on the grounds it is a trade secret, confidential commercial information or critical infrastructure information shall be treated in accordance with [section] §6-1.4 of this [t]Title.

(f) Requests for documents in the control of trial staff shall be subject to the provisions of this [p]Part. If trial staff asserts the "official information privilege" pursuant to § 87(2)(g) of the Public Officers Law, that assertion will be sustained only upon a showing that the interest in the confidentiality of the document at issue outweighs the interest

of the requesting party in its disclosure. Documents within the control of trial staff include those prepared by persons currently or previously designated to serve on it and those prepared by other employees of the Department and reviewed by, or in the possession of, a trial staff member in the course of his or her participation in the case in which the discovery request is made.

(g) Denial of discovery pursuant to this [p]Part does not preclude the granting of a request for a document pursuant to the Freedom of Information Law, where warranted.

### **§ 5.9 Miscellaneous procedures**

(a) Every party shall identify an individual to whom [data]discovery requests should be referred.

(b) The determination of when [S]service of discovery requests, objections, or responses [will be considered]is complete [when the document is deposited in the United States mail, first-class, postage prepaid; delivered to an overnight delivery service; or transmitted, to a party who has consented to receive such transmissions, via facsimile machine or via direct electronic transfer of data files between electronic data processors]is governed by § 3.5(e)(3) of this Title.

(c) Parties should attempt to resolve discovery disputes among themselves, without involvement of the presiding officer. Problems relating to questions or answers should be communicated to the other party immediately by telephone.

(d) The presiding officer may, [on]at the request of any party or on his or her own motion, modify the procedures set forth in this [p]Part for the purpose of promoting the fair, orderly, and efficient conduct of the case.

### **§ 5.10 Sanctions**

If a party fails or refuses to comply with a directive to disclose material, or renders incomplete or substantially misleading responses, the presiding officer may:

([1]a) take as established, to the disadvantage of the recalcitrant party, specified facts related to the matter at hand;

([2]b) prohibit the recalcitrant party from introducing the evidence concerning which the discovery request was made; or

([3]c) take such other action as may be proper in the circumstances.