

proceeding, how the proceeding will be conducted, the establishment of the record in such a proceeding, and the grounds for a default judgment or a dismissal.

(a) The hearings examiner, on the timely written motion of a party or on the examiner's own motion and with the consent of all parties to a protested proceeding, may conduct all or part of a prehearing conference or hearing by telephone.

(b) A party may request to appear at a prehearing conference or a hearing by telephone.

(1) All motions requesting a telephonic appearance or proceeding shall be in writing, shall be filed at the commission and served on all parties not less than 20 days prior to the proceeding, and shall include the pertinent telephone number(s).

(2) If the request is to conduct only a portion of the proceeding by telephonic means, the requesting party shall specify the part of the proceeding to be conducted telephonically.

(3) If the proceeding involves testimony, the requesting party shall identify the witnesses and, for expert witnesses, their qualifications to testify as experts.

(4) Responses to a request for telephonic appearance shall be made in accordance with § 1.28 of this title (relating to Responsive Pleadings and Emergency Action).

(5) Upon agreement of the parties or a finding of good cause, the examiner may modify the times for filing a request for telephonic appearance and/or responses to such a request, and for filing witness information.

(c) In considering whether conducting all or part of a prehearing conference or hearing by telephone is feasible, the hearings examiner shall ensure that the telephonic hearing will provide due process and will be fair, and shall take into account the following factors:

(1) whether a party's request for such is timely;

(2) whether all parties to a protested proceeding have agreed in writing, filed no later than ten days prior to the proceeding, to conducting all or part of the proceeding via telephone;

(3) whether the parties have demonstrated:

(A) how witnesses will be separated;

(B) how coaching of witnesses will be prevented;

(C) why observing a witness's oral demeanor is adequate to make a reliable determination of the truth of the witness's testimony; and

(D) how the witnesses' and parties' identities will be established;

(4) the number of parties;

(5) the number of witnesses;

(6) the number and type of exhibits;

(7) the distance of the parties or witnesses from Austin;

(8) the nature of the hearing; and

(9) any other pertinent factors which the examiner believes may affect the proceeding.

(d) The hearings examiner shall issue a ruling not less than ten days prior to the proceeding stating whether the proceeding will be conducted, in whole or in part,

telephonically. In addition, the examiner shall notify all parties by telephone or by facsimile transmission of the ruling. The parties may waive this notice deadline.

(e) Unless otherwise directed by the hearings examiner, the proponent of any documentary evidence other than prefiled written testimony filed pursuant to the provisions of § 1.105 of this title (relating to Written Testimony) shall serve copies of that evidence on all parties and the hearings examiner no later than five business days prior to the telephonic proceeding. All documentary evidence shall be clearly labeled with the name of the sponsoring party and a unique document number. With the consent of the hearings examiner, a party may supplement or amend evidence less than three days prior to the proceeding or during the proceeding.

(f) All substantive and procedural rights apply to telephonic proceedings, subject only to the limitations of the physical arrangement.

(g) The time and location of telephonic proceedings shall be properly posted, and any person may, by advance request, be present in the room with the hearings examiner.

(h) The hearings examiner shall conduct telephonic proceedings using a speaker telephone. The hearings examiner shall make a tape recording of the telephonic proceeding, or the proceeding may be recorded by a court reporter by prior arrangement, pursuant to § 1.129 of this title (relating to Reporters and Transcripts).

(i) The telephonic proceeding, including arranging the conference call, shall be initiated by the hearings examiner. When all parties appearing telephonically are connected, the hearings examiner shall affirm the parties' consent to the telephonic proceeding.

(1) The hearings examiner shall then call the proceeding to order and ask for all parties to identify themselves, their locations, and their witnesses.

(2) The hearings examiner shall affirm on the record the prior written agreement from all parties consenting to the telephonic appearance or proceeding and shall state whether the proceeding is being memorialized by means of a tape recording or transcription of the proceeding.

(3) The hearings examiner shall administer the oath to each witness individually, prior to his or her testimony.

(j) If the hearings examiner is prevented from establishing the telephonic connection for the proceeding through circumstances which are beyond the control of any party or the examiner; which cannot be attributed to any party's intentional or negligent conduct; and which continue for at least 30 minutes past the time for beginning the hearing, the hearings examiner may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened. The hearings examiner shall state on the record or in writing to all parties the date, time, and location of the reconvened proceeding.

(k) If the hearings examiner decides or any party requests not to proceed with the

telephonic proceeding at any time, or asserts that the presence of one or more of the parties or witnesses in the hearing room is necessary for full disclosure of the facts and states the reasons for such an assertion, the hearings examiner may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened with all participants present in person. The examiner shall state on the record and in writing to all parties the reasons for terminating the telephonic proceeding and the date, time, and location of the reconvened proceeding.

(l) The commission may consider the following events to constitute a failure to appear and grounds for default or dismissal:

(1) failure to answer the telephone for more than 10 minutes after the scheduled time for the proceeding;

(2) failure to free the telephone for the proceeding for more than 10 minutes after the scheduled time for the proceeding;

(3) failure to be ready to proceed with the proceeding within 10 minutes of the scheduled time; and

(4) a party's intentional disconnection from the call.

(m) In the event of accidental disconnection of one or more parties to the proceeding, the hearings examiner shall immediately recess the hearing and attempt to re-establish the connection or connections.

(1) If reconnection is achieved within 30 minutes, the hearings examiner may resume the telephonic hearing, or may postpone, continue, or recess the proceeding, as the hearings examiner deems appropriate, until the earliest possible date and time for the proceeding to be reconvened. The examiner shall state on the record or in writing to all parties the date, time, and location of the reconvened proceeding.

(2) If reconnection cannot be achieved within 30 minutes, then the hearings examiner shall recess the telephonic proceeding until a date and time certain and at a location specified in a written notice of reconvened hearing.

There are no Federal counterparts to the Commission's proposal to conduct all or part of a prehearing conference or administrative hearing by telephone. Neither SMCRA at section 525 nor the Federal regulations at 30 CFR 775.11 and 43 CFR part 4 address telephonic proceedings. However, nothing in the Commission's proposed rule supersedes or replaces its previously approved general rules of practice and procedures for hearings. The Commission is merely offering another method by which parties may appear at prehearing conferences or hearings. The proposed procedures for telephonic proceedings will provide due process for all parties involved in a prehearing conference or hearing. As stated in 16 TAC 1.130(c), the hearings examiner must ensure that the telephonic hearing will provide due process and will be fair. Black's Law Dictionary, Seventh Edition, defines due