

against harms that would be caused by premature circulation of such transcripts, while protecting the witness' rights by allowing him or her to inspect the official transcript. This approach, embodied in this regulation, is also consistent with the principles of Attorney General Ashcroft's October 12, 2001, "Memorandum for Heads of All Federal Departments and Agencies," on the Freedom of Information Act, in which he said, "Any discretionary decision by your agency to disclose information protected under the FOIA should be made only after full and deliberate consideration of the institutional, commercial, and personal privacy interests that could be implicated by disclosure of the information."

This proposal is modeled on the rules of the Securities and Exchange Commission (17 CFR 203.6) and those of other agencies which also follow the APA and permit the agency to limit witnesses to inspection of transcripts in non-public investigatory proceedings for good cause. The Board has followed the APA process by allowing witnesses, after their testimony, to ask the General Counsel for the opportunity to procure a copy of the transcript, provided, of course, that for good cause, the General Counsel may deny the petition and limit the witness (and his or her counsel) to an inspection of the witness' testimony. This regulation also makes it clear that this right to inspect the transcript is a right guaranteed by the APA and that witnesses who seek copies of the transcript are informed by the General Counsel of their right to inspect it.

As the court stated in *SEC v. Sprecher*, 594 F.2d 317, 319 (2nd Cir 1979), "[I]t is obviously impractical for the Commission to determine prior to the testimony of a witness whether there will be 'good cause' to withhold a copy of the testimony from that witness, and we do not read the APA as requiring such an advance determination."

Moreover, the courts have made it clear that the APA "does not require [the agency] to spell out the 'good cause' which was the basis for the refusal to sell copies of the transcript." *Commercial Capital Corp. v. SEC*, 360 F.2d 856, 858 (7th Cir. 1966).

In summary, this regulation largely tracks the language of the APA. The courts have recognized that such regulations are properly designed to "permit the [agency] to enjoy confidentiality, where it is necessary, in order effectively to complete its investigation." *Zients v. La Morte*, 319 F. Supp 956, 958 (S.D.N.Y 1970) (discussing purpose of the SEC regulation), accord *Lamorte v.*

Mansfield, 438 F.2d 448 (2d Cir 1971), (Friendly, J.) ("to the extent that a privilege exists, it is the agency's not the witness's").

Regulatory Flexibility Act

The Board, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed this regulation and certifies that it will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, 109 Stat. 48.

Federalism (E.O. 13132)

The CSB has determined this regulation conforms to the federalism principals of Executive Order 13132. It also certifies that to the extent a regulatory preemption occurs, it is because the exercise of State and tribal authority conflicts with the exercise of Federal authority under the U.S. Constitution's supremacy clause and Federal statute.

Paperwork Reduction Act

This regulation contains no reporting or record keeping requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3510 *et seq.*

List of Subjects in 40 CFR Part 1610

Administrative practice and procedure, Investigations.

For the reasons set forth in the preamble, the Chemical Safety and Hazard Investigation Board amends 40 CFR part 1610 as follows:

PART 1610—ADMINISTRATIVE INVESTIGATIONS

1. The authority citation for part 1610 is revised to read as follows:

Authority: 42 U.S.C. 7412(r)(6)(C)(i), 7412(r)(6)(L), 7412(r)(6)(N).

Section 1610.4 also issued under 5 U.S.C. 555.

2. Add § 1610.4 to read as follows:

§ 1610.4 Deposition Transcripts.

(a) Transcripts of depositions of witnesses compelled by subpoena to appear during a Board investigation, shall be recorded solely by an official

reporter designated by the person conducting the deposition.

(b) Such a witness, after completing the compelled testimony, may file a petition with the Board's General Counsel to procure a copy of the official transcript of such testimony. The General Counsel shall rule on the petition, and may deny it for good cause. Whether or not such a petition is filed, the witness (and his or her attorney), upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony. If such a petition is denied by the General Counsel, he shall inform the petitioner of the right to inspect the transcript.

(c) Good cause for denying a witness' petition to procure a transcript of his or her testimony may include, but shall not be limited to, the protection of: trade secrets and confidential business information contained in the testimony, security-sensitive operational and vulnerability information, and the integrity of Board investigations.

Dated: January 23, 2003.

Christopher W. Warner,
General Counsel.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 03-159, MB Docket No. 02-91, RM-10411]

Digital Television Broadcast Service; Cheboygan, MI

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission, at the request of WPNB/WTOM License Subsidiary, Inc., substitutes DTV channel 35 for DTV channel 14 at Cheboygan, Michigan. See 67 FR 31170, May 9, 2002. DTV channel 35 can be allotted to Cheboygan, Michigan, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 45-39-01 N. and 84-20-37 W. with a power of 80, HAAT of 168 meters and with a DTV service population of 68 thousand. Since the community of Cheboygan is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government has been obtained for this allotment. With this action, this proceeding is terminated.