

## CIRCUIT RULE 11-6

### PREPARATION OF THE CLERK'S RECORD FOR TRANSMITTAL; NUMBER OF COPIES

#### 11-6.1 Preparation of the Clerk's Record for Transmittal

In cases where the clerk's record is to be transmitted to the Court of Appeals pursuant to Circuit Rule 11-4.4 or Circuit Rule 11-5, the district court clerk shall tab and identify each document by the docket control number assigned when the document was initially entered on the district court docket. The documents shall be assembled in sequence according to filing dates, with a certified copy of the docket entries at the beginning. Papers shall be bound in a volume or volumes with each document individually tabbed showing the number corresponding to the district court docket entry. The docket sheet shall serve as the index.

#### 11-6.2 Number of Copies

In cases where the clerk's record is to be transmitted to the Court of Appeals pursuant to Circuit Rule 11-4.4 or 11-5, the district court shall transmit 1 set of the clerk's record to the Court of Appeals unless the Court of Appeals orders additional copies. If the Court of Appeals requests additional copies, the clerk of the district court shall give notice to the concerned parties, and additional copies shall be provided at the appellant's expense. The parties shall arrange with the clerk of the district court for any copies of the clerk's record needed for their own use.

## FRAP 12

### DOCKETING THE APPEAL; FILING OF THE RECORD

(a) Docketing the appeal. Upon receipt of the copy of the notice of appeal and of the docket entries, transmitted by the clerk of the district court pursuant to Rule 3(d), the clerk of the court of appeals shall thereupon enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the district court, with the appellant identified as such, but if such title does not contain the name of the appellant, the appellant's name, identified as appellant, shall be added to the title.

(b) Filing the record, partial record, or certificate. Upon receipt of the record transmitted pursuant to Rule 11(b), or the partial record transmitted pursuant to Rule 11(e), (f), or (g), or the clerk's certificate under Rule 11(c), the clerk of the court of appeals shall file it and shall immediately give notice to all parties of the date on which it was filed.

(c) [Dismissal for failure of appellant to cause timely transmission or to docket appeal] [Abrogated]

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986.)

Cross Reference: Circuit Rule 3-1, Filing of Appeal.

FRAP 13

#### REVIEW OF DECISIONS OF THE TAX COURT

(a) How obtained; time for filing notice of appeal. Review of a decision of the United States Tax Court shall be obtained by filing a notice of appeal with the clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by 1 party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered.

The running of the time for appeal is terminated as to all parties by a timely motion to vacate or revise a decision made pursuant to the Rules of Practice of the Tax Court. The full time for appeal commences to run and is to be computed from the entry of an order disposing of such motion, or from the entry of decision, whichever is later.

(b) Notice of appeal. How filed. The notice of appeal may be filed by deposit in the office of the clerk of the Tax Court in the District of Columbia or by mail addressed to the clerk. If a notice is delivered to the clerk by mail and is received after expiration of the last day allowed for filing, the postmark date shall be deemed to be the date of delivery, subject to the provisions of 7502 of the Internal Revenue Code of 1954, as amended, and the regulations promulgated pursuant thereto.

(c) Content of the notice of appeal; service of the notice; effect of filing and service of the notice. The content of the notice of appeal, the manner of its service, and the effect of the filing of the notice and of its service shall be as prescribed by Rule 3. Form 2 in the Appendix of Forms is a suggested form of the notice of appeal.

(d) The record on appeal; transmission of the record; filing of the record. The provisions of Rules 10, 11 and 12 respecting the record and the time and manner of its transmission and filing and the docketing of the appeal in the court of appeals in cases on appeal from the district courts shall govern in cases on appeal from the Tax Court. Each reference in those rules and in Rule 3 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court respectively. If appeals are taken from a decision of the Tax Court to more than 1 court of appeals, the original record shall be transmitted to the court of appeals named in the first notice of appeal filed. Provision for the record in any

other appeal shall be made upon appropriate application by the appellant to the court of appeals to which such other appeal is taken.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979.)

#### CIRCUIT RULE 13-1

##### EXCERPTS OF RECORD IN TAX COURT CASES

Review of the decisions of the Tax Court shall be in accordance with FRAP 13, except that preparation and filing of the excerpts of record in such cases shall be in accordance with Circuit Rule 30-1. Each reference in Circuit Rule 30-1 to the district court and to the clerk of the district court shall be read as a reference to the Tax Court and to the clerk of the Tax Court, respectively.

#### CIRCUIT RULE 13-2

##### TRANSMISSION OF THE RECORD IN TAX COURT CASES

The clerk of the Tax Court shall transmit the record to the Clerk of the Court of Appeals within 40 days after the notice of appeal is received by the Tax Court.

#### FRAP 14

##### APPLICABILITY OF OTHER RULES TO REVIEW OF DECISIONS OF THE TAX COURT

All provisions of these rules are applicable to review of a decision of the Tax Court, except that Rules 4-9, Rules 15-20, and Rules 22 and 23 are not applicable.

#### CIRCUIT RULE 14-1

##### APPLICABILITY OF OTHER RULES TO REVIEW OF DECISIONS OF THE TAX COURT

All provisions of these Circuit Rules are applicable to review of a decision of the Tax Court, except that any Circuit Rules accompanying FRAP 4-9, 15-20, and 22 and 23 are not applicable.

#### FRAP 15

##### REVIEW OR ENFORCEMENT OF AGENCY ORDERS - HOW OBTAINED; INTERVENTION

(a) Petition for review of order; joint petition.  
Review of an order of an administrative agency, board, commission or officer (hereinafter, the term "agency" shall include agency, board, commission or officer) shall be obtained by filing with

the clerk of a court of appeals which is authorized to review such order, within the time prescribed by law, a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal, whichever form is indicated by the applicable statute (hereinafter, the term "petition for review" shall include a petition to enjoin, set aside, suspend, modify or otherwise review, or a notice of appeal). The petition shall specify the parties seeking review and shall designate the respondent and the order or part thereof to be reviewed. Form 3 in the Appendix of Forms is a suggested form of a petition for review. In each case the agency shall be named respondent. The United States shall also be deemed a respondent if so required by statute, even though not so designated in the petition. If two or more persons are entitled to petition the same court for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition for review and may thereafter proceed as a single petitioner.

(b) Application for enforcement of order; answer; default; cross-application for enforcement. An application for enforcement of an order of an agency shall be filed with the clerk of a court of appeals which is authorized to enforce the order. The application shall contain a concise statement of the proceedings in which the order was entered, the facts upon which venue is based, and the relief prayed. Within 20 days after the application is filed, the respondent shall serve on the petitioner and file with the clerk an answer to the application. If the respondent fails to file an answer within such time, judgment will be awarded for the relief prayed. If a petition is filed for review of an order which the court has jurisdiction to enforce, the respondent may file a cross-application for enforcement.

(c) Service of petition or application. A copy of a petition for review or of an application or cross-application for enforcement of an order shall be served by the clerk of the court of appeals on each respondent in the manner prescribed by Rule 3 (d), unless a different manner of service is prescribed by an applicable statute. At the time of filing, the petitioner shall furnish the clerk with a copy of the petition or application for each respondent. At or before the time of filing a petition for review, the petitioner shall serve a copy thereof on all parties who shall have been admitted to participate in the proceedings before the agency other than respondents to be served by the clerk, and shall file with the clerk a list of those so served.

(d) Intervention. Unless an applicable statute provides a different method of intervention, a person who desires to intervene in a proceeding under this rule shall serve upon all parties to the proceeding and file with the clerk of the court of appeals a motion for leave to intervene. The motion shall contain a concise statement of the interest of the moving party and the grounds upon which intervention is sought. A motion for leave to intervene or other notice of intervention authorized by

an applicable statute shall be filed within 30 days of the date on which the petition for review is filed.

#### CIRCUIT RULE 15-1

##### REVIEW OR ENFORCEMENT OF AGENCY ORDERS

Review of an order of an administrative agency, board, commission or officer (hereinafter "agency") and applications for enforcement of an order of an agency shall be governed by FRAP 15.

#### CIRCUIT RULE 15-2

##### PROCEDURES FOR REVIEW UNDER THE PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION ACT

###### 15-2.1 Review - How Obtained:

Suits under the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. 839, et seq. (1982), shall be initiated by filing a petition for review. The parties seeking review shall be denominated petitioners. In each case, the Administrator of the Bonneville Power Administration or the Northwest Power Planning Council shall be denominated respondent.

###### 15-2.2 Contents of Petition:

The petition for review shall identify the order or action of which review is sought. A petition for review of a rate-making decision shall be labeled "Petition for Review of (specify) Rates," identifying rates at issue. Any other petition shall be labeled "Petition for Review under the Northwest Power Act" and shall on the face of the petition identify any other known petitions for review of the same order or action.

###### 15-2.3 Service, Consolidation and Intervention:

(a) Petitions shall, to the extent possible, comply with the service requirements of FRAP 15(c). If petitioners believe that compliance with FRAP 15(c) is impracticable or unreasonable in the circumstances, they may file a motion for a determination that service may be effected in a different fashion.

(b) All petitions for review of the same rates will be automatically consolidated by the clerk. All petitions for review of the same order or action will be automatically consolidated by the clerk. Other petitions may be consolidated by motion.

(c) Any petitioners in 1 of 2 or more consolidated cases will be deemed to have intervened in all consolidated cases. A party granted leave to intervene in 1 of a number of 2 or more consolidated cases will be deemed to have intervened in all consolidated cases. Intervention otherwise should be sought by motion under FRAP 15(d).

Cross Reference: Circuit Rule 1-1, Scope of Circuit Rules.

#### FRAP 15.1

#### BRIEFS AND ORAL ARGUMENT IN NATIONAL LABOR RELATIONS BOARD PROCEEDINGS

Each party adverse to the National Labor Relations Board in an enforcement or a review proceeding shall proceed first on briefing and at oral argument unless the court orders otherwise.

(As added Mar. 10, 1986, eff. July 1, 1986.)

#### FRAP 16

#### THE RECORD ON REVIEW OR ENFORCEMENT

(a) Composition of the record. The order sought to be reviewed or enforced, the findings or report on which it is based, and the pleadings, evidence and proceedings before the agency shall constitute the record on review in proceedings to review or enforce the order of an agency.

(b) Omissions from or misstatements in the record. If anything material to any party is omitted from the record or is misstated therein, the parties may at any time supply the omission or correct the misstatement by stipulation, or the court may at any time direct that the omission or misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

#### FRAP 17

#### FILING OF THE RECORD

(a) Agency to file; time for filing; notice of filing. The agency shall file the record with the clerk of the court of appeals within 40 days after service upon it of the petition for review unless a different time is provided by the statute authorizing review. In enforcement proceedings the agency shall file the record within 40 days after filing an application for enforcement, but the record need not be filed unless the respondent has filed an answer contesting enforcement of the order, or unless the court otherwise orders. The court may shorten or extend the time above prescribed. The clerk shall give notice to all parties of the date on which the record is filed.

(b) Filing - What Constitutes. The agency may file the entire record or such parts thereof as the parties may designate by stipulation filed with the agency. The original papers in the agency proceeding or certified copies thereof may be filed. Instead of filing the record or designated parts thereof, the agency may file a certified list of all documents, transcripts of testimony, exhibits and other material comprising the record, or

a list of such parts thereof as the parties may designate, adequately describing each, and the filing of the certified list shall constitute filing of the record. The parties may stipulate that neither the record nor a certified list be filed with the court. The stipulation shall be filed with the clerk of the court of appeals and the date of its filing shall be deemed the date on which the record is filed. If a certified list is filed, or if the parties designate only parts of the record for filing or stipulate that neither the record nor a certified list be filed, the agency shall retain the record or parts thereof. Upon request of the court or the request of a party, the record or any part thereof thus retained shall be transmitted to the court notwithstanding any prior stipulation. All parts of the record retained by the agency shall be a part of the record on review for all purposes.

#### CIRCUIT RULE 17-1

##### FILING OF THE RECORD ON REVIEW OR ENFORCEMENT OF AGENCY ORDERS

Filing of agency records where the appeal is directly from the agency to the Court of Appeals shall be pursuant to FRAP 17.

Cross Reference: Circuit Rule 13-2, Tax Court Records.

#### CIRCUIT RULE 17-2

##### EXCERPTS OF RECORD ON REVIEW OR ENFORCEMENT OF AGENCY ORDERS

###### 17-2.1 Filing of the Excerpts of Record

At the time the petitioner's brief is filed, the petitioner shall file 5 copies of excerpts of record bound separately from the briefs. The petitioner shall serve 1 copy of the excerpts on each of the other parties.

###### 17-2.2 Required Contents of the Excerpts of Record

(a) When review or enforcement of an agency order is sought, the excerpts of record shall include:

(i) the agency docket sheet, if there is one;

(ii) the order to be reviewed;

(iii) any opinion, findings of fact or conclusions of law filed by the agency, board, commissioner or officer which relates to the order to be reviewed;

(iv) except as provided in Circuit Rule 17-2.2(b), where an issue raised in the petition is based upon a challenge to the admission or exclusion of evidence, that specific portion of the reporter's transcript recording any discussion by court or

counsel involving the evidence, offer of proof, ruling or order, and objections at issue;

(v) except as provided in Circuit Rule 17-2.2(b), where an issue raised in the petition is based upon a challenge to any other ruling, order, finding of fact, or conclusion of law, and that ruling, order, finding or conclusion was delivered orally, that specific portion of the reporter's transcript recording any discussion by court or counsel in which the assignment of error is alleged to rest;

(vi) where an issue raised in the petition is based on a written exhibit (including affidavits), those specific portions of the exhibit necessary to resolve the issue;

(vii) any other specific portions of any documents in the record that are cited in petitioner's briefs and are necessary to the resolution of an issue on appeal; and,

(viii) where the petition is from the grant or denial of a motion, those specific portions of any affidavits, declarations, exhibits or similar attachments submitted in support of or in opposition to the motion that are essential to the resolution of an issue on review.

(b) In addition to the items required by Circuit Rule 17-2.2(a), where the petition seeks review of an agency adjudication regarding immigration or the grant or denial of benefits, the excerpts of record shall also include the entire reporter's transcript of proceedings before the immigration judge or the administrative law judge.

#### 17-2.3 Items Not to Be Included in the Excerpts of Record

The excerpts of record shall not include briefs or other memoranda of law unless necessary to the resolution of an issue on appeal, and shall include only those pages necessary therefor.

Cross Reference: Circuit Rule 17-3, Sanctions.

#### 17-2.4 Form of the Excerpts of Record

The documents which comprise the excerpts of record need not be certified as true copies, but if possible the agency's "filed" stamp should appear on each document. The documents in the excerpts should be arranged by file date in chronological order, with the document with the earliest file date on top. The document with the earliest file date should appear under the first or should be paginated beginning with page 1. The agency docket sheet, if there is one, should always be the last document in the excerpts. The 5 copies of the excerpts are to be reproduced on letter size white paper by any duplicating or copying process capable of producing a clear black image, and each copy must be securely bound at the top or on the left side and must have a tan cover styled as described in FRAP 32(a). The

excerpts must be either paginated or the documents marked with tabs corresponding to the tab number, if any, of the documents in the clerk's record. The excerpts must begin with an index organized chronologically describing the documents, exhibits and portions of the reporter's transcript contained therein and the page or tab number where they may be found in the excerpts. The information on the front cover of the excerpts of record should be styled exactly as a brief except that the wording "Excerpts of Record" should be substituted for "Brief of Petitioner". In those unusual cases in which the total number of pages in the excerpts exceeds 300 pages, the excerpts shall be filed in multiple volumes, with each volume containing 300 pages or fewer.

#### 17-2.5 Respondent's Supplemental Excerpts of Record

If the respondent believes that the excerpts of record filed by the petitioner exclude items which are required under this rule, or if argument in the respondent's brief requires review of portions of the reporter's transcripts or documents not included by petitioner in the excerpts, the respondent shall, at the time respondent's brief is filed, file supplemental excerpts of record, prepared pursuant to this rule, comprised of the omitted items. Respondent shall file 5 copies of the supplemental excerpts of record. The respondent shall serve 1 copy of the supplemental excerpts on each of the other parties.

#### 17-2.6 Additional Copies of the Excerpts of Record

Should the Court of Appeals consider a case en banc, the Clerk of the Court of Appeals will require counsel to submit an additional 20 copies of the excerpts of record.

#### CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 17-2

The purpose of the excerpts of record is to provide each member of the panel with those portions of the record necessary to reach a decision. In general, decisions will be rendered without review of parts of the record not contained in the excerpts and not specifically relied upon in the briefs on the parties. Therefore, parties should ensure that those parts of the record necessary to permit an informed analysis of their position are included in the excerpts. Nevertheless, in reaching its decision, the court may, but need not, rely on parts of the record not included by the parties in their excerpts.

#### CIRCUIT RULE 17-3

#### SANCTIONS FOR FAILURE TO COMPLY WITH CIRCUIT RULE 17-2

If materials required to be included in the excerpts under these rules are omitted, or irrelevant materials are included, the court may take one or more of the following actions:

(a) strike the excerpts and order that they be corrected and resubmitted;

(b) order that the excerpts be supplemented;

(c) If the court concludes that a party or attorney has vexatiously or unreasonably increased the cost of litigation by inclusion of irrelevant materials, deny that portion of the costs the court deems to be excessive; and/or

(d) impose monetary sanctions.

Counsel will be provided notice and have an opportunity to respond before sanctions are imposed.

FRAP 18

#### STAY PENDING REVIEW

Application for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant to the relief sought. Reasonable notice of the motion shall be given to all parties to the proceeding in the court of appeals. The court may condition relief under this rule upon the filing of a bond or other appropriate security. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Cross Reference: Circuit Rules 27-1, 27-2, 27-3, and 27-6, Motions Practice.

FRAP 19

#### SETTLEMENT OF JUDGMENTS ENFORCING ORDERS

When an opinion of the court is filed directing the entry of a judgment enforcing in part the order of an agency, the agency shall within 14 days thereafter serve upon the respondent and file with the clerk a proposed judgment in conformity with the opinion. If the respondent objects to the proposed judgment as not in conformity with the opinion, the respondent shall within 7

days thereafter serve upon the agency and file with the clerk a proposed judgment which the respondent deems to be in conformity with the opinion. The court will thereupon settle the judgment and direct its entry without further hearing or argument.

(As amended Mar. 10, 1986, eff. July 1, 1986.)

## FRAP 20

### APPLICABILITY OF OTHER RULES TO REVIEW OR ENFORCEMENT OF AGENCY ORDERS

All provisions of these Rules are applicable to review or enforcement of orders of agencies, except that Rules 3-14 and Rules 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

## CIRCUIT RULE 20-1

### APPLICABILITY OF OTHER RULES TO REVIEW OF AGENCY DECISIONS

All provisions of these Circuit Rules are applicable to review or enforcement of orders of agencies, except that any Circuit Rules accompanying FRAP 3 through 14, and FRAP 22 and 23 are not applicable. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review or enforce agency orders.

## FRAP 21

### WRITS OF MANDAMUS AND PROHIBITION DIRECTED TO A JUDGE OR JUDGES AND OTHER EXTRAORDINARY WRITS

(a) Mandamus or prohibition to a judge or judges; petition for writ; service and filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; order directing answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise it shall order that an answer to the

petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(c) Other extraordinary writs. Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(d) Form of papers; number of copies. All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.

Cross-Reference: FRAP 22, Habeas Corpus Proceedings; Circuit Rules 27-1, 27-2, 27-3, and 27-6.

#### CIRCUIT RULE 21-1

#### WRITS OF MANDAMUS, PROHIBITION, OTHER EXTRAORDINARY WRITS

Petitions for writs of mandamus, prohibition or other extraordinary relief shall conform to and be filed in accordance with the provisions of FRAP 21(a).

#### CIRCUIT RULE 21-2

#### CAPTIONS

Petitions for writs of mandamus, prohibition or other extraordinary relief directed to a judge or magistrate or bankruptcy judge shall bear the title of the appropriate court and shall not bear the name of the district judge or judges, magistrate, or bankruptcy judge as respondent in the caption. Petitions shall include in the caption: the name of each petitioner; the name of the appropriate court as respondent; and the name of each real party in interest. Other petitions for extraordinary writs shall include in the caption: the name of each petitioner; and the name of each appropriate adverse party below as respondent.

#### CIRCUIT RULE 21-3

#### CERTIFICATE OF INTERESTED PARTIES

Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the certificate as to interested parties required by Circuit Rule 28-2.1 and the statement of related cases required by Circuit Rule 28-2.6.

#### CIRCUIT RULE 21-4

#### ANSWERS TO PETITIONS

No answer to such a petition may be filed unless ordered by the Court. Except in emergency cases, the Court will not grant a petition without a response.

Cross Reference: FRAP 22, Habeas Corpus Proceedings; and Circuit Rules 27- 1, 27-2, 27-3, and 27-6, Motions Practice.

#### CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 21-1 to 21-4

Except in habeas corpus death penalty cases, a petition for writ of mandamus, writ of prohibition or other extraordinary relief is processed by the clerk and motions attorneys in the same fashion as a motion. If the panel does not believe that the petition makes a prima facie showing justifying issuance of the writ, it will deny the petition forthwith. That denial is not regarded as a decision on the merits of the claims. In other instances, the panel will direct that an answer and reply may be filed within specified times. The panel may also issue a stay or injunction pending further consideration of the petition. After receipt of the answer and reply, or expiration of the times set therefor, the matter is then forwarded to a new motions panel unless the first panel directs otherwise. The panel may grant or deny the petition or set it for oral argument. If the panel decides to set the petition for argument, it may be calendared before a regular panel of the Court or before the motions panel.

In emergency circumstances, an individual judge may grant temporary relief to permit a motions panel to consider the petition, may decline to act, or may order that an answer be filed. If the judge determines that immediate action on the merits is necessary, the judge will contact the members of the court currently sitting as a motions panel until two or more judges can consider whether to grant or deny the petition. Except in extreme emergencies, the judges will not grant a petition without calling for an answer to the petition. In habeas corpus death penalty cases, petitions are processed according to the procedures set forth above except that panel assignments are governed by Circuit Rules 22-2 and 22-3. (See FRAP 8; and Circuit Advisory Committee Notes to Rules 27-3 and 27-7.)

#### FRAP 22

#### HABEAS CORPUS PROCEEDINGS

(a) Application for the original writ. An application for a writ of habeas corpus shall be made to the appropriate district court. If application is made to a circuit judge, the application will ordinarily be transferred to the appropriate district court. If an application is made to or transferred to the district court and denied, renewal of the application before a circuit judge is not favored; the proper remedy is by appeal to the court of appeals from the order of the district court denying the writ.

(b) Necessity of certificate of probable cause for appeal. In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges thereof and shall be considered by a circuit judge or judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. If an appeal is taken by a state or its representative, a certificate of probable cause is not required.

#### CIRCUIT RULE 22-1

#### HABEAS CORPUS DEATH PENALTY CASES

The following rules apply to all proceedings within the jurisdiction of this court in cases brought pursuant to 28 U. S. C. 2254 involving a sentence of death, including appeals from orders of United States District Courts granting or denying habeas corpus relief, motions for stays of execution, or applications for certificates of probable cause. To the extent that other Circuit Rules are inconsistent with these rules, these rules apply.

#### CIRCUIT RULE 22-2

#### HABEAS CORPUS DEATH PENALTY PANEL

Upon receipt of a notice of appeal from the district court, or other application to this court for relief, in a habeas corpus death penalty case, the clerk shall docket the case and assign it to a special habeas corpus death penalty panel constituted from a pool of the active judges of the court and those senior judges who are willing to serve on such a panel. The clerk shall notify

the judges on the panel of their assignment by telephone or other expeditious means. The panel to which the case is assigned shall handle all matters pertaining to the case, including motions for a stay of execution, applications for certificate of probable cause, the merits, appeals from second or successive petitions, remands from the Supreme Court of the United States, and all incidental and collateral matters, including any separate proceedings questioning the conviction or sentence.

#### CIRCUIT RULE 22-3

##### PANEL SELECTION

The clerk shall prepare a pool of all active judges and those senior judges willing to serve on the special habeas corpus death penalty panels. Judges shall be assigned to the panels by random drawing from the pool. Once drawn, a judge shall not be returned to the pool until the pool is exhausted, unless the judge is unable to serve, in which event that judge's name shall be returned to the pool after a replacement has been drawn. When the pool has been exhausted, the clerk shall prepare a new pool and select panels from the pool in like manner.

If any judge serving on a panel is unable to continue to serve, a replacement shall be drawn from the pool.

#### CIRCUIT RULE 22-4

##### FIRST PETITION

(a) Definitions. This Rule shall apply to appellate proceedings involving a first petition for a writ of habeas corpus filed pursuant to 28 U.S.C. 2254 for a petitioner under a sentence of death. A "first petition" for habeas corpus shall mean: the original filing relating to a particular conviction or sentence, and a subsequent or amended filing if the original filing was not dismissed on the merits.

(b) Panel Assignments. Any motions involving a petitioner's first habeas corpus petition shall be assigned to a panel selected in accordance with Rule 22-3 rather than to the motions panel described in the Circuit Advisory Committee Note to Rule 27-1. This panel shall handle all matters pertaining to this petition and any subsequent petitions involving the same conviction or sentence.

(c) Stays of Execution and Certificates of Probable Cause. On the first petition, if a certificate of probable cause and a stay of execution have not been entered by the district court or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, upon application of the petitioner a certificate of probable cause will be issued and a stay of execution will be granted by this court pending the issuance of its mandate.

When the panel affirms a denial or denies a grant of a first petition, it shall enter an order staying the mandate through the rehearing process and through the time for filing a petition for writ of certiorari. If during the stay a petition is filed in the Supreme Court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue.

#### CIRCUIT ADVISORY COMMITTEE NOTE TO CIRCUIT RULES 22-4

If a petitioner has been granted relief, in whole or in part, a petition challenging a subsequent conviction or sentence shall be considered as a first petition and this rule shall apply rather than Rule 22-5.

#### CIRCUIT RULE 22-5

##### SUBSEQUENT PETITIONS

(a) Definitions. After this court has made a final determination of a first petition, this Rule shall apply to appellate proceedings involving any subsequent petitions with respect to the same conviction and sentence.

(b) Panel Assignments. A subsequent petition, and any matters pertaining to it, shall be assigned to the same panel that heard the first petition.

(c) Records of Other Proceedings. A panel that affirms a denial of a first petition may direct that respondent lodge in this court any documents, including petitions, motions, orders, opinions, or transcripts filed in any proceeding following its affirmance.

(d) Stays of Execution and Certificates of Probable Cause. If the district court issues a certificate of probable cause without issuing a stay of execution or if the district court has issued a stay of execution that will not continue in effect pending the issuance of this court's mandate, a stay will be granted by this court. If the district court denies an application for a certificate of probable cause and a motion for a stay of execution of a sentence of death, the application for a certificate of probable cause in a proceeding pursuant to 28 U. S. C. 2254 and a motion for stay of execution shall be accompanied by the following documents:

- (1) the complaint or petition to the district court;
- (2) each brief or memorandum of points and authorities filed in the district court that is pertinent to the motion;
- (3) the district court opinion giving its reasons for denying relief;

- (4) the application to the district court for a stay;
- (5) the district court order granting or denying a stay pending appeal, and the statement of reasons for its action;
- (6) the order denying a certificate of probable cause;
- (7) a copy of any state or federal court opinion or judgment in the case or, if there is no written opinion or judgment, a copy of the relevant portions of the transcript; and
- (8) a copy of the notice of appeal.

The clerk will notify all judges by the most expeditious means of the filing of an application for certificate of probable cause and a stay of execution, and will forward forthwith copies of the items listed above to any judge who asks for them.

(e) Motions for Stays of Execution - Procedures.

(1) If all documents referred to in subdivision (d) of this rule are not filed with the motion for stay of execution or application for certificate of probable cause, the motion shall state why the documents are unavailable and where they may be obtained. If the applicant does not provide the documents, the respondent shall provide them or state in any response to the motion for stay of execution why they are not available.

(2) Counsel shall adhere to Circuit Rule 27-3 regarding emergency motions, except to the extent it may be inconsistent with these rules.

(3) If the respondent has no objection to the motion for stay, the court shall enter an order staying the execution.

(4) Each application for a certificate of probable cause and stay of execution shall be presented to each member of the panel hearing the case. Oral argument may be held at the discretion of the panel. Any member of the panel may enter an order granting the application. If the panel votes unanimously to deny the application, it shall enter an order setting forth in detail the issues presented and the reasons why the certificate of probable cause should not issue.

(f) En Banc Procedures Regarding Certificates of Probable Cause and Stays of Execution.

(1) Immediately upon entry of an order denying a certificate of probable cause and a stay of execution, a copy of the order and of the motion and response, excluding exhibits and appendices, as well as notice of the scheduled date and time of execution shall be sent by the most expeditious method practicable to all active judges.

(2) Any active judge may within 24 hours, excluding weekends and holidays, of entry of an order denying an emergency motion for an application for a certificate of probable cause and a stay of execution request a vote on rehearing the application and the motion en banc. The requesting judge shall immediately notify the panel, the en banc coordinator, and all other active judges of the request. All votes in favor of rehearing the application and motion en banc shall be transmitted to the en banc coordinator within seven days of the request, unless the time is extended by the panel.

3) If the execution is scheduled to occur before expiration of the time for transmitting votes to the en banc coordinator, the panel shall enter a temporary stay of execution pending disposition of the request.

(4) If a majority of the active judges vote to rehear en banc the application for a certificate of probable cause and the motion for a stay of execution, the court shall issue a stay of execution pending disposition of the rehearing.

(5) The en banc coordinator may extend any of the time periods set forth in this section.

Cross Reference: Advisory Committee Note to Circuit Rule 22-4

CIRCUIT RULE 22-6

RULES APPLICABLE TO ALL PETITIONS

(a) Notice of Emergency Motions Upon the filing of a notice of appeal where the district court has denied a stay of execution, the clerk of the district court shall immediately notify the clerk of this court by telephone of such filing and transmit copies of the notice of appeal and the district court docket by the most expeditious method consistent with the proximity of the execution date. Counsel are encouraged to communicate with the clerk of this court by telephone as soon as it becomes evident that emergency relief will be sought from this court.

(b) Time Schedule Order. The panel shall set due dates for the preparation and transmittal of the record and briefing by the parties. At the direction of the panel, the clerk will issue a Time Schedule Order setting forth this schedule. Unless the panel decides otherwise, the appellant's opening brief and the appellee's brief shall not exceed 75 pages each, and the appellant's reply brief shall not exceed 35 pages, exclusive of pages containing the table of contents, table of authorities and any addenda containing statutes, rules, regulations and the like.

(c) Excerpts of Record. The appellant shall prepare and file excerpts of record in compliance with Circuit Rule 30-1. An appellant unable to obtain all or part of the record shall so notify the court. In addition to the documents listed in Circuit Rules 30-1.2 and 30-1.4, the excerpts of record shall contain all

final orders or rulings of all state courts involving the appeal or during the post-conviction process. The excerpts of record shall also include all final orders of the Supreme Court of the United States involving the conviction or sentence.

(d) Retention of Record, The clerk shall keep all papers filed in the Court of Appeals for future use of the court.

#### CIRCUIT ADVISORY COMMITTEE NOTE REGARDING HABEAS CORPUS PROCEEDINGS

Certificates of Probable Cause in Cases Not Involving Sentence of Death. All express or implied requests by state prisoners for issuance of a certificate of probable cause to appeal the denial of a petition for writ of habeas corpus brought under 28 U.S.C. 2254 are referred to the motions panel of the court. (See Note 27-3) If either the lead judge or the second judge of the motions panel decides that the application should be granted, the certificate is issued.

The court's order granting or denying a certificate need not state the reasons therefor. The sole test applied in deciding whether to grant or deny a certificate of probable cause is whether a reasonably debatable issue is presented by the appeal. Under FRAP 22(b), the fact that the appellant made no express application in the district court for a certificate is not an adequate reason for its denial. If the district court has not ruled on whether to issue a certificate, the court must remand the matter with the request that the district court perform this prescribed duty. The district court should state reasons if it denies the certificate, and this court may remand if the lower court fails to do so. See Gardner v. Pogue, 558 F.2d 548, 550 (9th Cir. 1977).