February 12, 2024

Via Electronic Filing

Presiding Officer Foelak
c/o Federal Trade Commission
Office of the Secretary
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Reviews and Testimonials Rule (16 CFR Part 465) (Project No. P214504)

Dear Presiding Officer Foelak,

The Interactive Advertising Bureau (IAB) submits this petition pursuant to 16 C.F.R. § 1.13(b)(1)(ii) to request that the Presiding Officer designate the two disputed issues of material fact identified in this petition as such at the informal hearing for the proposed Reviews and Testimonials Rule, and that IAB be permitted to cross examine the Federal Trade Commission's witnesses with respect to each issue. Section 1.13(b)(1)(ii) states that "[t]he presiding officer [for an informal hearing] may at any time on the presiding officer's own motion or pursuant to a written petition by interested persons, add or modify any issues designated [as disputed issues of material fact] pursuant to [the notice of informal hearing]."[1] Furthermore, if new issues are designated, "the presiding officer may determine whether interested persons may conduct cross-examination or present rebuttal submissions with respect to each new issue, as provided in § 1.12(b)."[2] The Presiding Officer has already decided to designate disputed issues of material fact related to the cost of a proposed rule in a very similar context, and IAB urges the Presiding Officer to take the same approach in this rulemaking by designating additional disputed issues of material fact.[3]

This petition sets forth: (1) the reasons that IAB's petition should be granted; (2) the two disputed issues of material fact and why each issue merits development through cross-examination of the Commission's witnesses at the upcoming hearing; (3) additional procedural modifications that the Presiding Officer should implement before and at the informal hearing; and (4) the reasons the Presiding Officer has authority to grant IAB's requests.

I. IAB Made a Timely Request to the Commission to Designate Disputed Issues of Material Fact and the Commission Incorrectly Denied that Request.

[1] 16 C.F.R. § 1.13(b)(1)(ii).

[2] *Id.*

[3] Order of Administrative Law Judge Foelak, Negative Option Rulemaking Proceeding (Jan. 25, 2024).

IAB respectfully requests that this petition be granted because IAB made a timely proposal in its original comment in response to the Commission's Notice of Proposed Rulemaking (NPRM) identifying the two disputed issues of material fact set forth in this petition and requesting to exercise the right to cross-examination that is set forth in the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act ("Magnuson Moss").[4] In its Initial and Final Notice of Informal Hearing ("Hearing Notice") published on January 16, 2024, the Commission denied that request, improperly relying on an incorrect and newly announced standard for assessing proposed disputed issues of material fact, despite the fact that the Commission has not explained its own conclusions or provided substantiating evidence regarding these disputed issues.[5] The Commission's conclusions and analysis in the Hearing Notice were incorrect, and it thus acted in an arbitrary and capricious manner.

Specifically, the Commission did not conduct the analysis that is required by Magnuson-Moss and instead, rejected IAB's proposed disputed issues of material fact because (1) they were purportedly not supported by affirmative evidence provided by IAB that would satisfy the summary judgment standard; and (2) they were purportedly "legislative" facts, rather than "specific" facts.[6] These two grounds, however, are not legitimate bases for excluding disputed issues of material fact from cross-examination in a proceeding where the Commission has failed to articulate a basis for its conclusions in the first place. That is, it is not appropriate for the Commission to assign the burden of disproving the reasonableness of the Commission's position in a proposed rule to commenters where the Commission has not provided a reasoned basis or evidence in the first place. Nor is it appropriate for the Commission to require affirmative evidence satisfying the summary judgment standard where disputes in the record must necessarily be determined based on the cumulative record, and no individual commenter has the ability to forecast what the administrative record will contain at the time it files an individual comment. Moreover, neither Magnuson-Moss, nor the Commission's rules or past practices, require disputed issues of material fact to be so-called "specific" facts, not "legislative" facts, or supported by affirmative evidence from commenters and evaluated under a summary judgment standard.[7] Instead,

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[4] Comment of Interactive Advertising Bureau on Reviews and Testimonials Rule, at 15 (Sept. 29, 2023) (hereinafter, "IAB Comment"); *see also* 15 U.S.C. § 57a(c)(2)(B) ("[A]n interested person is entitled . . . if the Commission determines that there are disputed issues of material fact it is necessary to resolve, . . . to conduct . . . such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.").

[5] Rule on the Use of Consumer Reviews and Testimonials, 89 Fed. Reg. 2526 (Jan. 16, 2024) (hereinafter, "Hearing Notice").

[6] *Id.* at 2528-29.

[7] *See generally* 15 U.S.C. § 57a; 16 C.F.R. §§ 1.7-1.20; Final Notice of Proposed Trade Regulation Rule Proceedings, Advertising of Ophthalmic Goods and Services, 41 Fed. Reg. 14194, 14195-96 (Apr. 2, 1976) (designating seven disputed issues of material fact covering topics such as economic effects of the rule, whether consumers are likely to be misled by certain practices, and whether disclosures will eliminate the potential for deception); Funeral Industry Practices Proposed Trade Regulation Rule, 41 Fed. Reg. 7787, 7788-89 (Feb. 20, 1976) (continued…)

Magnuson-Moss simply states that "an interested person is entitled . . . if the Commission determines that *there are disputed issues of material fact it is necessary to resolve* . . . to conduct . . . such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."[8]

Furthermore, IAB had no notice of the Commission's novel standard for determining whether disputed issues of material fact merit cross-examination. In fact, the Commission's NPRM simply requested that commenters identify "any proposals to add disputed issues of material fact necessary to be resolved during an informal hearing."[9] IAB followed this instruction, given the Commission's lack of analysis of the overbreadth of the rule and its potential negative consequences for legitimate companies. The Commission, however, dismissed the two issues raised by IAB without any specific analysis of the statutory standard—whether those facts were "*disputed* issues of *material* fact it is *necessary to resolve*."[10] Instead, the Commission shifted the burden to IAB, asserting that because IAB had not provided affirmative evidence that would satisfy the summary judgment standard, those issues were not disputed and cross-examination was not warranted. Imposing the summary judgment standard in this context—where the Commission has failed to explain the basis for its conclusions—will serve to prevent true and full disclosure of material facts by allowing the Commission to simply declare that its own findings "are sufficiently supported by substantial evidence in the record."[11] To avoid this outcome and ensure these important issues are adequately developed in the record, the Presiding Officer should apply the standard set forth in Magnuson-Moss, and grant this petition.[12]

(designating thirty disputed issues of material fact including topics such as whether the proposed rule would increase prices for customers and whether certain provisions would be "impractical or unwise").

[8] 15 U.S.C. § 57a(c)(2)(B) (emphasis added). The Commission's own rules of practice similarly state that cross-examination is available "to address disputed issues of material fact necessary to be resolved." 16 C.F.R. § 1.12(b).

[9] Rule on the Use of Consumer Reviews and Testimonials, 88 Fed. Reg. 49364, 49364 (July 31, 2023) (hereinafter "NPRM").

[10] 15 U.S.C. § 57a(c)(2)(B) (emphasis added).

[11] Hearing Notice, at 2528.

[12] According to the Commission's rules, "[n]o such petition shall be considered unless good cause is shown why any such proposed issue was not proposed pursuant to [the provision requiring that such proposals be submitted before the close of the comment period]." 16 C.F.R. § 1.13(b)(1)(ii). Good cause should not be required here because IAB made a timely proposal to designate disputed issues of material fact. But even if the Presiding Officer determines that good cause is required, the reasons set forth in this section provide good cause for this petition.

II. IAB's Proposed Disputed Issues of Material Fact Merit Cross-Examination at the Informal Hearing.

In its comment in response to the NPRM, IAB disputed the Commission's estimates of costs as well as whether the rule will result in unintended consequences that harm consumers. These issues are (1) disputed because the Commission asserts that honest businesses will not be significantly burdened by the proposed rule (while IAB asserts that the overbreadth of the rule will sweep in the practices of legitimate companies) and that unintended consequences from the proposed rule are unlikely (while IAB believes that such consequences are likely to occur and will harm businesses and consumers);[13] (2) material because they raise significant issues that should impact the content of the final rule; and (3) necessary to resolve because without this information, the Commission cannot make an informed and fair determination.[14]

In the Negative Option Rulemaking, the Presiding Officer recognized that issues related to the costs of the rule—specifically whether the proposed rule would have an annual effect on the national economy of $100 million or more and the amount of the recordkeeping and disclosure costs associated with the proposed rule—turned on "specific facts that can be presented through testimony, cross-examination, and documentary submissions."[15] Furthermore, the Presiding Officer explained that these issues are "'necessary to resolve' because the Commission is required to consider them under 15 U.S.C. § 57b-3(a) and 5 C.F.R. § 1320.5, respectively."[16] Although IAB does not agree that the other disputed issues of material fact that it proposed in that rulemaking did not warrant cross-examination, the same rationale applies to these facts. The Presiding Officer should thus take a similar approach here and conclude, that at a minimum, IAB's proposed disputed issue of material fact related to cost merits cross-examination. This issue similarly turns on specific facts that can be presented through testimony, cross-examination, and documentary submissions and must be considered under Magnuson-Moss.[17]

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[13] NPRM, at 49381 ("Because the proposed Rule is an application of preexisting law under Section 5 of the FTC Act, the Commission expects these compliance costs to be minimal."); *id.* at 49386 (stating that the most cautious large companies would likely only spend 8 hours implementing the proposed rule and small companies would spend only 1 hour); *id.* at 49386-87 (describing how some sellers might "overcorrect" in response to the high penalties imposed by the rule but stating that such consequences are "very unlikely").

[14] *Am. Fin. Servs. Ass'n v. F.T.C.*, 767 F.2d 957, 985 (D.C. Cir. 1985) (stating that an FTC rule may be set aside if it "'is not supported by substantial evidence in the rulemaking record' or if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]'" (citations omitted)).

[15] Order of Administrative Law Judge Foelak, Negative Option Rulemaking Proceeding (Jan. 25, 2024).

[16] *Id.*

[17] 15 U.S.C. § 57b-3(b)(C) ("Each preliminary regulatory analysis shall contain . . . a preliminary analysis of the projected benefits and any adverse economic effects and any other effects" for the proposed rule.).

Applying Magnuson-Moss's standard for assessing whether a disputed issue of material fact merits cross-examination, it is clear that IAB's two proposed issues are disputed, material, and necessary to resolve, and that allowing cross-examination would benefit all parties by fostering full and true disclosure of important issues that should inform the content of the final rule.[18] Below, IAB has set forth the two proposed disputed issue of material fact and explained why each is genuinely disputed, material, and necessary to resolve through cross-examination.

1. Whether the compliance costs for businesses will be minimal, particularly if the "knew or should have known" standard is finalized.

This is a significant issue disputed by IAB. The Commission has concluded with no basis that compliance costs associated with the proposed rule will be minimal simply because "the proposed Rule is an application of preexisting law under Section 5."[19] In contrast, IAB has explained that legitimate companies will be forced to invest significant resources into ensuring, for instance, that they will not be exposed to civil penalties because they "should have known" that a certain review or testimonial violated the rule. Numerous other commenters have raised similar concerns about the costs of complying with this novel rule.[20] A rule that is specifically targeted to the activities of the bad actors that generate high volumes of fake reviews would be significantly more effective in achieving the Commission's goals. This issue is material because cost (as well as cost/benefit tradeoffs) is a significant consideration that sheds light on the appropriate breadth of the rule. This is an important aspect of the decision to issue a rule that must

[18] Cross-examination has frequently been a feature of Magnuson-Moss informal hearings for precisely this reason—it encourages development of the record on key issues that must be considered before issuing a rule. *See, e.g.*, Statement of Basis and Purpose, Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50219 (Aug. 27, 1979) (describing how fifty witnesses participated in informal hearings and nine group representatives were permitted to examine and cross-examine all witnesses); Statement of Basis and Purpose, Sale of Used Motor Vehicles, 49 Fed. Reg. 45692, 45693 (Nov. 19, 1984) (describing how all witnesses were provided the opportunity to make an opening presentation and cross-examination was conducted by Commission staff as well as representatives of used car dealers, the auto rental and leasing industries, and consumer groups).

[19] NPRM, at 49381.

[20] *See, e.g.*, Comment of Nat'l Retail Federation on NPRM, at 2 (Sept. 29, 2023) ("Rather than promote better practices amongst retailers, the Proposed Rule threatens burdensome compliance costs that may make retailers reconsider hosting reviews for their products or services at all."); Comment of Ass'n of Nat'l Advertisers on NPRM, at 13 (Sept. 29, 2023) ("[The proposed rule] will impose significant costs on legitimate businesses, when a rule targeted at the behavior of these bad actors would be a much more effective and efficient mechanism to address the problem."); Comment of U.S. Chamber of Commerce on NPRM, at 3 (Sept. 29, 2023) ("The Chamber is concerned that a 'knows or should know' or a 'knows or could have known' standard allows the FTC to second guess compliance practices after the fact and increase the costs of compliance."); Comment of Nat'l Automobile Dealers Ass'n on NPRM, at 6 (Sept. 29, 2023) ("[Proposed § 465.5] raises a potentially high compliance burden for businesses and could present a considerable risk of inadvertent noncompliance given the difficulty of determining the scope of this prohibition.").

be considered under the Administrative Procedure Act (APA) as well as Magnuson-Moss. Through cross-examination, IAB could probe the basis for the Commission's estimate that compliance costs, even in light of the "should have known standard," will be minimal. Finally, as noted previously, the Presiding Officer has already determined in a similar context that cost constitutes a disputed issue of material fact.

2. Whether the Commission's finding that unintended consequences from the NPRM are unlikely (e.g., for fear of violating the review suppression section, businesses will allow more fake reviews to stay up on their websites).

This issue is also disputed because the Commission has asserted without evidence that unintended consequences, such as a seller overreacting to the fake review provision by displaying no reviews at all, "are very unlikely."[21] IAB, however, believes that such unintended consequences are likely to occur, particularly because several provisions of the proposed rule would impose civil penalties even when a company is not aware that a review or testimonial violated the rule. Other commenters have also raised similar concerns.[22] This issue is material because it relates to how broad or narrow the rule should be. It is necessary to resolve this issue because without this information the Commission cannot appropriately assess all important aspects of the decision to issue a rule, as required by the APA. Through cross-examination, IAB could elicit information about the basis for the Commission's conclusion that unintended consequences are unlikely.

Finally, although the Hearing Notice did not address all of the "circumstances [that] indicate . . . requests [for cross-examination] should be granted" per the Commission's rules of practice, IAB's proposed disputed issues of material fact also meet that standard. The Commission's rules state that if "[a] full and true disclosure with respect to the issue can be achieved only through cross-examination rather than through rebuttal submissions or the presentation of additional oral submissions," "[t]he particular cross-examination or rebuttal submission is required for the resolution of a disputed issue," and the issue is a "specific" fact rather than a "legislative" fact, then this indicates that the request for cross-examination should be granted.[23] Here, the only way to ensure full and true assessment of the important issues that IAB has raised is through cross-examination that draws out and tests the validity of the support for the

[21] NPRM, at 49386-87.

[22] *See, e.g.*, Comment of Amazon.com, Inc. on NPRM, at 5 (Sept. 29, 2023) ("Such an overbroad rule would have significant unintended negative consequences on legitimate conduct."); Comment of Computer & Commc'ns Indus. Ass'n on NPRM, at 2 (Sept. 29, 2023) ("It is critical that any regulation targets those actually creating fake or false reviews, not the underlying online intermediaries the perpetrators may be using. This will avoid unintended consequences for online review platforms that help people make decisions about where to spend money on goods and services."); Comment of Trustpilot on NPRM, at 2 (Sept. 29, 2023) ("[T]here are areas of the proposed Rule which we believe need adjustment if they are to be effective whilst avoiding unintended consequences."); Comment of U.S. Chamber of Commerce on NPRM, at 3-4 (Sept. 29, 2023) ("Section 465.2 may sweep too broadly and create unintended consequences for the important review ecosystem.").

[23] 16 C.F.R. § 1.12(b)(1)-(3).

Commission's conclusions about the costs of the rule and likelihood of the rule having unintended harmful consequences for businesses and consumers. This support is not set out in the NPRM, and as demonstrated by the Negative Option Rulemaking, the Commission has been willing to simply rest on the NPRM rather than provide this information to interested persons. Cross-examination is required to resolve these disputed issues in order to ensure that the Commission has considered all relevant information and issues a properly tailored rule that effectively targets bad actors. Finally, although it is not a requirement, IAB's proposed disputed issues of material fact are "specific" facts. For example, how much the rule will cost and whether it will have unintended consequences for consumers are questions of fact. Furthermore, the Presiding Officer has already determined that issues related to cost constitute "specific" facts in the Negative Option Rulemaking proceeding.

III. The Presiding Officer Should Modify the Informal Hearing to Promote More Robust Examination of the Disputed Issues.

Because of the significant issues that IAB has identified for resolution through cross-examination, IAB requests that (1) the Commission be required to present witnesses in support of the rule so that cross-examination of the disputed issues of material fact will be meaningful; (2) the total length of the hearing be increased to a full day to provide sufficient time to develop the disputed issues of material fact through cross-examination; (3) the hearing be scheduled for a date three weeks after the Commission designates its witnesses so that IAB, and other participants, have adequate time to prepare; (4) all interested persons be invited to submit comments in advance of the hearing to foster additional development of the record on these issues; and (5) the Presiding Officer issue a recommended decision on these disputed issues at the conclusion of the hearing. Limiting the hearing to ninety minutes for presentations by three participants as well as not allowing the Presiding Officer to make a recommended decision is not consistent with Magnuson-Moss, is a stark departure from the Commission's past practice, and seems designed to thwart rather than encourage open debate about the Commission's proposed rule.[24] Granting IAB's requested relief as to the format of the hearing will lead to more robust development of the key disputed issues in this rulemaking and a more appropriately tailored rule.

IV. The Presiding Officer Has Authority to Grant IAB's Requests.

A. The Presiding Officer Has Authority to Designate Additional Disputed Issues of Material Fact, Allow Cross-Examination, and Order the Commission to Put Forward a Witness in Support of its Conclusions.

As previously noted in this petition, the Commission's rules expressly grant the Presiding Officer authority to designate additional disputed issues of material fact and allow interested

[24] *Harry and Bryant Co. v. F.T.C.*, 726 F.2d 993, 996 (4th Cir. 1984) (describing how during the Funeral Rule rulemaking, the FTC held fifty-two days of hearings in which three hundred and fifteen witnesses testified); Public Workshop: Business Opportunity Rule, 74 Fed. Reg. 18712 (Apr. 24, 2009) (providing for a full day workshop that was open to the public); 15 U.S.C. § 57a(c)(1)(B) (requiring that the hearing officer make a recommended decision at the conclusion of the informal hearing).

persons to conduct cross-examination with respect to those issues.[25] If the Presiding Officer determines that there are disputed issues of material fact and accordingly that cross-examination must be conducted, then the Commission *must* present a witness in support of the rule because otherwise, the right to cross-examination set forth in Magnuson-Moss would be meaningless. Magnuson-Moss states that "an interested person is *entitled* . . . if the Commission determines that there are disputed issues of material fact it is necessary to resolve . . . *to conduct* . . . *such cross-examination* of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."[26] Thus, if the Presiding Officer—acting as an agent of the Commission—determines that there are disputed issues of material fact that it is necessary to resolve, IAB is "entitled" to conduct cross-examination "of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues."[27] The Presiding Officer therefore can and should order that the Commission put forward witnesses necessary for the cross-examination needed to resolve the disputed issues of material fact. Otherwise, the Commission would be able to short circuit the Magnuson-Moss rulemaking process by refusing to put forward witnesses in support of its proposed rules, thereby sidestepping cross-examination entirely, even where there are disputed issues of material fact.[28]

Prior to the Commission's changes to its rules of practice in 2021, the Presiding Officer's power to order the appearance of witnesses was expressly set forth in the Commission's rules. Specifically, 16 C.F.R. § 1.13(d)(6) previously stated, "[d]uring the course of the rulemaking proceeding, the presiding officer shall entertain requests from the Commission's staff or any interested person to compel the attendance of persons or the production of documents or to obtain responses to written questions."[29] The 2021 rule changes removed that language. In its explanation for the rule changes, the Commission stated that these procedures were "unnecessary for the conduct of effective informal hearings in rulemaking proceedings . . . ."[30] However, this justification does not hold if the Commission refuses to provide any witnesses in support of its own proposed rule, effectively extinguishing the right to cross-examination under Magnuson-Moss. IAB respectfully submits that even though the 2021 rule changes eliminated the provision describing the Presiding Officer's authority to compel the presence of witnesses, the Presiding

[25] 16 C.F.R. § 1.13(b)(1)(ii).

[26] 15 U.S.C. § 57a(c)(2) (emphasis added).

[27] *Id.*

[28] This is what has transpired in the Negative Option Rulemaking proceeding, where the Commission has declined to put forward any witnesses or documentary evidence with respect to the designated disputed issues of material fact.

[29] 16 C.F.R. § 1.13(d)(6) (2020). Such requests were required to "contain a statement showing the general relevancy of the material, information or presentation, and the reasonableness of the scope of the request, together with a showing that such material, information or presentation is not available by voluntary methods and cannot be obtained through examination, including cross-examination, of oral presentations or the presentation of rebuttal submissions, and is appropriate and required for a full and true disclosure with respect to the issues designated for consideration in accordance with paragraphs (d)(5) and (d)(6) of this section." *Id.*

[30] Final Rule, *Revisions to Rules of Practice*, 86 Fed. Reg. 38542 (July 22, 2021).

Officer still possesses that power to the extent required to give meaning to Magnuson-Moss's right to cross-examination. Indeed, "[i]t is axiomatic" that an agency's power to promulgate rules "is limited to the authority delegated by Congress" and cannot override the governing statute. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Put differently, the revised rule adopted by the Commission in 2021 is contrary to Magnuson-Moss, and therefore *ultra vires*, in the circumstances presented here.

B. The Presiding Officer Has Authority to Extend the Duration of the Informal Hearing.

Second, the Presiding Officer plainly has the authority to extend the duration of the hearing to a full day. The Commission's rules state that the Presiding Officer has the power to "modify the location, format, or time limits prescribed for the informal hearing, except that the presiding officer may not increase the time allotted for an informal hearing beyond a total of five hearing days over the course of a thirty-day period . . . ."[31] IAB's request for the hearing's duration to be expanded to a full day falls directly within the Presiding Officer's authority pursuant to the Commission's rules.

C. The Presiding Officer Has Authority to Extend the Informal Hearing.

Third, the Presiding Officer has authority to extend the hearing. Section 1.13(a)(2)(ii) of the Commission's rules confirms the Presiding Officer's power "[t]o modify the location, format, or time limits prescribed for the informal hearing," with one exception: "the presiding officer may not increase the time allotted for an informal hearing beyond a total of five hearing days over the course of a thirty-day period, unless the Commission, upon a showing of good cause, extends the number of days for the hearing."[32] While IAB does not interpret Section 1.13(a)(2)(ii) as precluding the Presiding Officer from increasing the time allotted for the hearing beyond 30 days, IAB's request that the hearing be delayed so that it takes place three weeks after the Commission designates its witnesses falls within the Presiding Officer's interpretation of her authority under this rule.

D. The Presiding Officer Has Authority to Invite All Interested Persons to Participate in the Informal Hearing.

Fourth, the Presiding Officer has authority to invite additional interested persons to participate in the hearing, even if the Commission has refused to allow their participation. The Commission's rules state that the Presiding Officer has the power to "[t]o rule on all requests of interested persons made during the course of the informal hearing."[33] The term "interested persons" is not defined by the Commission's rules or Magnuson-Moss. The most reasonable and straightforward meaning of that term is persons that have "interest" in the rulemaking, meaning

[31] 16 C.F.R. § 1.13(a)(2)(ii).

[32] *Id.*

[33] *Id.* § 1.13(a)(2)(viii).

they have commented on the NPRM.[34] The Commission could have attempted to define that term more narrowly, for instance to include only those persons that requested to present at the hearing, but it did not. This provision contemplates that persons besides the speakers at the informal hearing will participate in the hearing by making requests to the Presiding Officer. Accordingly, the Presiding Officer has authority to invite the participation of additional interested persons in the hearing, and to rule on their requests that arise during the hearing.

E. The Presiding Officer Must Issue a Recommended Decision.

Finally, the Presiding Officer must issue a recommended decision at the conclusion of the hearing. Magnuson-Moss states that "[t]he officer who presides over the rulemaking proceeding *shall make a recommended decision* based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission."[35] The Commission's rules similarly state that, "[t]he presiding officer *will* make a recommended decision based on their findings and conclusions as to all relevant and material evidence."[36] The Presiding Officer should thus decline to follow the Commission's Hearing Notice, which stated "the presiding officer is not anticipated to make a recommended decision," and instead abide by the statute and rules and issue a recommended decision at the conclusion of the hearing. Any other approach would contravene the clear statutory instruction prescribed by Magnuson-Moss.

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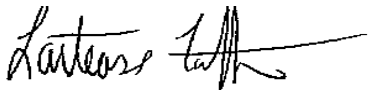
Denying this petition and confirming the Commission's refusal to allow for any cross-examination at the upcoming informal hearing will prevent the development of facts necessary to issue a sound rule. Such actions would constitute a stark departure from past Commission practice and would fail to satisfy the specific requirements of Magnuson-Moss. For the reasons set forth above, IAB requests that the Presiding Officer grant this petition.

Sincerely,



Lartease M. Tiffith, Esq.
Executive Vice President for Public Policy
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[34] This is how courts have interpreted the phrase "any party in interest in the proceeding before the agency" in the Administrative Orders Review Act (also known as the Hobbs Act), 28 U.S.C. § 2348. *See, e.g., Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539 (D.C. Cir. 1999) (interpreting "any party in interest" clause as encompassing "those who have participated before the agency").

[35] 15 U.S.C. § 57a(c)(1)(B) (emphasis added).

[36] 16 C.F.R. § 1.13(d) (emphasis added).