

BEFORE THE
POSTAL RATE COMMISSION

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

REVIEW OF SUNSET RULES

DOCKET NO. RM2001-3

COMMENTS OF UNITED PARCEL SERVICE IN
RESPONSE TO COMMISSION ORDER NO. 1319
(August 21, 2001)

Pursuant to the Commission's Notice and Order Concerning the Rules of Practice issued July 18, 2001, 66 Fed. Reg. 38602 (July 25, 2001), United Parcel Service ("UPS") submits these comments in opposition to the reissuance of five sets of expired rules of practice relating to Express Mail rates and fees,¹ market tests of proposed mail classification changes,² provisional service changes of limited duration,³ minor classification changes,⁴ and multi-year test periods.⁵

The Commission should not initiate a rulemaking proceeding to examine these rules. They have been little used, they invite additional litigation expense, they make unnecessarily rigid distinctions between types of proceedings, and they provide no more

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1. Rules 57 through 57c.
 2. Rules 161 through 166.
 3. Rules 171 through 176.
 4. Rules 69 through 69c.
 5. Rules 181 and 182.

flexibility than that which already is possible under the Commission's current rules. The Postal Service has rarely used them and to date has not asked that they be re-enacted. In short, these rules are neither necessary nor useful.

I. These Rules Have Been in Place For Several Years And Have Not Been Used, Or Have Been Used Sparingly.

The best evidence that these rules have not been necessary or useful is that they have been in place for several years and have not been used, or have been used only sparingly. This shows that the situations which the rules were designed to address rarely (if ever) arise.

A. Express Mail Market Response Rules 57-57c

The Express Mail market response rules, Rules 57 through 57c, have been in place for 10 years and have never been used. During this time, Express Mail rates have changed a number of times, but the Postal Service has not called on the Commission to act under the market response rules. The experience with resolving competitive concerns involving Express Mail in general rate cases has apparently been satisfactory to all. The fact that the market for expedited letters is now well-established supports the conclusion that regular rate cases, not truncated and expedited special Express Mail cases, are adequate to respond to any changes in the marketplace.

In Docket No. RM95-1, the Commission decided to re-enact this rule even though it had not been used by the Postal Service. Order No. 1042, Order Re-Enacting Express Mail Market Response Rules (Feb. 17, 1995). Its rationale was that even though the rules had not been used, "it is possible that expeditious adjustments in Express Mail rates may be useful to sustain the viability of [Express Mail] to meet future

competitive contingencies.” *Id.* at 7-8. Now, fully six years later and more than ten years after they were initially enacted, these rules still have not been invoked.

After all this time, there is no reason to think that, if the Postal Service wished to initiate a proceeding under the regular rules for one class of mail (such as Express Mail), the Commission would not complete the proceeding well within the ten month period established under 39 U.S.C. section 3624(c)(1) for rate cases if circumstances warranted. The ten month period is the statutory **maximum** period, and the Commission is not required to take that much time. The Commission’s regular rules, as will be discussed in more detail below, specifically allow for shortening this schedule if appropriate for the particular case. A well prepared presentation would ensure fast and efficient resolution of the case.

B. The Remaining Rules Were Rarely Used In Their Five Year Existence, Indicating That They Are Not Necessary.

The rules relating to market tests, provisional service changes, minor classification cases, and multi-year test periods were rarely if ever used, indicating that they are not necessary.

- The rules providing for market tests of proposed mail classification changes, Rules 161 through 166, were in effect for five years. During that time, they were used only once, in Docket No. MC98-1, Mailing Online Service. That case was eventually converted into an experiment under Rules 67 through 67d. See Docket No. MC2000-2.
- The rules providing for provisional service changes, Rules 171 through 176, were in effect for five years and also were used only once, in Docket No. MC97-5, Provisional Packaging. Even though the Commission

recommended the provisional service change the Postal Service requested in that docket, the Governors never acted on that recommendation. The fact that the Postal Service itself lost interest in the proposed service calls into question the necessity of having a special set of rules.

- The rules for minor classification cases, Rules 69 through 69c, were also used only once in their five year history, in Docket No. MC99-4, Bulk Parcel Return Service. That “minor” case ended in a stipulated settlement. This easy resolution by agreement of the participants in that case shows how such minor cases do not require special rules and can be easily resolved even if the regular rules for classification cases were applied.
- The rules providing for multi-year test periods, Rules 181 and 182, have never been used.

Infrequent use of, and lack of interest in, these rules shows that they have not proven to be useful or necessary to the Postal Service or to anyone else.

II. The Overlap In The Rules Between Types Of Changes Is Confusing And Reduces, Rather Than Enhances, The Efficiency Of Proceedings Conducted Under Them.

The three distinct sets of rules for minor classification cases, provisional service changes of limited duration, and market tests of proposed classification changes add unnecessary complexity to the rules which may very well result in unnecessary confusion and litigation expense.

It is difficult to distinguish between the subtle variations between the types of factual situations covered by these different types of proceedings, yet each has its own set of procedural rules. Minor classification cases involve classification changes that “would not involve a change in any existing rate or fee”; “would not impose any restriction in addition to pre-existing conditions of eligibility for entry of mail”; and “would not significantly increase or decrease the estimated institutional cost contribution of the affected subclass or category of service.” 39 C.F.R. § 3001.69(a). Provisional service changes of limited duration involve services “which will supplement, but will not alter, existing mail classifications and rates for a limited and fixed duration.” 39 C.F.R. § 3001.171(a). The rules for market tests involve proposed classification changes that are “limited in scope, scale, duration, and potential adverse impact,” 39 C.F.R. § 3001.161(a); it is difficult to distinguish “market tests” from “experimental changes,” which are the subject of existing rules 67-67d.

By adding complexity to the Commission’s procedures, these rules invite litigation over whether the proper set of rules is being applied, litigation which could be avoided by removing the requirement that particular, highly unusual types of cases be forced down specific procedural paths. There is no need for this uncertainty, as each of these three types of cases could easily be handled under the Commission’s established rules for rate and classification changes, which allow for waivers of unduly onerous filing requirements, 39 C.F.R. §§ 3001.54(r), 64(h)(3), and, if appropriate, expedited consideration.

III. The Current Rules Provide Sufficient Flexibility To Achieve Expedited Review.

It appears that the main purpose of all of the rules that are the subject of Order No. 1319 was to give the Postal Service greater flexibility in seeking approval of changes in rates and classifications. However, the Postal Service's legitimate interest in expedition in making rate or classification changes responsive to customer demand can easily be accommodated by the Commission's current rules.

Commission Rule 1 requires that "[t]he rules in this part shall be liberally construed to secure just and speedy determination of issues." Moreover, there are specific provisions which enable the Commission to conduct proceedings in an expedited manner where appropriate. For example, the Commission can issue schedules with expedited discovery on its own or at the request of a party. 39 C.F.R. § 3001.23(a)(1). Furthermore, the Presiding Officer has broad authority to act to expedite proceedings. 39 C.F.R. § 3001.23(a)(10).

Prehearing conferences are specifically intended to provide an opportunity for streamlining and tailoring proceedings to fit the needs of the participants and the characteristics of the particular case. The purpose of the prehearing conference is to consider "all possible ways of expediting the proceeding" 39 C.F.R. § 3001.24(a). This is achieved through "definition and simplification of the issues" and by "[l]imitation of the scope of the evidence." *Id.* §§ 3001.24(d)(1), 24(d)(7). The prehearing conference encompasses "All other matters which would aid in an expeditious disposition of the proceeding" *Id.* § 3001.24(d)(12). Prehearing procedures "shall be rigorously pursued" with "utmost practical expedition." *Id.* § 3001.24(a). The

prehearing conference can readily be used to develop a litigation plan appropriate for each case to achieve a balance between fairness and efficiency.

The waiver provisions in the Commission's current rules also give ample flexibility to respond to any requests of the Postal Service for expedited consideration of rate and classification changes. The broadest of these is Rule 22, which provides that:

any requirement of any subpart of this Part 3001 may be waived in whole or in part to the extent permitted by law upon a showing that such waiver will not unduly prejudice the interests of other participants and is consistent with the public interest and the Commission's expeditious discharge of its responsibilities under the Act.

39 C.F.R. § 3001.22. In addition, Rule 54(r) (relating to formal requests for change in rates or fees) provides a means for streamlining procedures by permitting waiver of certain filing requirements "if in the Commission's judgment it has been demonstrated that the proposed change in a rate or rates of postage and a fee or fees for postal service does not significantly change the then effective rates and fees or alter the cost-revenue relationships of the various classes and types of postal services." Similarly, Rule 64(h)(3) (regarding new mail classifications or proposed changes in the mail classification schedule) permits the waiver of filing requirements for mail classification cases "if in the Commission's judgment it has been demonstrated that the proposed change in the classification schedule does not significantly change the rates and fees or the cost-revenue relationships referred to in paragraphs (h)(1)(i) through (iv) of [Rule 64]." These provisions give the Commission the ability to respond to the Postal Service's needs for speed and flexibility while allowing participants to help craft the best, most appropriate procedures for each case.

Under the existing rules, cases that are “minor,” that do not result in “significant” changes, or are “limited” in scope have settled quickly. For example, the Postal Service’s request for Renewal of Experimental Classification and Fees for Weight-Averaged Non-Lettersize Business Reply Mail, 1999, Docket No. MC99-1, initiated March 10, 1999, was resolved in less than 3 months. Docket No. MC99-1, Opinion and Recommended Decision Approving Stipulation and Agreement (May 14, 1999). The Postal Service’s recent request for Experimental Presorted Priority Mail Rate Categories, Docket No. MC2001-1, was initiated on March 7, 2001, and was resolved less than three months later. Docket No. MC2001-1, Opinion & Recommended Decision Approving Stipulation & Agreement (May 25, 2001). The Postal Service’s request for Classification and Fees for Weight-Averaged Nonletter-Size Business Reply Mail, 1999, Docket No. MC99-2, was initiated March 10, 1999, and was resolved in less than five months. Docket No. MC99-2, Opinion and Recommended Decision Approving Stipulation and Agreement (July 14, 1999). The Postal Service’s request for an Experimental “Ride-Along” Classification Change for Periodicals, Docket No. MC2000-1, initiated September 27, 1999, was resolved in less than five months. Docket No. MC2000-1, Opinion & Recommended Decision Approving Stipulation & Agreement (February 3, 2000). These cases show that the Commission has acted with the increased speed and efficiency the Postal Service sometimes needs even without the rules that are the subject of this Docket.

Furthermore, the existing rules for experimental proceedings can accommodate situations that the regular rules do not cover. Whether or not a classification is “experimental” depends on its novelty, the magnitude and effect of the proposed

change, the ease or difficulty of data collection, and its duration. These rules can be applied to encompass what would qualify as “market tests,” or as minor classification changes. In fact, the only case initiated under the rules for market tests, Mailing Online Service (Docket No. MC98-1), ended up under the experimental rules.

On the other hand, there is little to be gained by attempting to create ideal procedural rules for cases in a vacuum, as was done with the rules at issue here. These cases do not come up very often, so the efficiency realized by having the details of the procedural schedule worked out ahead of time is negligible. In addition, there may be litigation over whether the Postal Service has picked the right rule [e.g., is it really a “minor” classification change as defined in Rule 69(a), or does a proposed “provisional service change” meet the prerequisites of Rule 171(a)]. Clearly, there is no reason to add to the number of Commission rules without adding to their substance.

IV. There Is A Risk Resulting From These Rules.

While there is no good reason for reissuing these rules, there is a risk of harm in doing so. First, they force the Commission to pigeonhole cases into specific procedural tracks. Thus, the Commission is constrained by predetermined deadlines which may not be appropriate for the particular case. Second, more rules means more complexity and confusion, and thus more expense, especially when the rules increase the number of definitions over which attorneys can argue. These results are avoided by keeping the number of procedural rules to a minimum and avoiding unduly specific rules when

general rules work just as well.⁶ Third, there is no reason to have rules on the books which are not necessary but which have the potential for implicating due process concerns. These rules call for compressed hearings, discovery, and briefing schedules. Rules which accelerate the pace of proceedings in advance rather than on the basis of an informed decision to do so in a particular case by, e.g., waiving certain requirements potentially compromise needlessly the ability of participants to analyze and respond to issues raised by the Postal Service's proposals.

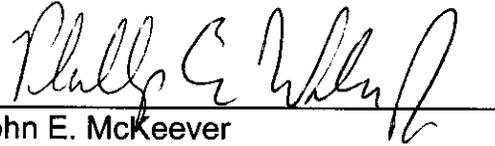
CONCLUSION

There is no reason for the Commission to begin a rulemaking proceeding to continue these rules in effect. The Postal Service has had little need for them, they are superfluous in light of the Commission's existing authority to tailor proceedings to the circumstances of each case, and they have potentially serious implications for due process rights.

6. Increasingly technical rules also make Commission proceedings less accessible to participation by the general public.

WHEREFORE, United Parcel Service respectfully submits that the Commission should not reissue any of the rules that are the subject of Order No. 1319 or institute a rulemaking proceeding with respect to those rules.

Respectfully submitted,

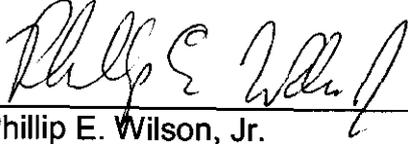


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CERTIFICATE OF SERVICE

I hereby certify that on this date I have caused the foregoing document to be served by first class mail, postage prepaid, in accordance with Section 12 of the Rules of Practice.


Phillip E. Wilson, Jr.

Dated: August 21, 2001