

UNITED STATES OF AMERICA
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Before Commissioners:

Ruth Y. Goldway, Chairman;
Robert G. Taub, Vice Chairman;
Mark Acton;
Tony Hammond; and
Nanci E. Langley

Rules Pursuant to 39 U.S.C. 404a

Docket No. RM2013-4

NOTICE OF PROPOSED RULEMAKING
ESTABLISHING RULES PURSUANT TO 39 U.S.C. 404a

(Issued June 5, 2013)

I. INTRODUCTION

The Commission is proposing rules to govern complaints alleging violations of 39 U.S.C. 404a. Section 404a(a) precludes the Postal Service from: (1) establishing regulations that have the effect of harming competition; (2) compelling private entities to disclose information about their intellectual property; and (3) using information obtained from a person without their consent and then offering any postal product that uses or is based on such information.

Persons believing that the Postal Service is not complying with the section 404a(a) restrictions may file a complaint with the Commission. 39 U.S.C. 3662(a). The Commission's current complaint procedures are found in 39 CFR part 3030. These proposed rules would supplement the current complaint procedures and work in conjunction with the current rules. Proposed part 3032 would create substantive rules

that implement the statutory prohibitions found in 39 U.S.C. 404a. It would enhance the discovery process by allowing complainants to utilize depositions.

Part 3033 proposes to create an optional accelerated procedure designed to have the Commission adjudicate certain types of 39 U.S.C. 404a complaints in 90 days. The Commission is concerned that, at least for some businesses, Postal Service violations of section 404a—whether through abuse of its governmental regulatory authority, improperly requiring parties to divulge intellectual property, or inappropriately obtaining information—could cause irreparable harm and threaten the livelihood of certain companies or individuals. Prolonged litigation might not be financially viable even if the complainant were to ultimately succeed. This would leave such parties without effective recourse and frustrate the purpose of section 404a. These proposed rules address this concern by providing a mechanism for prompt complaint resolution. This should benefit both the complainant and the Postal Service because prompt resolution will avoid the uncertainty and lack of finality that occurs in a long, drawn out, formal trial-type proceeding. The proposed rules afford parties raising claims that the Postal Service violated 39 U.S.C. 404a with an alternative to more prolonged litigation.

Below, the Commission discusses the proposed rules with respect to complaints alleging violations of 39 U.S.C. 404a. Part II presents a more thorough discussion and foundation for the issues raised in this docket by the Commission's proposed substantive rules found in proposed part 3032. Part III discusses the foundations and major issues of the Commission's proposed procedural rules found in proposed part 3033 and the procedural deposition rule of part 3032. Part IV provides a section-by-section analysis of each proposed new rule. The proposed rules are set forth at the end of this Notice.

Comments by interested persons are due no later than 45 days from the date of publication in the *Federal Register*. Reply comments are due no later than 75 days from the date of publication in the *Federal Register*.

II. SUBSTANTIVE PROVISIONS

In this part, the Commission explains the derivation of the substantive provisions of its proposed 39 U.S.C. 404a rules. It begins with the text of the statute. Unless otherwise expressly authorized by law, 39 U.S.C. 404a prohibits the Postal Service from taking the following actions:

- (1) establish[ing] any rule or regulation (including any standard) the effect of which is to preclude competition or establish the terms of competition unless the Postal Service demonstrates that the regulation does not create an unfair competitive advantage for itself or any entity funded (in whole or in part) by the Postal Service;
- (2) compel[ing] the disclosure, transfer, or licensing of intellectual property to any third party (such as patents, copyrights, trademarks, trade secrets, and proprietary information); or
- (3) obtain[ing] information from a person that provides (or seeks to provide) any product, and then offer any postal service that uses or is based in whole or in part on such information, without the consent of the person providing that information, unless substantially the same information is obtained (or obtainable) from an independent source or is otherwise obtained (or obtainable).

39 U.S.C. 404a(a). The Commission then explores the policy considerations of section 404a. Taking these policies into account, the Commission explains its proposed substantive 39 U.S.C. 404a regulations found in proposed part 3032.

A. Policy Guidance

In evaluating the major policy objectives for implementing the substantive provisions of 39 U.S.C. 404a, the Commission considers the relevant legislative history of the Postal Accountability and Enhancement Act (PAEA), Public Law No. 109-435, 120 Stat. 3218 (2006) and its precursor bills.

Section 404a was enacted as part of the PAEA. The PAEA is not accompanied by any conference reports or committee reports. However, several precursor bills contain a provision identical to that which was ultimately enacted as 39 U.S.C. 404a.

Those precursor bills were explained in two Congressional Reports from the 108th and 109th Congresses—a Senate Committee Report and a House Committee Report.

The Senate Committee on Government Affairs issued a written report on S. 2468, a precursor bill to the PAEA, during the 108th Congress. See Senate Report 108-318 (August 25, 2004).¹ With respect to proposed 39 U.S.C. 404a, that committee report noted:

The new section 404[a] prohibits the Postal Service from: (1) establishing rules or regulations which preclude competition or give the Postal Service an unfair competitive advantage; (2) compelling disclosure, transfer, or licensing of intellectual property; or (3) offering any product or service that makes use of information obtained from a person that provides or seeks to provide a product to the Postal Service unless the person has consented to such use or the information can be obtained from another source. The Regulatory Commission is required to prescribe regulations to carry out the purposes of this section, and the prohibitions will be enforced through the Commission's strengthened complaint process and remedies, which include ordering rescission of any regulation.

Senate Report 108-318 (August 25, 2004) at 51. The Senate Committee Report also proclaimed that:

S. 2468 contains a number of provisions the Committee believes are necessary to ensure that the Postal Service competes fairly with the private sector, particularly when offering products and services classified as competitive. The Postal Service, in our view, plays an important role in offering competitive products, even though a number of private sector businesses provide alternative services. We also believe, however, that steps need to be taken to level the playing field between the Postal Service and its competitors in the competitive product market. This is especially important now that this legislation gives the Postal Service significant new commercial flexibilities, particularly in the area of pricing. *The language in Title IV ensures that the benefits the Postal Service gets by virtue of its status as a government entity do not give it an opportunity to abuse its new commercial freedom.*

¹ See also Postal Accountability and Enhancement Act, S. 2468, 108th Congress (2004) (as reported by S. Comm. on Gov't Affairs, August 25, 2004).

Id. at 27 (emphasis added). The Senate Report makes clear that “the Postal Service is barred from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage.” *Id.* at 28.

In addition to the earlier Senate Committee Report, the House of Representatives issued a House Committee Report explaining a precursor House bill to the PAEA.² This precursor House bill contained a provision identical to that ultimately enacted later in the same Congress within the PAEA as 39 U.S.C. 404a. The related House Committee Report contained almost identical language to the earlier Senate Report cited above with respect to its explanation of the provision. Moreover, the Report states that “unlike the unconstrained pricing flexibility recommended by the President’s Commission for competitive products, the bill imposes limited but important controls to protect the public interest from unfair competition.” House Report 109-66, Part I (April 28, 2005) at 43. The House Committee Report explains that “[u]nder the legislation, the Postal Service will compete on a level playing field, under many of the same terms and conditions as faced by its private sector competitors, albeit with stronger controls, oversight, and limitations in recognition of its governmental status.” *Id.* at 44.

These Committee reports demonstrate that the enactment of 39 U.S.C. 404a sought to create a level playing field between the Postal Service and its competitors. There was a concern that without the prohibitions in 39 U.S.C. 404a the Postal Service may use its authority as an arm of the government to create an unfair competitive advantage for itself in areas where it competes with private enterprises. Accordingly, these proposed rules are designed to prohibit the Postal Service from unfairly using its status as a governmental entity to provide itself or third parties with a competitive advantage.

² See House Report 109-66, Part I (April 28, 2005); see also Postal Accountability and Enhancement Act, H.R. 22, 109th Congress (2005) (as reported by H. Comm. on Gov’t Reform, April 28, 2005).

B. Proposed Substantive 39 U.S.C. 404a Regulations

With these policy considerations and unfair competition principles in mind, the Commission turns to the substantive provisions of its proposed rules related to 39 U.S.C. 404a in proposed part 3032.

1. 39 U.S.C. 404a(a)(1)

In drafting proposed part 3032, the Commission reviewed other federal agencies' regulations for resolving analogous complaints. The Commission found the Federal Communications Commission's (FCC) complaint regulations on program access rules to be instructive and informative with respect to its responsibilities under 39 U.S.C. 404a(a)(1). See 47 U.S.C. 548(b); 47 CFR 76.1001-02.

Similar to 39 U.S.C. 404a(a)(1), Public Law 102-385 (October 8, 1992), the Cable Television Consumer Protection and Competition Act of 1992 has a program access provision that declared it unlawful for certain communications vendors to "engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent" the distribution of certain programming. 47 U.S.C. 578(b). The FCC's program access rules are intended, among other things, to promote competition in the video distribution market by limiting the ability of vertically integrated cable companies and common carriers to withhold satellite programming from competitors in the distribution market. *Cablevision Systems Corp. v. Federal Communications Commission*, 649 F.3d 695, 699 (D.C. Cir. 2011); see also 47 CFR 76.1004. Parties may file a complaint with the FCC to enforce these regulations. 47 U.S.C. 548(c)(1); 47 CFR 76.1003.³

The Commission's proposed rules in part 3032 draw upon similarities to the FCC's statutory mandate and regulations regarding program access where appropriate.

³ For example, in 2008, AT&T Services, Inc. (AT&T) filed an FCC program access complaint alleging that Cox Enterprises (Cox) violated the program access rules by failing to provide AT&T with access to live coverage of San Diego Padres baseball games. See *AT&T Services, Inc. v. Cox, FCC Program Access Complaint*, FCC Docket No. CSR-8066-P, September 11, 2008.

In drafting proposed part 3032, the Commission's proposed regulations seek to assign the burden of proof and burden of persuasion as set forth in each provision of 39 U.S.C. 404a.

The Commission notes that to succeed on a claim under 39 U.S.C. 404a(a)(1), the complainant must demonstrate that Postal Service action or inaction "precludes competition," or "establish[es] the terms of competition." Similarly, to successfully mount an affirmative defense under 39 U.S.C. 404a(a)(1), the statute requires the Postal Service to show that its action or inaction "does not create an unfair competitive advantage." In its application, the Commission anticipates, as a matter of policy, drawing upon the similarities between these provisions in 39 U.S.C. 404a(a)(1) and precedent developed under federal statutes concerning unfair methods of competition.⁴

Federal unfair competition claims are reviewed in two separate ways: under a "rule of reason" analysis, or a "*per se*" analysis.⁵ Most commonly, claims of unfair competition are reviewed under the rule of reason analysis. This analysis focuses on whether the behavior unreasonably restrains competition. In making such a determination, the decision maker reviews the "anticompetitive effects" of the action. These anticompetitive effects must "harm the competitive process and thereby harm consumers....[H]arm to one or more competitors will not suffice."⁶ Just as in 39 U.S.C. 404a(a)(1) cases where the burden is on the complainant to show that the conduct "precludes competition," or "establish[es] the terms of competition," in federal unfair competition cases, the burden is on the plaintiff to demonstrate that the conduct has the requisite anticompetitive effect. *Id.*⁷ If such a showing is made, the defendant "may

⁴ See, e.g., 15 U.S.C. 45 (prohibiting "unfair methods of competition").

⁵ The *per se* analysis does not allow potential positive effects on competition to be considered as a defense to the alleged anticompetitive behavior.

⁶ *United States v. Microsoft Corp.*, 253 F.3d 58 (D.C. Cir. 2001).

⁷ See generally *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) at 225-26.

proffer a ‘procompetitive justification’ for its conduct.”⁸ Similarly, under 39 U.S.C. 404a(a)(1) cases, the Postal Service must show that its conduct “does not create an unfair competitive advantage.”

In unfair methods of competition cases, the procompetitive justification must be “a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.”⁹ If the defendant’s procompetitive justification stands unrebutted, then the “plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit.” *Id.*

Application of analogous precedent concerning claims of unfair competition will serve as useful guidance in adjudicating claims under 39 U.S.C. 404a(a)(1).

Proposed rule 3032.5 also clarifies that 404a(a)(1)’s use of the phrase “rule or regulation (including any standard)” includes other documents or policies issued by the Postal Service when it is acting as a governmental entity. Such a reading is suggested, as a matter of policy, by the legislative history in the precursor bills which clarifies that 39 U.S.C. 404a was enacted, in part, to keep the Postal Service from improperly using its governmental authority to stifle competition. Additionally, using the catch-all provision of “other document or policies” ensures that form is not elevated over substance. It would be inappropriate for the Postal Service to be able to avoid violations of 39 U.S.C. 404a by merely titling its governmental policies as “manuals” or “operating procedures” as opposed to “regulations” or “standards.”

2. 39 U.S.C. 404a(a)(2)

In drafting the implementing regulation for 39 U.S.C. 404a(a)(2), the Commission attempts to ensure, by regulation, that parties attempting to do business or otherwise interact with the Postal Service will not be coerced into divulging their intellectual

⁸ *Microsoft*, 253 F. 3d at 59 (D.C. Cir. 2001); *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) at 483.

⁹ *Microsoft*, 253 F. 3d at 59 (D.C. Cir. 2001).

property to third parties. The proposed implementing regulation for 39 U.S.C. 404a(a)(2) ensures that parties' interactions with the Postal Service are shielded from third-party threats to their intellectual property. Third parties will be unable to use the Postal Service as a vehicle for obtaining their competitors' or potential competitors' intellectual property.

3. 39 U.S.C. 404a(a)(3)

In drafting the implementing regulation for 39 U.S.C. 404a(a)(3), the Commission attempts to ensure, by regulation, that the Postal Service may not use information obtained from a party to offer a postal service based on such information without the party's consent. The party's consent must be informed. As an exception to this prohibition, the Postal Service may show that it has obtained substantially the same information from an independent source.

III. PROCEDURAL PROVISIONS

In this part, the Commission explains the derivation of the procedural provisions of its proposed 39 U.S.C. 404a rules. First, the Commission considers the relevant policy guidance that has shaped the proposed 39 U.S.C. 404a procedural regulations. Second, the Commission discusses the overall structure of these proposed procedural regulations.

A. Policy Guidance

In determining how to give effect, procedurally, to the provisions of 39 U.S.C. 404a, the Commission draws upon its experience and that of other agencies tasked with similar responsibilities. The Commission also takes note of a recent executive order regarding agency regulations. Executive Order No. 13563, entitled "Improving Regulation and Regulatory Review," requests that agencies review their regulations and consider how best to "modify, streamline, expand or repeal them in accordance with

what has been learned.” E.O. 13563 at section 6 (January 18, 2011).¹⁰ In connection with that guidance, the Commission, as part of this rulemaking, considers how to streamline its complaint rules relating to section 404a complaints.

The Commission’s initial PAEA complaint rules contemplate two types of complaints—those relating to broad postal policy matters and complaints relating to operational or service issues. See Docket No. RM2008-3, Order No. 101, Notice and Order of Proposed Rulemaking Establishing Rules for Complaints, August 21, 2008, at 6-9. Since the passage of the PAEA and the implementation of the Commission’s PAEA complaint rules, the Commission has conducted one major complaint proceeding that raised issues relating to unfair competition: Docket No. C2009-1, GameFly Inc. (GameFly). Although the GameFly complaint did not directly raise issues related to 39 U.S.C. 404a, without changes to the Commission’s procedural complaint rules, section 404a complaints would be adjudicated in a similar manner because they raise unfair competition issues. The Commission’s experience with the GameFly complaint and others has provided valuable insight into identifying potential ways to accelerate resolution of complaints while still providing appropriate due process. Accordingly, the Commission proposes special procedural rules to provide for prompt, streamlined adjudication of section 404a complaints.

With respect to other agencies’ experiences, the Commission notes that in the Telecommunications Act of 1996, Congress mandated that the FCC “expedite the processing of formal complaints,” including those similar to the Commission’s section 404a complaints.¹¹ In response, the FCC adopted streamlined complaint procedures to provide a forum for prompt resolution of complaints. *Id.* at 1-2. Drawing upon that

¹⁰ E.O. 13563 does not directly apply to the Postal Regulatory Commission. E.O. 13563 section 7(a). Nonetheless, the Office of Management and Budget has stated that independent agencies, such as the Commission, “are encouraged to give consideration to all of its provisions, consistent with their legal authority.” Memorandum M-11-10 from Office of Management and Budget entitled “Executive Order 13563, Improving Regulation and Regulatory Review” at 6 (February 2, 2011).

¹¹ Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, 12 F.C.C.R. 22497 (November 25, 1997).

experience, the Commission proposes accelerated complaint procedures based in part on the FCC's revised formal complaint procedures. The Commission finds that many of the FCC's revised complaint procedures can be used by the Commission to accelerate 39 U.S.C. 404a complaints, while still preserving due process.

B. Proposed Procedural 39 U.S.C. 404a Regulations

These proposed section 404a procedural rules are designed to work in conjunction with the Commission's general complaint rules currently found in 39 CFR part 3030. They complement existing rules, but are tailored to the specific circumstances raised by section 404a. These complaint procedures are well suited to the circumstances of complaints alleging violations of the prohibited actions specified in section 404a.

As noted, the Commission is concerned that, at least for some businesses, Postal Service violations of section 404a could cause irreparable harm and threaten the livelihood of certain companies or individuals. These proposed rules address these concerns by providing a mechanism for prompt complaint resolution. Moreover, for the vast majority of issues expected to arise under 39 U.S.C. 404a, complainants should have the information and documentation needed to support their claims well in advance of filing a complaint.

1. Special Accelerated Procedures

The proposed regulations implementing 39 U.S.C. 404a include regulations allowing for optional accelerated procedures for complaints alleging violations of 39 U.S.C. 404a. Under these accelerated procedures, a complainant can opt to have the Commission decide the case on the basis of only a complaint and answer, and in limited circumstances, a reply. As part of each pleading, participants are to file a complete statement of facts that set forth and support the facts demonstrating violation of 39 U.S.C. 404a. The accelerated procedural rules also contemplate allowing

interested parties who could be directly impacted by a decision on the issues raised by the complaint, to intervene and argue their cases in a similar manner.

In essence, these requirements are designed to elicit, as expeditiously as possible, all the information necessary for the Commission to make a determination as to whether the complaint is justified under section 3662(c). These proposed rules are an attempt to accelerate the adjudicatory process to the maximum extent feasible consistent with due process. As proposed, the rules allow the participants to fully develop their theories of the case, applicable legal requirements, and the facts while still permitting the Commission to respond rapidly to the issues raised by the complainant.

Under these procedures, it is the Commission's intention to issue a final decision on the merits of a complaint filed using these accelerated procedures prior to the deadline in 39 U.S.C. 3662(b)(1) for making a finding that the complaint raises a material issue of fact or law; that is, within 90 days of the date the complaint is filed. As a result, if adopted as final rules, the Commission must strictly enforce all deadlines as set forth in the proposed rules. Failure to adhere to such deadlines may result in adverse action. The Commission's strong commitment to prompt resolution of accelerated complaints and their effective foreclosure of avenues for delaying litigation may foster and even encourage settlement or informal resolution of disputes.

The proposed accelerated complaint and pleadings procedures require the participants to produce at the outset of the case all the material and evidence on which they seek to rely. This ensures that litigation delay tactics will be avoided and the Commission can promptly issue a decision. The use of these accelerated procedures is also expected to significantly decrease litigation costs due to the absence of a prolonged formal discovery process and hearing.

The Commission does not anticipate the absence of discovery under these accelerated procedures to appreciably affect the complainant's ability to make a compelling case on the merits. For the vast majority of issues expected to arise under 39 U.S.C. 404a, complainants should have the information and documentation needed to support their claims well in advance of filing a complaint. For example, for complaints

arising under section 404a(a)(1), the complainant should be in possession of the information and documents necessary to show how a Postal Service rule or regulation is causing competitive harm in the marketplace. Discovery from the Postal Service would not be expected to appreciably help the complainant demonstrate how the Postal Service's action causes competitive harm. The complainant is in the best position to directly establish such harm by reference to the effects the questionable rule or regulation has or will have on his or her business or other activities.

Notwithstanding these substantial benefits, the Commission recognizes that the proposed accelerated procedures place additional burdens and due process limitations compared to those traditionally afforded to complainants under 39 CFR part 3030. In particular, these accelerated procedures will require both the Postal Service and the complainant to present their cases for adjudication without discovery and under compressed time frames. They may also require participants to expend additional resources to meet the condensed schedules. These burdens are not insignificant.

On balance, however, the Commission's initial analysis is that the additional burdens on the participants for complaints filed under the proposed accelerated procedures, while real, are justified and outweighed by the significant benefits of bringing the important issues raised in section 404a complaints to a prompt, potentially less costly resolution.

This initial analysis could change, however, if for example, other meaningful benefits or burdens are identified. Consequently, the Commission is especially interested in commenters' views on its identification and balancing of the proposed benefits and burdens of these accelerated procedures. It would be helpful for commenters to address these topics in their submissions.

It is important to highlight the fact that these accelerated 404a complaint procedures are proposed to be voluntary at the election of the complainant. This ensures that the complainant will have the option of either utilizing the accelerated complaint procedures or the typical complaint procedures. The Commission recognizes that some section 404a complainants may prefer the more thorough discovery process

and Commission review that results from the Commission's traditional complaint procedures. Such actions may be preferable in those circumstances where the Postal Service is in possession of much of the information and documents necessary for a complainant to prove violations of 39 U.S.C. 404a. In such circumstances, the Commission's traditional complaint procedures, including their discovery options, may be better equipped to allow complainants to make their case before the Commission. The complainant will be in a good position to know whether the issues raised by the complaint are best suited for these proposed accelerated procedures or the traditional complaint procedures found in 39 CFR part 3030.

Given these possibilities, the Commission does not believe it is prudent, at the current time, to foreclose the traditional complaint route option for complaints raising issues under 39 U.S.C. 404a.

2. Depositions in Non-Accelerated Section 404a Complaints

In order to streamline the discovery process for section 404a complaints that are not filed under the proposed accelerated procedures, the Commission is also proposing to allow depositions during the discovery phase of the complaint. Because section 404a complaints are expected to involve a limited number of participants, they would appear to be particularly well-suited for depositions. Depositions should allow participants to exchange information in a more efficient manner than the interrogatory procedures typical of the Commission's general rules of practice and procedure. Whereas, responses to interrogatories ordinarily take weeks, responses to questioning during depositions will result in immediate responses and allow for immediate follow up. This procedure should streamline Commission review by allowing participants to promptly narrow the issues for Commission review and decision.

The Commission recognizes that depositions can prove to be costly. As such, the Commission's proposal is not to make depositions mandatory, but rather to allow an expanded opportunity for participants to engage in depositions in order to facilitate the exchange of information.

IV. SECTION-BY-SECTION ANALYSIS

In this part, the Commission reviews the proposed rules, describing what each rule is designed to accomplish. The purpose of this section-by-section analysis is to assist commenters in determining the nature of each proposed regulation and the rationale behind it. Each proposed section is discussed below.

Section 3030.1 Applicability. The proposed changes to this section are designed to tie together the Commission's current complaint rules with proposed new parts 3032 and 3033 with respect to complaints filed under 39 U.S.C. 404a.

Section 3032.1 Applicability. This proposed rule identifies the types of complaints that the Commission will review under part 3032. In particular, it states that only complaints alleging violations of 39 U.S.C. 404a will be subject to the requirements of part 3032. Additionally, the rule recognizes that such complaints may be heard under the Commission's traditional procedural complaint rules in part 3030 or the Commission's new proposed accelerated complaint procedures of part 3033. Subsection (b) makes clear that the rules under part 3032 apply to only those portions of a complaint alleging violations of section 404a. Any remaining counts and complaint allegations will be reviewed under other applicable statutory and regulatory standards apart from part 3032.

Section 3032.5 Unfair competition. This proposed rule sets forth the requirements for the Commission to find a complaint alleging a violation of 39 U.S.C. 404a(a)(1) to be justified. It also sets forth the requirements for the Postal Service's statutory affirmative defense. This section defines the term "rule or regulation (including any standard)" as used in the statute to include documents or policies issued by the Postal Service exercising its regulatory authority or otherwise acting as a governmental entity, as opposed to acting solely as a competitor or market participant. This reflects legislative history that Congress intended for section 404a(a)(1) to, in part, place a check on the Postal Service and keep it from using its authority as a regulator or governmental entity to harm the marketplace. See Senate Report 108-318 ("The language in Title IV ensures that the benefits the Postal Service gets by virtue of its

status as a government entity do not give it an opportunity to abuse its new commercial freedom.”); Senate Report 108-318 (“[T]he Postal Service is barred from using its rulemaking authority to put itself at a competitive advantage or put another party at a competitive disadvantage.”); House Report 109-66 (“Under the legislation, the Postal Service will compete on a level playing field, under many of the same terms and conditions as faced by its private sector competitors, albeit with stronger controls, oversight, and limitations in recognition of its governmental status.”).

Section 3032.6 Disclosure, transfer, and licensing of intellectual property. This proposed rule sets forth the requirements for the Commission to find a complaint alleging a violation of 39 U.S.C. 404a(a)(2) to be justified. This section defines the term “disclosure, transfer, or licensing of intellectual property” to include actions that have adverse effects on the value of intellectual property. This prevents form from being elevated over substance and ensures that the Commission can remedy a violation of 39 U.S.C. 404a(a)(2) regardless of the means used to compel a party to provide its intellectual property to a third party.

Section 3032.7 Unlawfully obtaining information. This proposed rule sets forth the requirements for the Commission to find a complaint alleging a violation of 39 U.S.C. 404a(a)(3) to be justified. It also sets forth the requirements for the Postal Service's statutory affirmative defenses. The section contains a provision establishing that the statutory affirmative defense of “consent” requires more than just a signature on a form that a party must sign before talking to the Postal Service. The consent must be informed and uncoerced. In determining whether consent is informed and uncoerced, the Commission draws upon the experience of the D.C. Bar Rule of Professional Conduct 1.0 and its associated comments.

The communication necessary to obtain consent will vary according to the circumstances. The Postal Service must make reasonable efforts to ensure that the party giving consent possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes an explanation reasonably necessary to inform a party of their legal rights and obligations of the

proposed course of conduct, and a discussion of the options and alternatives. In determining whether the information and explanation provided are reasonably adequate, relevant factors include the party's experience in legal matters generally and in making decisions of the type involved, and whether the party is independently represented by counsel in giving the consent. In all circumstances, the consent must be not only informed, but also uncoerced by the Postal Service or anyone working on the Postal Service's behalf.

Section 3032.8 Statutorily authorized affirmative defense. This proposed rule sets forth the Postal Service's statutory affirmative defense that its violations of 39 U.S.C. 404a are justified because those actions are specifically authorized by law. This affirmative defense may be used with respect to alleged violations of either 39 U.S.C. 404a(a)(1), (2), or (3). However, the Postal Service's statutory general and specific powers under 39 U.S.C. 401 and 404 are subject to the prohibitions of 39 U.S.C. 404a. See 39 U.S.C. 401 ("Subject to the provisions of section 404a, the Postal Service shall have the following general powers."); 39 U.S.C. 404 ("Subject to the provisions of section 404a...the Postal Service shall have the following powers."). Such statutory provisions provide that the Postal Service may not base any statutory affirmative defenses to alleged violations of 39 U.S.C. 404a(a) on the powers enumerated in 39 U.S.C. 401 and 404. However, this section does not preclude the Postal Service from arguing that a particular Postal Service regulation or other action (or inaction) does not have the requisite effect to violate 39 U.S.C. 404a(a).

Section 3032.15 Depositions in non-accelerated section 404a complaint proceedings. This proposed rule allows for the taking of depositions, in accordance with the Federal Rules of Civil Procedure, for section 404a complaints that are filed under the Commission's traditional complaint rules in part 3030. This rule is inapplicable until the Commission initiates a proceeding on the complaint, *i.e.*, until the Commission finds that the complaint raises a material issue of fact or law. Without such a provision, the deposition process might be abused. This ensures that only complainants raising material issues of fact or law will subject the Postal Service to the time and expense of

the discovery process. The Commission anticipates that allowing depositions will expedite the discovery process since responses to oral questions posed during depositions allow for immediate follow up. This is in contrast to the Commission's typical discovery process which does not result in responses for 2 weeks and often involves follow up. See 39 CFR 3001.26. In proposing to adopt the deposition standard found in Federal Rule of Civil Procedure 30, the Commission anticipates that the deposition process should prove to be more like those routinely taken during proceedings in federal court rather than those taken in Docket No. C2008-3 pursuant to Commission rule 3001.33. Additionally, since section 404a complaints are expected to involve a limited number of participants, they would appear to be particularly well-suited for depositions. Logistically, depositions are more manageable when there are fewer participants conducting them.

Section 3033.1 Applicability. This proposed rule makes clear that the choice to use the accelerated procedures of part 3033 exclusively rests with the complainant. It also states the types of complaints eligible for the accelerated procedures of part 3033—those alleging violations of 39 U.S.C. 404a or associated regulatory requirements. Paragraph (b) ensures that a complaint filed under part 3033 may only make claims arising under 39 U.S.C. 404a or associated regulatory requirements. Complaints arising under the same set of facts raising claims alleging violations of multiple statutory or regulatory requirements found in 39 U.S.C. 3662(a)—in addition to those related to 39 U.S.C. 404a—must be filed under part 3030.¹² This eliminates the possibility of requiring the Postal Service to litigate two complaints (one accelerated and one non-accelerated) arising out of the same set of facts. It avoids the potential unfairness that would result if the Postal Service had to effectively divulge its litigation strategy at an early stage of a non-accelerated complaint through its filings in a related accelerated proceeding.

¹² Alternatively, complainants may have their 39 U.S.C. 404a claims heard under the accelerated procedures of part 3033 by waiving their other claims under other statutory or regulatory provisions.

Paragraph (c) ensures that complaints filed under part 3033 are adjudicated under these rules. A complainant may not file a complaint under part 3033, withdraw the complaint, and then re-file it under 3030. This eliminates the potential unfairness that would result if the Postal Service had to file its entire case in the expedited form and manner identified in part 3033 only to then have to relitigate the case under the rules of part 3030. Once a complaint is filed under part 3033, it either must be settled or decided by the Commission. However, if a complaint filed pursuant to part 3033 is dismissed without prejudice on procedural grounds pursuant to a motion to dismiss; such a complaint may be refiled under either part 3030 or part 3033. The legal doctrines of *res judicata* and *collateral estoppel* shall apply. Paragraph (d) identifies the other Commission rules that are applicable to complaints filed under this part.

Paragraph (e) sets forth the standard the Commission will apply in reviewing motions filed under this part. The Commission recognizes that unanticipated extraordinary circumstances may arise and participants may need to request relief from certain aspects of the rules of this part, *e.g.*, a severe illness to a witness or counsel. In such circumstances, a motion requesting a brief extension would be reasonable. However, the speedy resolution of complaints envisioned by these rules will be exceedingly difficult if the general substance of these regulations is not followed. Participants must file their complete cases, including pleadings and supporting documentation in the manner, structure (complaint, answer, reply), and under the procedural schedule set forth in the rules. If alterations to the procedural schedule routinely occur, the prompt adjudication of section 404a complaint disputes as intended by these rules will be compromised. Accordingly, motions to excuse participants from conforming to the substance of these rules generally will be looked on with disfavor. Such motions will only be granted in exceptional circumstances.

Responses to motions filed pursuant to paragraph (e) will be due 3 days after the motion is filed. This shortened time is consistent with the expedited schedule established by these rules.

Section 3033.5 General pleading requirements for accelerated 404a complaints.

This rule sets forth the filing requirements for pleadings filed under this part and states that a complaint filed under part 3033 will be decided based on the record consisting of the complaint, the answer, a reply (if applicable), intervenor submissions, and supporting documentation.

Section 3033.6 Complaint contents. This proposed rule identifies the information that must be included in a complaint filing in order to satisfy the “form and manner” requirements of 39 U.S.C. 3662(a) for complaints filed pursuant to part 3033. These requirements are based in large part upon the Commission’s general complaint content requirements of part 3030 but are specifically tailored to ensure that the Commission has the information it needs to decide the complaint under the accelerated time frame envisioned by part 3033.

Section 3033.7 Answers. This proposed rule identifies the information that must be included in the Postal Service’s answer for complaints filed pursuant to part 3033. These requirements are based in large part upon the Commission’s general complaint answer requirements of part 3030, but are specifically tailored to ensure that the Commission has the information it needs to decide the complaint under the accelerated time frame envisioned by part 3033.

The proposed rule is designed to ensure that the Postal Service narrows the issues for Commission adjudication in its answer. The rule also specifically requests that the Postal Service address the complainant’s proposed remedies and their potential effects on the Postal Service—both intended and unintended. This will ensure that, if necessary, the Commission has the information necessary to determine how to best achieve compliance with applicable requirements and remedy the effects of any noncompliance.

Section 3033.8 Pleadings filed in response to a complaint. This proposed rule governs the timeline for the Postal Service to respond to complaints. In general, the Postal Service has 20 days to respond to a complaint. If the Postal Service files an appropriate motion, the timeline for the Postal Service to file its answer to a complaint is

altered in a manner similar to that in the Federal Rules of Civil Procedure. If the Postal Service does file such motion, this rule also governs the deadline for filing a response to such motion.

Section 3033.9 Replies to answers raising affirmative defenses. This rule sets forth the limited circumstances under which replies to answers are allowed, and the contents allowed in such replies. In particular, replies are only allowed when the Postal Service's answer raises affirmative defenses, which are required to be clearly identified in the Postal Service's answer pursuant to section 3033.7(a)(6). The statutory affirmative defenses found in 39 U.S.C. 404a are restated in the Commission's rules in proposed sections 3032.5, 3032.7, and 3032.8. Other potential affirmative defenses may exist, depending on the facts and circumstances of each case (e.g., statute of limitations, fair use, *Noerr-Pennington* doctrine, etc.).

Section 3033.10 Complete statement of facts. This proposed rule sets forth requirements for the statement of facts, which needs to be included as part of the complaint, answer, and reply. The statement of facts must include all documents and testimony (through affidavits or declarations) that the filing participant is relying upon in order to prove its case. The information submitted under this rule is expected to form the evidentiary basis of the Commission's findings of fact in connection with complaint proceedings filed under part 3033. Paragraph (b) ensures that participants do not submit documents or information exchanged as part of settlement discussions as evidence.

Section 3033.11 Intervention. This rule governs the types of intervenors that are allowed to participate in complaint proceedings filed under part 3033. Due to the accelerated time frames and the need for prompt action, the Commission proposes to limit intervenors to those interested persons who can demonstrate that intervention is necessary to protect their interests and that they be directly impacted by a decision on the merits. Intervenors also may not expand the scope of the proceeding. This ensures that the Commission and the parties will not have to spend time and resources

responding to intervenors that do not have a sufficient stake in the outcome of the proceeding or attempt to change its focus.

Under this proposed rule, motions to intervene along with all associated supporting documentation are due within 10 days of an answer being filed, in conjunction with the reply deadline (if applicable). The supporting documentation must include a complete statement of facts pursuant to section 3033.10 related to the issues raised and facts alleged by the potential intervenor. The complainant and the Postal Service then have 10 days to respond to the issues raised in the motion to intervene and the supporting documentation. Such responses must comply with the requirements for replies under section 3033.9 and may only address the issues raised in the motion to intervene and the supporting documentation. This will ensure that the Commission will be able to issue its decision on the complaint in a timely manner as requested in the accelerated complaint while still appropriately balancing the rights of potential intervenors to have their views and concerns considered.

Section 3033.12 Notice of Proceeding. This rule sets forth the information that the Commission will provide in its notice docketing the section 404a complaint proceeding filed pursuant to part 3033. Such notice will be published on the Commission's website.

Section 3033.15 Final order. Under this proposed rule, the Commission shall issue a final order on the complaint in 90 days. The rule ensures that if the Commission finds the complaint to be justified, it will grant appropriate relief in accordance with rule 3030.50. The final order will also rule on any motions for intervention filed pursuant to proposed rule 3033.10 that have not been previously ruled upon. Due to the strict time constraints, the Commission anticipates ruling on most intervention motions in the final order.

V. PUBLIC REPRESENTATIVE

Pursuant to 39 U.S.C. 505, Sean C. Duffy is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in the above-captioned docket.

VI. ORDERING PARAGRAPHS

It is ordered:

1. Docket No. RM2013-4 is established for the purpose of receiving comments of the Commission's proposed rules under 39 U.S.C. 404a.
2. The Commission proposes to amend its regulations as shown below the signature of the Secretary. The proposed amendments involve altering and adding a new subsection to rule 3030.1 and adding new parts 3032 and 3033.
3. Sean C. Duffy is designated as an officer of the Commission to represent the interests of the general public in this docket.
4. Interested persons may submit comments no later than 45 days from the date of publication in the *Federal Register*.
5. Interested persons may submit reply comments no later than 75 days from the date of publication in the *Federal Register*.

6. The Secretary shall arrange for publication of this Order in the *Federal Register*.

By the Commission.

Ruth Ann Abrams
Acting Secretary

PART 3030—RULES OF COMPLAINTS

Amendments to Section 3030.1 [new subsection (c)]

§ 3030.1 Applicability.

(a) Except as provided in paragraph (c) of this section, the rules in this part govern the procedure for complaints filed under 39 U.S.C. 3662 that meet the form and manner requirements of subpart B of this part. Part 3001, subpart A of this chapter, applies unless otherwise stated in this part or otherwise ordered by the Commission.

* * * * *

(c) If a complaint under 39 U.S.C. 3662 alleges a violation of 39 U.S.C. 404a, the person filing the complaint may choose to file such complaint under this part or under the accelerated procedures provided in part 3033 of this chapter. If the complaint is filed under this part, the special rules under part 3032 of this chapter shall apply to the complaint in addition to the rules under this part.

PART 3032—SPECIAL RULES FOR COMPLAINTS ALLEGING VIOLATIONS OF 39 U.S.C. 404a

Subpart A—General

Sec.

3032.1 Applicability.

Subpart B—Requirements and Defenses

Sec.

3032.5 Unfair competition.

3032.6 Disclosure, transfer, and licensing of intellectual property.

3032.7 Unlawfully obtaining information.

3032.8 Statutorily authorized affirmative defense.

Subpart C—Special Procedural Rules for 404a Complaints

Sec.

3032.15 Depositions in non-accelerated section 404a complaint proceedings.

Subpart A—General**§ 3032.1 Applicability.**

(a) The rules in this part govern proceedings filed under 39 U.S.C. 3662 alleging violations of 39 U.S.C. 404a that meet the requirements of:

- (1) §§ 3030.2 and 3030.10 of this chapter; or
- (2) §§ 3033.5 and 3033.6 of this chapter.

(b) If a complaint alleges violations of multiple legal or regulatory requirements, the rules in this part apply only to those claims of a complaint alleging violations of 39 U.S.C. 404a and associated regulatory requirements.

(c) Subpart B of this part applies to complaints adjudicated under part 3030 of this chapter and part 3033 of this chapter. Subpart C of this part applies only to complaints adjudicated under part 3030 of this chapter.

Subpart B—Requirements and Defenses**§ 3032.5 Unfair competition.**

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(1) must show that:

(1) A Postal Service rule, regulation, or standard has the effect of:

- (i) Precluding competition; or
- (ii) Establishing the terms of competition; and

(2) The rule, regulation, or standard harms or harmed the person filing the complaint and competition.

(b) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(1), the Postal Service may demonstrate that the rule, regulation, or standard at issue does not create an unfair competitive advantage for itself or any entity funded, in whole or in part, by the Postal Service.

(c) As used in this section, the term “rule, regulation, or standard” includes, among other things, documents or policies issued by the Postal Service to exercise its regulatory authority or otherwise act as a governmental entity.

§ 3032.6 Disclosure, transfer, and licensing of intellectual property.

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(2) must show that the Postal Service has compelled or attempted to compel the disclosure, transfer, or licensing of the intellectual property of the person filing the complaint to a third party.

(b) As used in this section, the term “intellectual property” includes, among other things, patents, copyrights, trademarks, trade secrets, and proprietary information.

(c) As used in this section, the term “disclosure, transfer, or licensing of intellectual property” includes, among other things, an action that has an adverse effect on the value of intellectual property.

§ 3032.7 Unlawfully obtaining information.

(a) A complaint alleging a violation of 39 U.S.C. 404a(a)(3) must show that:

(1) The person filing the complaint has provided or sought to provide a product to the Postal Service;

(2) The Postal Service obtained information about such product from the person filing the complaint; and

(3) The Postal Service offers or offered a postal service that uses or is based, in whole or in part, on the information obtained from the person filing the complaint.

(b) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(3), the Postal Service may demonstrate that substantially the same information was obtained (or was obtainable) from an independent source or is otherwise obtained (or obtainable) through lawful means.

(c) As an affirmative defense to a complaint under 39 U.S.C. 404a(a)(3), the Postal Service may show that the information obtained was provided by consent. Such consent must be informed, uncoerced, and given only after the Postal Service has communicated adequate information and explanation about the risks of providing such consent.

§ 3032.8 Statutorily authorized affirmative defense.

(a) As an affirmative defense to an allegation of a violation of 39 U.S.C. 404a(a), the Postal Service may demonstrate that it is specifically authorized by law to take the action or inaction alleged to be a violation of that section.

(b) Authority under 39 U.S.C. 401 or 39 U.S.C. 404 may not form the basis of an affirmative defense under paragraph (a) of this section.

(c) Paragraph (b) of this section does not preclude the Postal Service from arguing that a particular Postal Service regulation or other action (or inaction) does not have the requisite effect to violate 39 U.S.C. 404a(a).

Subpart C—Special Procedural Rules for section 404a Complaints

§ 3032.15 Depositions in non-accelerated section 404a complaint proceedings.

(a) If the complaint was filed under part 3030 of this chapter, participants may take depositions in accordance with Federal Rule of Civil Procedure 30. Participants may take depositions immediately after the Commission makes a finding under § 3030.30(a) of this chapter that the complaint raises material issues of fact or law.

(b) Section 3001.33 of this chapter does not apply to depositions under this section.

PART 3033—ACCELERATED PROCEDURES FOR COMPLAINTS ALLEGING VIOLATIONS OF 39 U.S.C. 404a

Subpart A—General

Sec.

3033.1 Applicability.

Subpart B—Form and Manner Requirements for Pleadings in Accelerated Complaints

Sec.

3033.5 General pleading requirements for accelerated 404a complaints.

3033.6 Complaint contents.

3033.7 Answers.

3033.8 Pleadings filed in response to a complaint.

3033.9 Replies to answers raising affirmative defenses.

3033.10 Complete statement of facts.

3033.11 Intervention.

3033.12 Notice of Proceeding.

Subpart C—Commission Determinations and Relief
Sec.

3033.15 Final order.

Subpart A—General

§ 3033.1 Applicability.

(a) Any person filing a complaint under 39 U.S.C. 3662 alleging violations of 39 U.S.C. 404a and associated regulatory requirements may choose to have the complaint adjudicated under the accelerated procedures of this part. If the person does not choose to have the complaint adjudicated under the accelerated procedures of this part, the procedural requirements of part 3030 of this chapter will apply to the complaint.

(b) A complaint filed under part 3033 may only make claims arising under 39 U.S.C. 404a and associated regulatory requirements. A complaint otherwise eligible for filing under part 3033 containing additional claims raising one or more of the other statutory or regulatory provisions listed in 39 U.S.C. 3662(a) must be filed under part 3030 of this chapter if such additional claims arise out of the same set of facts.

(c) A complaint filed under this part may not be refiled under part 3030 of this chapter unless: (1) withdrawn by the person filing the complaint prior to the Postal Service's answer to the complaint; or (2) dismissed without prejudice.

(d) Unless otherwise stated in this part or otherwise ordered by the Commission, §§ 3001.1, 3001.5 - 3001.15, 3001.21, 3001.23, 3001.32, 3030.2, 3030.11, 3030.20, 3030.21, 3030.40, 3030.41, and 3030.50 of this chapter apply to accelerated complaints filed under this part.

(e) Except as otherwise provided in this part, motion practice is limited to extraordinary circumstances. Motions requesting waiver from compliance with the substance of the rules of this part, including material modifications of the procedural schedule, will generally be disfavored and granted only in exceptional circumstances. Except as otherwise provided in this part, responses to motions are due within 3 days.

(f) The special rules under part 3032 of this chapter apply to each complaint filed under this part.

Subpart B—Form and Manner Requirements for Pleadings in Accelerated Complaints

§ 3033.5 General pleading requirements for accelerated 404a complaints.

(a) A complaint filed under this part will be resolved on a written record consisting of a complaint and answer, along with all associated submissions. A reply to an answer is permissible only as set forth in § 3033.9. Intervenor filings and responses thereto are permissible only as set forth in § 3033.11.

(b) Pleadings must be clear, concise, and explicit. All matters concerning a claim, defense, or requested remedy, including damages, must be pleaded fully and with specificity.

(c) Pleadings must present facts which, if true, are sufficient to constitute a violation of the law, Commission regulation or order, or a defense to such alleged violation.

(d) Facts must be supported by relevant affidavit(s), declaration(s), or documentation.

(e) Legal arguments must be supported by appropriate statutory, judicial, Commission, or other administrative authority.

(f) If known, opposing authorities must be identified and distinguished.

(g) All authorities relied upon which are not routinely available in national reporting systems, such as unpublished decisions or slip opinions of courts or administrative agencies, must be included as part of filings.

(h) Information submitted, as well as relevant legal authorities, must be current, accurate, and updated as necessary and in a timely manner at any time before a decision is rendered on the merits of the complaint.

(i) Rules, regulations, and standards that are referred to or relied upon in a complaint, answer, or other pleading shall be appended to such complaint, answer, or other pleading.

(j) Pleadings shall identify the name, address, telephone number, and e-mail address of the filing attorney or, if a participant is not represented by an attorney, the filing participant.

§ 3033.6 Complaint contents.

(a) A complaint filed under this part shall contain:

(1) An affirmative statement that the person filing the complaint seeks relief under the accelerated procedures of this part;

(2) A full explanation of how the Postal Service's action or inaction violates applicable statutory standards under 39 U.S.C. 404a or related regulatory requirements, including citations to the relied upon section or sections of statute, regulation, order, or other regulatory requirements;

(3) A statement of the specific relief requested and the basis for that relief;

(4) Identification of persons or classes of persons known, or believed to be similarly affected by the issues involved in the complaint, if applicable;

(5) A complete statement of facts that conforms with § 3033.10 that establishes the violation(s) described in paragraph (a)(2) of this section;

(6) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the complaint;

(7) A certification that prior to the filing, the person filing the complaint attempted to meet or confer with the Postal Service's General Counsel to resolve or settle the complaint, why the person filing the complaint believes additional such steps would be unsuccessful, and the reasons for that belief;

(8) A statement as to whether the issues presented are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum; and if so, an explanation of why timely resolution cannot be achieved in that proceeding;

(9) All affidavits, declarations, documents, data and analysis upon which the person filing the complaint intends to rely to support the facts alleged in the complaint; and

(10) A certification that the complaint has been served on the Postal Service as required by § 3030.11 of this chapter.

(b) The Commission may waive any of the requirements listed in paragraph (a) of this section to serve the interests of justice.

§ 3033.7 Answers.

(a) The Postal Service's answer to a complaint filed under § 3033.6 shall contain:

(1) Sufficient information to advise the person filing the complaint and the Commission fully and completely of the nature of each defense;

(2) A full explanation of why the Postal Service's action or inaction does not violate applicable statutory standards under 39 U.S.C. 404a or related regulatory requirements, including citations to the relied upon section or sections of statute, regulation, order, or other regulatory requirements;

(3) If applicable, a full explanation of why the relief requested is inappropriate, including information on how granting the relief requested could have unintended consequences or cause harm to the Postal Service unrelated to the issues raised in the complaint;

(4) Specific responses to all material allegations of the complaint and a detailed statement of the basis for such responses;

(5) A complete statement of facts that conforms with § 3033.10 that establishes the Postal Service's defenses, including affirmative defenses, to the allegations raised in the complaint;

(6) Identification of and justification for each defense asserted, including a separate section captioned "Affirmative Defenses" identifying any affirmative defenses and the justifications for each such defense;

(7) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the answer;

(8) A certification that the Postal Service attempted to meet or confer with the person filing the complaint to resolve or settle the complaint, why the Postal Service believes additional such steps would be unsuccessful, and the reasons for that belief;

(9) A statement as to whether the issues presented are pending in or have been resolved by an existing Commission proceeding or a proceeding in any other forum; and

(10) All affidavits, declarations, documents, data and analysis upon which the Postal Service relies or intends to rely to support the facts alleged in the answer.

(b) The Commission may waive any of the requirements of paragraph (a) of this section to serve the interests of justice.

§ 3033.8 Pleadings filed in response to a complaint.

(a) Except as provided in paragraph (b) of this section or unless otherwise ordered by the Commission, the Postal Service shall file an answer to the complaint in the manner prescribed in this part within 20 days of service of the complaint.

(b) If appropriate, within 10 days after the complaint is filed, the Postal Service may file a dispositive motion with respect to the complaint, including a motion to dismiss. If the Postal Service files such a motion, unless otherwise ordered by the Commission, the period of time for filing its answer is altered such that if the Commission denies the motion or postpones disposition, the Postal Service shall file an answer within 7 days of the Commission's action.

(c) If the Postal Service files a motion pursuant to paragraph (b) of this section, responses to such motion are due within 7 days. The Commission shall issue its decision on such motion within 14 days or such other time as the Commission may establish.

(d) If the Postal Service's answer is delayed by the filing of a motion under paragraph (b) of this section, it may not obtain a further delay by filing another motion under paragraph (b) of this section.

§ 3033.9 Replies to answers raising affirmative defenses.

(a) Within 10 days after service of an answer containing affirmative defenses presented in accordance with the requirements of § 3033.7(a)(6), the person that filed the complaint may file and serve a reply containing statements of relevant, material facts and legal arguments that are responsive to the specific factual allegations and legal arguments made by the Postal Service in support of its affirmative defenses. Material facts shall conform to the requirements of § 3033.10. No new causes of action may be raised in a reply.

(b) Failure to reply to an affirmative defense shall be deemed an admission of such affirmative defense and of any facts supporting such affirmative defense that are not specifically contradicted in the complaint.

(c) The reply shall contain proposed findings of fact, conclusions of law, and legal analysis relevant to the affirmative defenses raised in the answer.

(d) The reply shall contain as attachments all affidavits, declarations, documents, data and analysis upon which the complainant relies or intends to rely to support the facts alleged in the reply.

(e) If an answer does not contain affirmative defenses, the person filing the complaint may not file a reply to an answer.

(f) The Commission may waive any of the requirements of this section to serve the interests of justice.

§ 3033.10 Complete statement of facts.

(a) Each complaint, answer, and reply under this part must contain a statement of facts. All material facts in the statement of facts must be supported by relevant affidavits, declarations, and documentation, including copies of relevant written

agreements, offers, counter offers, denials, and other correspondence. The statement of facts shall include a detailed explanation of how the facts presented are related to the allegations set forth in the pleadings, including a full identification and description of the communications, transmissions, services, or other conduct complained of and the nature of any alleged injury. Assertions based on information and beliefs are expressly prohibited unless accompanied by affidavit(s) or declaration(s) explaining the basis for the belief and why the facts could not be reasonably ascertained.

(b) Documents prepared for the purposes of settlement discussions may not be submitted as part of the statement of facts under paragraph (a) of this section.

§ 3033.11 Intervention.

(a) For purposes of this section, the term “intervenor” means a person who could be directly impacted by a decision on the merits of the complaint and who can demonstrate that intervention in the proceeding under this part is necessary to protect the person’s interest(s).

(b) A potential intervenor may not expand the scope of the proceeding by addressing any issue(s) outside the scope of the complaint and answer.

(c) To intervene in a proceeding under this part, a potential intervenor must file a motion for leave to intervene within 10 days of an answer being filed pursuant to § 3033.7. The motion shall address how the potential intervenor meets the definition of intervenor under paragraph (a) of this section and how such intervention does not alter the scope of the proceeding pursuant to paragraph (b) of this section.

(d) The motion for leave to intervene must contain as an attachment an intervenor statement providing the following information:

- (1) Whether the potential intervenor supports the complaint or answer; and
- (2) The basis for potential intervenor’s support.

(e) The attached intervenor statement filed pursuant to paragraph (d) of this section may contain the following supporting documentation, if applicable:

(1) A full explanation of why the Postal Service's action or inaction does or does not violate the applicable statutory standards under 39 U.S.C. 404a or related regulatory requirements, including citations to the relied upon section or sections of statute, regulation, order, or other regulatory requirements raised in the complaint or answer;

(2) A complete statement of facts that conforms with § 3033.10 that establishes the violation(s) or defense(s), including affirmative defense(s), raised by the potential intervenor in its intervenor statement;

(3) Proposed findings of fact, conclusions of law, and legal analysis relevant to the claims and arguments set forth in the intervenor statement; or

(4) All affidavits, declarations, data and analysis, and documents upon which the potential intervenor intends to rely to support the facts alleged in the intervenor statement;

(f) Responses to motions for leave to intervene, including responses to the intervenor statement filed pursuant to paragraph (d) of this section, may be filed by the person filing the complaint and the Postal Service within 10 days of the date the motion for leave to intervene is filed. Responses to the intervenor statement shall conform to the requirements of § 3033.9.

(g) No new causes of action may be raised in a response to a motion for leave to intervene.

(h) For purposes of this part, an officer of the Commission designated to represent the interests of the general public pursuant to 39 U.S.C. 505 shall be treated as an intervenor whose motion for leave to intervene has been granted.

§ 3033.12 Notice of Proceeding.

(a) Whenever a complaint is filed under this part, the Commission shall issue a notice of the proceeding.

(b) Notice under paragraph (a) of this section shall be published on the Commission's website and contain the following:

- (1) A brief summary outlining the claims and requested remedies contained in the complaint;
- (2) A reference to the legal authority which the proceeding is to be conducted;
- (3) The identification of an officer of the Commission to represent the interests of the general public in the docket;
- (4) A statement that interested persons may move to intervene in the proceeding in accordance with § 3033.11; and
- (5) Such other information as the Commission deems appropriate.

Subpart C—Commission Determinations and Relief

§ 3033.15 Final order.

- (a) The Commission will issue a final order on a complaint no later than 90 days after the complaint is filed. Such final order will also address outstanding intervention requests filed pursuant to § 3033.11, if applicable.
- (b) Orders issued pursuant to paragraph (a) of this section shall include the Commission's written statement setting forth the bases for its determination.
- (c) If the Commission finds the complaint to be justified, the Commission will provide for remedies in accordance with § 3030.50 of this chapter.