

ORDER NO. 1273

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

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POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

Before Commissioners: Edward J. Gleiman, Chairman
George A. Omas, Vice Chairman
Dana B. Covington, Sr., Ruth Y. Goldway
W.H. "Trey" LeBlanc III

Revisions to Library Reference Rule

Docket No. RM98-2

ORDER ADOPTING FINAL REVISIONS TO
RULES ON LIBRARY REFERENCES

Issued (November 24, 1999)

Introduction. The Commission initiated this rulemaking to improve the administration of the library reference practice. In particular, it has sought to clarify the role of library references in formal proceedings, to address the responsibilities of those who file library references, and to assist those who wish to review them. The scope of the docket, the rationale for specific proposals, and commenters' suggestions have been discussed extensively in the course of several previous orders. See Order No. 1219 (63 FR 47456, Sept. 8, 1998); Order No. 1223 (63 FR 71251, Dec. 24, 1998); and Order No. 1263 (64 FR 52725, Sept. 30, 1999). At this point, the Commission finds that remaining concerns about the wording or effect of certain provisions can be resolved through clarification in the ensuing discussion and with minimal changes to the most recent proposal (set out in Order No. 1263). The changes include adoption of a

compromise suggested by one commenter on the issue of obtaining service of certain library references, clarification of whether the "unduly burdensome" consideration factors into filing a library reference under "other circumstances," and minor editorial revisions.

I. Review of Comments Filed in Response to Order No. 1263

The Commission received comments from Douglas F. Carlson (Carlson), David B. Popkin (Popkin), the Office of the Consumer Advocate (OCA), and the Postal Service in response to the set of provisions proposed in Order No. 1263. See Carlson Comments on Proposed Revisions to Library Reference Practice (October 15, 1999); Popkin Comments in Response to Order No. 1263 on Further Proposed Revisions to Library Reference Practice (Third Set) (October 16, 1999); OCA Comments in Response to Order No. 1263 on Further Proposed Revisions to Library Reference Practice (Third Set) (October 13, 1999); and Postal Service Comments on Third Set of Proposed Revisions to Library Reference Practice (October 20, 1999). (Hereafter, Carlson Comments, Popkin Comments, OCA Comments, and Postal Service Comments.)

A. Carlson's Comments

Carlson notes that under the proposed rules, a party may request that a copy of a library reference be served if "interest . . . is likely to be so limited that service on the entire list would be unreasonably burdensome, and the participant agrees to serve the material on individual participants upon request within three days of a request." Carlson Comments at 1, citing proposed rule 31(b)(2)(ii)(A). He supports this approach, but objects to the treatment the proposal accords a library reference containing material that is filed in compliance with a discovery request for production of documents or things. In this circumstance, Carlson notes that the filer is not required to comply with special

requests, but may be required to serve the material upon the filing of a detailed motion setting forth the reasons why service is necessary or appropriate. *Id.* at 2, citing proposed rule 31(b)(2)(ii)(D) and 31(b)(2)(ix). Carlson asserts that the motion requirement imposes a significant burden on parties located a long distance from Washington who wish to review particular library references. Specifically, he estimates that the motion requirement could generate up to \$50 in additional expense and delay of at least 7 to 10 days. *Id.* at 2-3. Carlson notes that he periodically has asked a party who has filed a library reference to provide him with a copy, and this has allowed him to obtain library references and avoid an expensive trip to Washington to view the material. He suggests that the Commission maintain the status quo or adopt an alternative that would require the party to serve the documents on the interrogating party upon request, while retaining the motion requirement for others. *Id.*

B. Popkin's Comments

Popkin expresses two main concerns about the proposal. One is how it affects his ability to determine the contents of the library reference without traveling to Washington; the other is the extra expense and time associated with the requirement of a motion to obtain the library reference. Popkin Comments at 1.

With respect to determining the contents of a library reference, Popkin asserts that the tradeoff for not having to serve all participants should be a requirement that the filer provide a meaningful explanation of the library reference's contents. He also asks for clarification of the difference between the mandatory disclosures outlined in subsection 31(b)(2)(iv) [regarding the contents of the required notice] and the optional preface or summary submitted with the library reference covered in subsection (vi). *Id.* at 1. Popkin also says the explanation of the library reference should be available on the Commission's website so that participants will have easy and quick access to the material. *Id.*

With respect to service, Popkin raises the same concerns Carlson expresses regarding the additional expense and work associated with the motion requirement. Also, Popkin says the term “special requests” in subsection 31(b)(2)(ix) does not make clear whether the motion is required to obtain a reference on an occasional basis. *Id.* at 1.

Subsection 31(b)(2)(ii)(D) refers to material filed in compliance with a discovery request for production of documents or things. Popkin says this provision is not clear, and suggests that it be divided into two parts: one for items that are directly associated with the interrogatory question; the other for supporting data or information. He proposes that the first category be automatically furnished to the proponent of the interrogatory, and the second treated like any other reference. *Id.* at 2. Popkin also says the three-day service requirement contained in subsection 31(b)(2)(ii)(A) should apply to subpart (D) “at a minimum.” *Id.* at 2.

C. The OCA's Comments

The OCA prefaces its comments with the overall assessment that the proposed rules “are workable and the requirement for a detailed notice will be an improvement over the current rules.” OCA Comments at 1. At the same time, it notes that the Commission has not accepted its suggestion for a cross-walk, reiterates its preference for this requirement, but indicates it is not pursuing this position in this round of comments. *Id.* at 1-2.

Subsection 31(b)(1): general introduction to provisions on documentary material. The OCA notes that the Commission has included in this provision a new sentence requiring that testimony, exhibits, and supporting conclusions premised on data or conclusions developed in a library reference provide the location of that information within the library reference. *Id.* at 2. The OCA suggests further expansion to require the location of underlying information developed in other testimony, other exhibits or other supporting workpapers. It proposes the following substitute:

Testimony, exhibits and supporting workpapers prepared for Commission proceedings that are premised on data or conclusions developed in a library reference, other testimony, other exhibits, or other supporting workpapers shall provide the location of that information within the library reference, testimony, exhibits, and supporting workpapers with sufficient specificity to permit ready reference, such as the page and line, or the file and worksheet or spreadsheet page or cell.

Id. at 3.

Subsection 31(b)(2)(iii): other circumstances justifying the filing of a library reference. The OCA suggests that clarification of this provision, which permits the filing of any material as a library reference in unusual circumstances, is needed because it is not clear whether the “unduly burdensome” condition applies here as one of the “other applicable requirements” of referenced subsection 31(b)(2)(ii)(B). Its position is that this criterion should be specifically included to remove any uncertainty.

Subsection 32(b)(2)(iv)(H). The OCA suggests adding the words “into the record” after the word “entered.” Id. at 4. With this change, the phrase would read: “To the extent feasible, identify portions expected to be entered into the record . . .”

Subsection 32(b)(2)(vi): optional preface or summary. The OCA suggests revising this subsection to read: “Inclusion of a preface or summary in a library reference addressing the matters set out in subsection 31(b)(2)(iv)(A)-(H) is encouraged but optional.” It contends that this will encourage the Postal Service to continue its acknowledged practice, in the vast majority of instances, of providing a preface to its library references. The OCA notes that this currently serves as a convenience to the participants and the Commission. Id.

Subsection 31(b)(2)(vii): electronic version. The OCA also suggests requiring the electronic version of the notice to accompany the library reference (if not already incorporated therein) on grounds that this will “better insure ready access to the detailed notice.”

D. The Postal Service's Comments

The Postal Service observes that the proposed rules may prove generally satisfactory in most salient respects, but suggests several improvements. Postal Service Comments at 1. The Service also notes that in previous comments, it indicated that it hoped that the outcome of this rulemaking would be useful new procedures that would not unnecessarily impair its ability to complete preparations for submission of a request for a recommended decision in the most expeditious manner possible or its ability to maintain a smooth and timely flow of information in response to discovery requests. With the exceptions identified in its comments, the Service says it believes the most recently proposed rules may be consistent with these objectives. *Id.* at 10.

Section 31(b)(1). The Service raises the possibility that the language the Commission adopted in apparent response to an OCA comment could be misinterpreted as meaning that every time a number that originates in a library reference is cited, it must be cross-referenced. Moreover, the Service claims the Commission's proposal goes beyond what the OCA suggested, and proposes two alternatives. One entails striking the reference to testimony; the other involves rewriting the middle part of the sentence to read:

Testimony, exhibits and supporting workpapers prepared for Commission proceedings that are premised on data or conclusions developed in a library reference shall, whenever providing the location of that information within the library reference, do so with sufficient specificity to permit ready reference, such as the page and line, or the file and the worksheet or spreadsheet page or cell.

Id. at 5-6.

The Service notes that this revision is consistent with the Commission's position that the purpose of this rulemaking is to pursue relatively narrow improvements. *Id.*

Subsection 31(b)(2)(ii): examples of physical characteristics rendering service unduly burdensome. The Postal Service suggests adding “or electronic format” to the list of examples of physical characteristics. In support of this addition, it says: “Many library references are filed as such because they consist of one or more diskettes or CDs — the electronic format most currently in vogue — and there certainly is no intention (nor should there be) to serve copies of such items on every party.” *Id.* at 6-7.

The Postal Service’s reply to the OCA’s comments. In addition to its own suggestions, the Service also addresses the OCA’s comments. With respect to subsection 31(b)(1), the Service says that the OCA’s proposal to expand the new “specificity” provision to include citation to testimony, exhibits and workpapers, in addition to the citations to library references encompassed by the Commission’s current proposal, exacerbates its concerns about the potential for misinterpretation. *Id.* at 7. Specifically, the Service asserts that this suggestion manifests no awareness of the difficulties inherent in preparing a postal rate filing, such as the need to revise testimony up to the printing deadline. The Service notes that these revisions change pagination and create “ripple effects.” *Id.* at 7-8. Given these circumstances, the Service urges a focus “at a practical level” on identifying and resolving real problems the parties might be experiencing under existing practices. *Id.* at 8.

Subsection 31(b)(2)(iii): The Service notes that the OCA suggests that the “other applicable requirements” language of this provision might not clearly incorporate the “unduly burdensome” condition referred to in the preceding subsection. However, the Service points out the function of this provision is to deal with exceptional circumstances. Since it provides ample limitations against abuse, the Service contends that it seems much wiser to leave intact the flexibility afforded by the proposed rules regarding the “unduly burdensome” condition. *Id.* at 9.

Subsection 31(b)(2)(iv)(H) and (vi): minor editorial revisions. The Service says it has no objections to the OCA’s suggestion that subsection 32(b)(2)(iv)(H) be revised to include the phrase “into the record” after “entered.” Similarly, it has no objection to

revising subsection 31(b)(2)(vi) to include language stating that inclusion of a preface is "encouraged but optional."

Sec. 31(b)(2)(vii): suggestion regarding notice of library reference filed in electronic format. The Service notes that the root of OCA's concern appears to be that someone who gains access to a library reference on the Commission's web page might not be able to benefit fully from this access if he or she does not have similar access to the information provided with the notice. *Id.* at 9. It notes, however, that under current practice, the Commission is scanning pleadings and posting them on the web already. Therefore, the Service says that whether or not an electronic version of the notice is submitted, the parties will have access to that information on the web as long as the notice is scanned. Consequently, it considers the rule as proposed entirely adequate. *Id.*

II. Commission Response

Proposed alternative approaches to subsection 31(b)(1) (general introduction to provisions on documentary material). Both the Postal Service and the OCA suggest changes to this provision. The Service's proposed alternative adds a clause stating that "whenever" citations are made in testimony and exhibits, they must do so with sufficient specificity. According to the Service, the purpose of this wording change is to prevent misinterpretation of the Commission's proposal, especially of the type that would lead to litigation over whether every number originating in a library reference and used in testimony must be cross-referenced. Postal Service Comments at 4. The Service says it does not understand this to be the intent of the Commission's proposal, but is concerned that this could be its effect. The OCA, on the other hand, expands the reach of the proposal by including, in addition to library references, other testimony, exhibits, or supporting workpapers. OCA Comments at 3.

The Commission finds that the OCA's suggestion carries with it the potential for imposing far greater burden on the filing party than this rulemaking has contemplated.

Therefore, it believes it is preferable to retain the language proposed in Order No. 1263. In doing so, the Commission notes that the intent of the provision is not to impose on testimony unnecessarily severe or exhaustive citation requirements. In terms of guidance, the Commission notes that witness Tolley's recent presentations (which the Service refers to its comments) included a Technical Appendix containing extensive citations to source materials. These presentations provide an example of testimony that would comply with the new rule. In addition, the Commission expects participants to apply a common-sense standard.

Special requests. The issue of service of library references is problematic. In part, this is because it appears that the Service has complied with the requirement that material filed in response to a request for production of documents under rule 26 be made available "for inspection and copying" by filing a library reference. While this may pose some inconvenience for those located outside the greater Washington, DC area, the Service correctly notes that rule 26 does not necessarily require actual service.

The Commission will not impose an across-the-board obligation to provide copies of all library references the Postal Service may file in a case. As stated in Order No. 1263, it believes that the growing ability to produce and distribute most material in an electronic format will greatly reduce the need for participants to make special requests for hard-copy service. It also believes that exposing the filer of a library reference to the potential for repeated requests for service diminishes the extent to which the practice of filing a library reference is a convenience.

The Commission believes that the compromise Carlson has suggested has merit. Under this approach, a participant filing a discovery request (under rule 25 or 26) that leads to the lodging of a library reference with the Commission may make a special (informal) request for service, while others would be required to file a motion. The Commission expects the filer to honor these informal, oral special requests whenever reasonably feasible. In the most recent proposal, no specific deadline was set for service. Upon reconsideration, the Commission believes that the same three-day period specified in subsection 31(b)(2)(ii)(A) should apply. As the terms of that

provision also allow the filer to provide an explanation of why the material cannot be provided within the specified time period, much of the flexibility of the previously-proposed standard allowing service within a reasonable time is preserved. The final rule reads as follows:

(ix) *Special requests and motions seeking service.* In situations other than that covered in (ii)(A), special requests for service of material contained in a library reference may be made by the participant that filed the interrogatory or inquiry that generated a response in the form of a library reference. Service shall be made within three days of a request, or the filer shall provide, within the same period, an explanation of why the material cannot be provided, and undertake reasonable efforts to promptly provide the material. Others seeking service of the material contained in a library reference shall file a detailed motion setting forth the reasons why service is necessary or appropriate.

Popkin's request for clarification of the differences between subsection 31(b)(2)(iv) and (vi). Popkin requests clarification of the differences between the "mandatory" provisions in subsection 31(b)(2)(iv) and the "optional" provisions in subsection 31(b)(2)(vi). In the Commission's view, the first provision identifies the disclosures that must be included in the *notice* the party serves (on all participants) informing them that a library reference has been filed. In contrast, the other provision addresses what must be included in the library reference itself. The Commission continues to believe these distinctions are appropriate, and retains them in the final rule. However, in keeping with the OCA's suggestion (and the Service's lack of objection thereto), the wording of subsection 31(b)(2)(vi) is revised to make clear that inclusion of a preface or summary is also encouraged.

Popkin's request for a change in subsection 31(b)(2)(ii)(D). Popkin contends that the effect of this provision, which refers to material filed in compliance with a discovery request for production of documents or things, is not clear. He suggests that it be divided into two parts: one for items that are directly associated with the interrogatory question; the other for supporting data or information. He further proposes that the first

category be automatically furnished to the proponent of the interrogatory, and the second treated like any other reference. *Id.* at 2. Popkin also says that the three-day service requirement contained in subsection 31(b)(2)(ii)(A) should apply.

The inclusion of this provision in the rule recognizes an informal practice that appears to have grown up around longstanding rule 26 (requests for production of documents or things for purposes of discovery). In many instances, it seems the Service has complied with requests that could be deemed to fall within rule 26 (even if not specifically identified as such) by filing a library reference. Rather than discourage these efforts, the Commission has attempted to draft the new provision on special requests in a way that preserves the spirit of cooperation underlying the ongoing practice. Given the alteration in the motion requirement that is being made, the Commission believes that Popkin's concerns about availability are addressed.

Suggestions regarding interpretation of the "unduly burdensome" condition in connection with subsection 31(b)(2)(iii). This subsection addresses "other circumstances" when it is appropriate to file material as a library reference, but for the inability to satisfy the terms of subsection 31(b)(2)(A)-(D). In response to a request for clarification, the Commission notes that these terms, by the language of subsection 31(b)(2)(ii), are factors to be considered *in addition to* physical characteristics that are reasonably likely to render compliance with service requirements unduly burdensome.


The OCA suggests that the rule could be improved by adding the phrase "unduly burdensome" to this subsection, while the Service says the existing approach provides a necessary degree of flexibility. The Commission's intent is that the "unduly burdensome" condition in subsection 31(b)(2)(ii) applies to this section; that is, a filer can qualify the material for acceptance as a library reference by virtue of its physical characteristics, even if conditions in (A) through (D) are not met. Given the potential for confusion, the Commission is revising the introductory sentence of this subsection to read as follows: "If a participant considers it appropriate to file material as a library reference because physical characteristics render service unduly burdensome, but cannot satisfy the terms"

Minor editorial revisions. Several other suggestions have been made for minor editorial revisions. The Commission is adopting the OCA's suggestions for changes in subsection 31(b)(2) (iv)(H) and (vii) without change. It is also adopting the Service's suggestion, with one small adjustment. This latter entails adding the broader term "format" to the examples of physical circumstances, instead of "electronic format."

It is ordered:

1. The Commission adopts the provisions set out in the attachment as a final rule amending 39 CFR 3001.31(b).
2. The rule is effective upon publication in the *Federal Register*.
3. The Secretary shall cause this order to be published in the *Federal Register*.

By the Commission.
(S E A L)


Margaret P. Crenshaw
Secretary

Amendments to Rule 31(b) [39 CFR 3001.31(b)]
(Final Set of Revisions)

For the reasons discussed in Order No. 1273, the Commission amends rule 31, Evidence [39 CFR 3001.31]. The amended version reads as follows:

Section 3001.31 Evidence

* * * * *

Rule 31(b) *Documentary material.* (1) *General.* Documents and detailed data and information shall be presented as exhibits. Testimony, exhibits and supporting workpapers prepared for Commission proceedings that are premised on data or conclusions developed in a library reference shall provide the location of that information within the library reference with sufficient specificity to permit ready reference, such as the page and line, or the file and the worksheet or spreadsheet page or cell. Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant or not intended to be put in evidence, the participant offering the same shall plainly designate the matter offered excluding the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would unnecessarily encumber the record, it may be marked for identification, and, if properly authenticated, the relevant and material parts may be read into the record, or, if the Commission or presiding officer so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit. Copies of documents shall be delivered by the participant offering the same to the other participants or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

(2) *Library references.* (i) The term "library reference" is a generic term or label that participants and others may use to identify or designate certain documents or things ("material") filed with the Commission's docket section. To the extent possible, material filed as a library reference shall be identified and referred to by participants in terms of the following categories:

Category 1 — Reporting Systems Material (consisting of library references relating to the Service's statistical cost and revenue reporting systems, and their primary outputs); Category 2 — Witness Foundational Material (consisting of material relating to the testimony of specific witnesses, primarily that which is essential to the establishment of a proper foundation for receiving into evidence the results of studies and analyses); Category 3 — Reference Material (consisting of previously published material provided for the convenience of the reader, such as books, chapters or other portions of books, articles, reports, manuals, handbooks, guides, and contracts; Category 4 — Material Provided in Response to Discovery (consisting of material provided in response to discovery requests); Category 5 — Disassociated Material (consisting of material filed at the request of another, from which the filing party wishes to be disassociated, is not vouching for or sponsoring the material provided); Category 6 — All Other Material (consisting of library references not fitting any of the other categories).

(ii) The practice of filing a library reference is authorized primarily as a convenience to filing participants and the Commission under certain circumstances. These include when the physical characteristics of the material, such as number of pages, bulk, or format, are reasonably likely to render compliance with the service requirements unduly burdensome; and one of the following considerations apply:

(A) interest in the material or things so labeled is likely to be so limited that service on the entire list would be unreasonably burdensome, and the participant agrees to serve the material on individual participants upon request within three days of a request, or to provide, within the same period, an explanation of why the material cannot be provided within three days, and to undertake reasonable efforts to promptly provide the material; or,

(B) the participant satisfactorily demonstrates that designation of material as a library reference is appropriate because the material constitutes a secondary source. A secondary source" is one that provides background for a position or matter referred to elsewhere in a participant's case or filing, but does not constitute essential support and

is unlikely to be a material factor in a decision on the merits of issues in the proceeding;
or,

(C) reference to, identification of, or use of the material would be facilitated if it is filed as a library reference; or

(D) the material is filed in compliance with a discovery request for production of documents or things.

(iii) *Other circumstances.* If a participant considers it appropriate to file material as a library reference because its physical characteristics render service unduly burdensome, but cannot satisfy the terms set out in paragraph 31(b)(2)(ii)(A) - (D), the material may be filed (by means of a notice) subject to the following conditions:

(A) inclusion in the accompanying notice of a detailed explanation of the reason for filing the material under this provision;

(B) satisfaction of all other applicable requirements relating to library references;
and

(C) the Commission's right to refuse acceptance of the material in its docket room and its right to take other action to ensure participants' ability to obtain access to the material.

(iv) *Filing procedure.* Participants filing material as a library reference shall provide contemporaneous written notice of this action to the Commission and other participants, in accordance with applicable service rules. The notice shall:

(A) set forth the reason(s) why the material is being designated as a library reference, with specific reference to paragraphs (b)(2)(ii) and (iii) of this section;

(B) identify the category into which the material falls and describe in detail what the material consists of or represents, noting matters such as the presence of survey results;

(C) explain in detail how the material relates to the participant's case or to issues in the proceeding;

(D) identify authors or others materially contributing to substantive aspects of the preparation or development of the library reference;

(E) identify the documents (such as testimony, exhibits, and an interrogatory) or request to which the library reference relates, to the extent practicable;

(F) identify other library references or testimony relied upon or referred to in the designated material, to the extent practicable;

(G) indicate whether the library reference is an update or revision to another library reference and, if it is, clearly identify the predecessor material.

(H) to the extent feasible, identify portions expected to be entered into the record and the expected sponsor (if the participant filing a library reference anticipates seeking, on its own behalf, to enter all or part of the material contained therein into the evidentiary record).

(v) *Labeling.* Material filed as a library reference shall be labeled in a manner consistent with standard Commission notation and any other conditions the presiding officer or Commission establishes.

(vi) *Optional preface or summary.* Inclusion of a preface or summary in a library reference addressing the matters set out in paragraph 31(b)(2)(iv)(A)-(H) is encouraged but optional.

(vii) *Electronic version.* Material filed as a library reference shall also be made available in an electronic version, absent a showing of why an electronic version cannot be supplied or should not be required to be supplied. Participants are encouraged to include in the electronic version the information and disclosures required to be included in the accompanying notice.

(viii) *Number of copies.* Except for good cause shown, two hard copies of each library reference shall be filed.

(ix) *Special requests and motions seeking service.* In situations other than that covered in paragraph 31(b)(2)(ii)(A), special requests for service of material contained in a library reference may be made by the participant that filed the interrogatory or inquiry that generated a response in the form of a library reference. Service shall be made within a reasonable time. Others seeking service of the material contained in a

library reference shall file a detailed motion setting forth the reasons why service is necessary or appropriate.

(x) *Waiver.* Upon the filing of a motion showing good cause, the Commission may waive one or more of the provisions relating to library references. Motions seeking waiver may request expedited consideration and may seek waiver for categories of library references.

(xi) *Status of library references.* Designation of material as a library reference and acceptance in the Commission's docket section do not confer evidentiary status. The evidentiary status of the material is governed by this section.