

UNITED STATES OF AMERICA
Before The
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

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OFFICE OF THE SECRETARY

Experimental Presorted Priority)
Mail Rate Categories, 2001

Docket No. MC2001-1

RESPONSE OF THE OFFICE OF THE CONSUMER
ADVOCATE TO HEARING QUESTION OF
COMMISSIONER GOLDWAY
(April 9, 2001)

The Office of the Consumer Advocate ("OCA") herein responds to the hearing question propounded by Commissioner Goldway at the prehearing conference of April 6, 2001.¹ As requested, the OCA has prepared a comparison of *pro forma* procedural schedules illustrating possible dates (1) for a hearing with oral cross-examination of witnesses and (2) a hearing conducted without oral cross-examination ("paper" hearing).

The following table lists typical events in a procedural schedule for a classification case, and provides example dates for such activities in the event there is oral cross-examination and without such cross-examination. The table illustrates the potential to shorten the record-compilation portion of the case by approximately one month, due mostly to omitting the time to prepare for, to conduct, and to evaluate the result of oral cross-examination. Provision is made for the submission of designated

¹ Tr. 1/19.

written cross-examination resulting from the written discovery process that would be undertaken in any event.

Event	With Oral Cross	Without Oral Cross
Filing of USPS testimony	3/7/01	3/7/01
Prehearing conference	4/6/01	4/6/01
Completion of discovery of USPS	5/4/01	5/4/01
Cross-examination of USPS witnesses	5/17-18/01	N/A
Filing of participants' testimony/rebuttal USPS	6/1/01	5/18/01 ²
Completion of discovery of participants	6/22/01	6/8/01
Cross-examination of participants' witnesses	7/5-6/01	N/A
Filing of USPS rebuttal testimony ³	7/13/01	6/15/01 ⁴
Close of record	7/23/01	6/25/01
Initial Briefs	7/27/01	6/29/01
Reply Briefs	8/7/01	7/10/01

In addition to this illustrative table, the OCA provides as Attachment A hereto a summary of the points discussed by the OCA during the prehearing conference. The Attachment includes citations to statutes, cases, or rules bearing on the nature of the hearing that the Commission must provide, and the means by which a "full and true disclosure of the facts" can be made without oral cross-examination.

The OCA, however, repeats the caution that the necessity of oral cross-examination depends upon many circumstances. The complexity of an omnibus rate case is such that the Commission's long-standing practice of providing rounds of oral

² With omission of cross-examination, this date would also be the date for participants to file designated cross-examination from discovery ended 5/4/01.

³ The Commission does not usually provide formal discovery procedures for rebuttal testimony. Any disputes over material included by the Postal Service in rebuttal would be subject to motions to strike or other motions practice.

⁴ With omission of cross-examination, this date would also be the date for USPS to file designated cross-examination from discovery ended 6/8/01.

cross-examination after the filing of written evidence may be a necessity. The present more limited case, however, with a small number of participants and limited issues, appears to be a case in which a “paper” hearing can be conducted with fairness to all participants and the completion of a full evidentiary record. Nonetheless, within a reasonable time after the filing of prepared testimony, any participant should be permitted to file a request for oral cross-examination for good cause shown. Any such request must be supported by a specific showing that a “full and true disclosure of the facts” cannot be achieved without oral cross-examination.

The Commission has not yet determined whether to grant the Postal Service request for experimental treatment under the Commission’s rules, carrying with it the commitment of the Commission to issue a recommended decision within 150 days of the determination. Even if the Commission denies the Postal Service motion, however, expedition is advisable in light of the expected filing of another omnibus rate case in the next few months. Utilizing a “paper” hearing procedure would permit the Commission to turn its attention to the issuance of a recommended decision approximately one month earlier, thus minimizing the period in which both this proceeding and the expected omnibus rate proceeding would be active concurrently. It could even permit the completion of the entire case within five months, if the Commission so desires.

A compromise between the customary practice of sequential scheduling of oral cross-examination (*i.e.*, between rounds of evidence) and conducting an entirely “paper” hearing would be to schedule all cross-examination of witnesses at one time after all prepared testimony has been filed. This would be feasible in a case with a limited number of witnesses and issues, and would take less time. It is likely that parties would

tend to limit oral cross-examination at such a late date, all written testimony having been filed at that point.

Conclusion

For the reasons given in its April 3 Comments, at the April 6 prehearing conference, and herein, the OCA commends to the Commission's consideration utilization of "paper" hearing procedures for this Docket. Regardless of the choice made by the Commission on how to proceed, the OCA stands ready to cooperate in expediting this proceeding.

Respectfully submitted,

OFFICE OF THE CONSUMER ADVOCATE



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Attachment A

At the prehearing conference of April 6, 2001, the OCA was asked to elaborate on the suggestion that the Commission adopt “paper” hearing procedures in this docket. The following provides a synopsis of the points made in the record (Tr. 1/10-15) along with supporting citations for the points made.

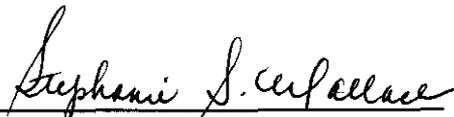
- The Commission must provide an “opportunity for a hearing on the record under sections 556 and 557 of title 5” 39 U.S.C. § 3624(a).
- There is no magic to phrase “on the record”—absent congressional intent to contrary, the decision on whether to use a formal hearing rests on the substantive character of proceedings involved. *Marathon Oil Co. v. EPA*, 564 F.2d 1253 (9th Cir. 1977).
- Section 554 of the APA applies to “every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554(a). The essentials are notice, opportunity to submit facts and argument, and receive evidence.
- Section 556 of the APA requires a person to “preside at the taking of evidence” but does not necessarily mandate oral hearings or cross-examination. 5 U.S.C. § 556(b). Thus, a formal hearing is required, but the record may be compiled without an oral hearing. *American Public Gas Ass’n v. FPC*, 498 F.2d 718 (D.C. Cir. 1974) (even in formal adjudicatory hearing, cross-examination is not always a right).
- The essential requirement is that hearing procedures promote the “full and true disclosure of the facts.” A “party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). But an oral hearing is not mandated.
- Other agencies have shifted hearing policy without violating APA.
- *Nuclear Regulatory Commission*—The NRC is required in licensing cases to “grant a hearing.” 42 USC § 2239(a)(1)(A). Early practice was to use oral hearings with cross-examination, later shifted away from oral hearings. Courts confirm significant latitude for NRC to decide what kind of hearing to provide. *Kelley v. Selin*, 42 F.3d 1501, 1511 (6th Cir. 1995).
- *Federal Energy Regulatory Commission*—The FERC is required to issue decision “after notice and opportunity for a hearing” for certificate issues, and is required to “enter upon a hearing” and issue decision “after full hearings” for rate issues. 15 USC §§ 717f(a); 717c(e). The FERC discarded its oral hearing practice for

certificates informally in 1980s, and more recently has selectively handled rate issues without oral hearing. Dispensing with cross-examination has been upheld by the courts. *Louisiana Assn' of Independent Producers v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992).

- *Surface Transportation Board*—The STB can prescribe a rail rate, when a violation is found “after a full hearing.” 49 USC § 10704(a)(1). The statute mentions “discovery and evidentiary phases” of such rate proceedings. 49 USC § 10704(d). Although the ICC originally used oral cross-examination hearings extensively, the ICC (and now its successor the STB) adopted “modified procedures” to be used “when substantially all material issues of fact can be resolved through submission of written statements.” 49 CFR § 1112.1.
- In this case, efficiency can be served by omitting oral hearings and relying on discovery and written evidence—both written testimony and designated cross-examination from responses to discovery—to compile the decisional record. Where the schedule normally would allow time for discovery and oral cross on each round of written testimony, the hearing can conclude more quickly with the omission of the oral steps.
- The Commission, however, must consider if oral cross is needed upon a showing by a party that oral cross-examination is needed to resolve an issue of material fact. *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 193 (D.C. Cir. 1988); *Cellular Mobile Systems v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985).
- The OCA recommendation in this case is made in light of the limited number of participants and issues—the OCA does not recommend dispensing with oral cross-examination in an omnibus rate case.

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing document upon all participants of record in this proceeding in accordance with Section 12 of the Rules of Practice.


Stephanie S. Wallace
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Washington, D.C. 20268-0001
April 9, 2001