

ORDER NO. 1481

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

Before Commissioners:

George Omas, Chairman;
Dawn A. Tisdale, Vice Chairman;
Mark Acton; Ruth Y. Goldway; and
Tony Hammond

Review of Sunset Rules

Docket No. RM2006-1

ORDER ADOPTING AMENDMENTS TO
THE RULES OF PRACTICE AND PROCEDURE

(November 8, 2006)

In Order No. 1479, the Commission proposed to amend its Rules of Practice and Procedure, 39 C.F.R. § 3001.1 *et seq.*, with respect to five sets of rules that are subject to five-year sunset provisions, each of which is scheduled to expire November 28, 2006.¹ Generally, these rules provide for expedited consideration of various Postal Service requests for a recommended decision. The five sets of rules include:²

39 C.F.R. §§ 3001.57 – 60, market response Express Mail rate requests;

39 C.F.R. §§ 3001.69 – 69c, minor classification changes;

39 C.F.R. §§ 3001.161 – 166, market tests of proposed classification changes;

39 C.F.R. §§ 3001.171 – 176, provisional service changes of limited duration; and

¹ PRC Order No. 1479, Docket No. RM2006-1, September 15, 2006.

² The Rules of Practice and Procedure may be accessed on the Commission's website, www.prc.gov, by clicking first on "Contents" and then on "Commission Rules" which are found under the heading "Table of Contents."

39 C.F.R. §§ 3001.181 – 182, multi-year test periods for proposed new services.

Exclusive of minor, non-substantive editorial changes, the Commission proposed to amend its rules in two principal ways, while reserving judgment on the rules concerning market response Express Mail rates. First, it proposed to reissue rules 69-69c, 161-166, 171-176, and 181-182, amended to eliminate the sunset provision.³ Second, the Commission proposed to standardize and shorten the time period for interventions as of right in proceedings involving minor classification changes (rules 69-69c), market tests (rules 161-166), and provisional service changes (rules 171-176). The Commission did not propose to reissue rules 57-60 (market response Express Mail rates), but rather sought comments on whether their reissuance would be in the public interest.

Interested persons were invited to comment on the proposed rulemaking. The Postal Service and the Office of the Consumer Advocate (OCA) submitted initial comments;⁴ the Postal Service also filed reply comments.⁵

I. PARTIES' COMMENTS

The sole controversy raised by the comments is whether rules 57-60 should be reissued or allowed to lapse. The Postal Service argues for reissuance, while the OCA advocates allowing these rules to lapse unless the Postal Service justifies their retention and indicates “a concrete intention to use them in the future[.]”⁶ Otherwise, the

³ Under the proposal, the rules for minor classification changes (§§ 3001.69 – 69c) are renumbered as § 3001.69(a) – (f) to conform to Office of the Federal Register style preference.

⁴ Initial Comments of the United States Postal Service in Response to Order No. 1479, October 13, 2006 (Postal Service Initial Comments); Office of the Consumer Advocate Comments in Response to Order No. 1479, October 13, 2006 (OCA Comments).

⁵ Reply Comments of the United States Postal Service, October 20, 2006 (Postal Service Reply Comments).

⁶ OCA Comments at 1.

commenters agree, for all intents and purposes, that the proposed amendments should be adopted.⁷

In Order No. 1479, the Commission discussed the substance and history of each of the rules. Among other things, it noted that the market response Express Mail rules, which were enacted in 1989, had never been invoked by the Postal Service. In light of this, the Commission questioned whether these rules had any continuing utility, suggesting that “[a]bsent an affirmative showing, there may be no compelling reason to reissue these rules.”⁸

The Postal Service urges the Commission to reissue rules 57-60 for an additional five years.⁹ It contends that, notwithstanding their lack of use, these rules retain a continuing value providing a “defined procedural mechanism” to enable the Postal Service to respond to changes in the overnight delivery market more quickly than may otherwise be possible. *Id.* at 4. The Postal Service further asserts that reissuing the rules would not impose a burden on the Commission or any interested party. *Id.* at 5.

The OCA’s opposition to rules 57-60 is conditional.¹⁰ It would have them lapse unless the Postal Service justifies their retention and explicitly commits to employ them in the future. Absent that, OCA suggests that discontinuing the rules may serve “administrative efficiency.” *Id.* at 2.

In its reply, the Postal Service comments on the OCA’s conditional opposition. It asserts that its initial comments provide explicit justification supporting retention of rules 57-60.¹¹ The Postal Service argues that OCA’s second condition, that it commit to using the rules, is impractical because, by their nature, the rules are designed to permit the Postal Service to respond to market developments that it can neither predict nor

⁷ OCA does not take a position on the proposed shortening of the intervention period because it is not required to intervene in Commission proceeding, but rather is appointed pursuant to 39 U.S.C. § 3624(a). *Id.* at 2.

⁸ PRC Order No. 1479, *supra*, at 8.

⁹ Postal Service Initial Comments at 3.

¹⁰ OCA Comments at 1-2.

¹¹ Postal Service Reply Comments at 2-3.

control. *Id.* at 3. Finally, the Postal Service counters the OCA's suggestion that discontinuing the rules may serve administrative efficiency, arguing that retaining the rules provides definitive procedures governing limited Express Mail rate requests which are preferable to ad hoc determinations which would otherwise be required to achieve expedition. *Id.* at 4-5.

II. COMMISSION ANALYSIS

The proposal to reissue the rules regarding minor classification changes (redesignated as rule 69(a)-(f), market tests (rules 161-166), provisional service changes (rules 171-176), and multi-year test periods (rules 181-182) on a permanent basis, *i.e.*, by eliminating the sunset provisions, is unopposed. These provisions, which provide procedural options to facilitate expedited consideration of certain Postal Service requests, have proven to be useful.¹² Accordingly, the Commission adopts the proposal to reissue these rules, amended to eliminate the sunset provisions.

Likewise the Commission's proposal to standardize and shorten the intervention period as of right in proceedings involving minor classification changes, market tests, and provisional service changes is uncontroversial. Under the current rules, interventions are due 26 or 28 days after filing of the Postal Service's request.¹³ These provisions predate the Commission's adoption of electronic filing requirements. As the Commission noted, the proposed change should present no hardship to any prospective intervenor given the ready online availability of the Postal Service's request, the Commission's order noticing the request, and the ease of intervening electronically.¹⁴

¹² See PRC Order No. 1479 at 3-6. Although the Postal Service has yet to invoke rules 181-182, the Commission finds that reissuance, as amended, is appropriate. The rules, which simply prescribe the documentation necessary to support such a request, provide a framework for considering potential new services. Retention of these rules disadvantages no potentially interested person, while affording the Postal Service increased flexibility regarding new services.

¹³ See current rules 69b(e), 163(b), and 173(b); *see also* proposed rules 69(e)(4), 163(e), and 173(e).

¹⁴ PRC Order No. 1479 at 8.

The Postal Service supports this proposal.¹⁵ No party contests it. Accordingly, the Commission adopts the proposal to standardize and shorten the intervention period in the relevant proceedings.¹⁶

The Commission did not propose not to reissue rules 57-60. Instead, it simply did not propose to reissue those rules, urging any party favoring them to demonstrate that renewal is appropriate. The Postal Service has made an adequate showing to support reissuing the rules for another five-year period. In addition, it satisfactorily addressed OCA's conditional opposition, demonstrating the problematic nature of requiring an explicit commitment to employ the rules.¹⁷

Two additional factors influence the Commission's decision to reissue these rules for an additional five-year period. First, the rules provide procedures governing requests for an expedited recommended decision on limited Express Mail rate proposals. Interested persons may intervene in any such proceeding to protect their interests. As with all proceedings before the Commission, one initiated under these

¹⁵ The Postal Service suggests that rules 163(d) and 173(d) be revised to make them consistent with revised rule 69b(d), redesignated as rule 69(e)(3), which eliminated the requirement that the Postal Service's notice accompanying its request for a minor classification change "identify the last day for filing a notice of intervention with the Commission." Postal Service Initial Comments at 2-3. The Postal Service's suggestion is well-taken. The failure to revise rules 163(d) and 173(d) to reflect the proposal was an oversight. Under the proposal, the Commission's notice of proceeding will afford all interested persons a minimum of 15 days after the filing of the Postal Service's request within which to intervene. See attached rules 69(e)(4), 163(e), and 173(e). The current rules require the Postal Service's notice of its filing to identify the last day for filing a notice of intervention with the Commission. See current rules 69b(d), 163(d), and 173(d). This requirement is unnecessary under the proposal. Accordingly, the Postal Service's suggestion will be adopted in the final rule. Conforming changes will not be made to rules 59(c)(1) and (c)(3) at this time because rules 57-60 are substantively different from the rules applicable to limited classification changes and would require revisions to other rules as well.

¹⁶ See attached rules 69(e)(4), 163(e), and 173(e).

¹⁷ To avoid the possibility that the current rules may lapse, the Commission finds it in the public interest to issue this order as a direct final rule to become effective upon publication in the *Federal Register*. This approach also provides the Postal Service with maximum operating flexibility under the circumstances.

rules would be decided on the merits. Thus, no potentially interested person is prejudiced by renewal of the rules.¹⁸

A second consideration is the notable absence of any comments from private carriers opposing reissuance. This void is not meant to suggest that such comments would have been dispositive. By the same token, the Commission is reluctant to read too much into the lack of opposition. Nonetheless, absent indications to the contrary, it would seem to imply that, at a minimum, the rules contain adequate safeguards to protect the interests of such prospective parties.

Finally, as a cautionary observation, the Commission notes that, although it is, under the circumstances, reissuing these rules for an additional five-year period, this result is not intended to preclude a finding, based on the record in a future proceeding, that these rules have become obsolete.

In conclusion, pursuant to the foregoing discussion, the Commission hereby amends its Rules of Practice as set forth below.

It is ordered:

1. The Commission's Rules of Practice are amended as set forth below the signature line of this Order.
2. The amended rules are effective upon publication in the *Federal Register*.

¹⁸ The Postal Service may be alluding to this point when it states that reissuing these rules imposes no burden on interested stakeholders. Postal Service Reply Comments at 2-3; see also Postal Service Initial Comments at 5.

3. The Secretary shall cause this Order to be published in the *Federal Register*.

By the Commission.
(SEAL)

Steven W. Williams
Secretary

List of Subjects in 39 C.F.R. Part 3001

Administrative Practice and Procedure, Postal Service

For the reasons discussed above, the Commission proposes to amend 39 CFR part 3001 as follows:

1. The authority citation for part 3001 continues to read as follows:

Authority: 39 U.S.C. 404(b); 3603; 3622-24; 3661, 3662, 3663.

2. In § 3001.57, revise paragraph (b) to read as follows:

Subpart B — Rules Applicable to Requests for Changes in Rates or Fees

* * * * *

(b) This section and §§ 3001.58 through 3001.60 are effective [upon publication in the Federal Register through the same date five (5) years thereafter].

3. Revise § 3001.69 to read as follows:

Subpart C — Rules Applicable to Requests for Establishing or Changing the Mail Classification Schedule

§ 3001.69 Expedited minor classification cases.

(a) *Applicability.* This section applies when the Postal Service requests a recommended decision pursuant to § 3623 and seeks expedited review on the ground that the requested change in mail classification is minor in character. The requirements and procedures specified in this section apply exclusively to Commission consideration of requested mail classification changes which the Postal Service denominates as, and the Commission finds to be, minor in character.

(b) *Considerations.* A requested classification change may be considered minor in character if it:

- (1) would not involve a change in any existing rate or fee;

(2) would not impose any restriction in addition to pre-existing conditions of eligibility for the entry of mail in an existing subclass or category of service or for an existing rate element or worksharing discount; and

(3) would not significantly increase or decrease the estimated institutional cost contribution of the affected subclass or category of service.

(c) *Filing of formal request and prepared direct evidence.* Whenever the Postal Service determines to file a request under this section, it shall file a request for a change in mail classification pursuant to § 3623 that comports with the requirements of this section and of Subpart C of the rules of practice. Each such formal request shall include the following information:

(1) A description of the proposed classification change or changes, including proposed changes in the text of the Domestic Mail Classification Schedule and any pertinent rate schedules;

(2) A thorough explanation of the grounds on which the Postal Service submits that the requested change in mail classification is minor in character; and

(3) An estimate, prepared in the greatest level of detail practicable, of the overall impact of the requested change in mail classification on postal costs and revenues, mail users and competitors of the Postal Service.

(d) *Data and information filing requirements.* Formal requests generally require the submission of the data and information specified in § 3001.64.

(1) If the Postal Service believes that data required to be filed under § 3001.64 are unavailable, it shall explain their unavailability as required by § 3001.64(a)(2)(i), (ii), and (iv).

(2) If the Postal Service believes that data or other information required to be filed under § 3001.64 should not be required in light of the minor character of the requested change in mail classification, it shall move for a waiver of that requirement. The motion shall state with particularity the reasons why the character of the request and its circumstances justify a waiver of the requirement.

(3) A satisfactory explanation of the unavailability of information required under § 3001.64 or of why it should not be required to support a particular request will constitute grounds for excluding from the proceeding a contention that the absence of the information should form a basis for rejection of the request, unless the party desiring to make such a contention:

(i) demonstrates that, considering all the facts and circumstances of the case, it was clearly unreasonable for the Postal Service to propose the change in question without having first secured the information and submitted it in accordance with § 3001.64; or

(ii) demonstrates other compelling and exceptional circumstances requiring that the absence of the information in question be treated as bearing on the merits of the proposal.

(e) *Expedited procedural schedule.* The Commission will treat requests under this section as subject to the maximum expedition consistent with procedural fairness.

(1) Persons who are interested in participating in proceedings initiated under this section may intervene pursuant to Subpart A of the rules of practice. Parties may withdraw from a proceeding by filing a notice with the Secretary of the Commission.

(2) When the Postal Service files a request under this section, it shall comply with the Filing Online procedures of §§ 3001.9 through 3001.12.

(3) When the Postal Service files a request under this section, it shall on that same day file a notice that briefly describes its proposal. This notice shall indicate on its first page that it is a notice of a request for a minor change in mail classification to be considered under this section.

(4) Within 5 days after receipt of a Postal Service request invoking § 3001.69, the Commission shall issue a notice of proceeding and provide for intervention by interested persons pursuant to Subpart A of the rules of practice. The notice of proceeding shall state that the Postal Service has denominated the mail classification change as a minor change, and has requested expedited consideration pursuant to § 3001.69. The notice shall further state the grounds on which the Postal Service submits that the requested change in mail classification is minor in character and shall afford all interested persons a minimum of 15 days after filing of the Postal Service's request within which to intervene, submit responses to the Postal Service's request for consideration of its proposed mail classification change under § 3001.69, and request a hearing.

(5) Within 28 days after publication of the notice of proceeding pursuant to paragraph (e)(4) of this section, the Commission shall decide whether to consider the request under this section and shall issue an order incorporating that ruling. The Commission shall order a request to be considered under this section if it finds:

(i) the requested classification change is minor in character;
and

(ii) the effects of the requested change are likely to be appropriately limited in scope and overall impact.

(6) If the Commission determines that a Postal Service request is appropriate for consideration under this section, those respondents who request a hearing shall be directed to state with specificity within 14 days after publication of that determination the issues of material fact that require a hearing for resolution. Respondents shall also identify the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the fact or facts and the evidence it intends to provide in support of its position.

(7) The Commission will hold hearings on a Postal Service request considered under this section when it determines that there are genuine issues of material fact to be resolved and that a hearing is needed to resolve those issues. Hearings on a Postal Service request will commence within 21 days after issuance of the Commission determination pursuant to paragraph (e)(5) of this section. Testimony responsive to the Postal Service's request will be due 14 days after the conclusion of hearings on the Postal Service request.

(8) If the Commission determines that a request of the Postal Service is not appropriate for consideration under this section, the request will be considered in accordance with appropriate provisions of the Commission's rules.

(f) *Time limits.* The schedule involving a request under this section will allow for issuance of a recommended decision:

(1) not more than 90 days after the filing of a Postal Service request if no hearing is held; and

(2) not more than 120 days after the filing of a request if a hearing is scheduled.

4. Remove § 3001.69a.

5. Remove § 3001.69b.

6. Remove § 3001.69c.

7. In § 3001.161 remove paragraph (b) and remove the designation of paragraph (a) to read as follows:

Subpart I — Rules for Expedited Review to Allow Market Tests of Proposed Mail Classification Changes

§ 3001.161 Applicability.

This section and §§ 3001.162 through 3001.166 apply in cases in which the Postal Service requests a recommended decision pursuant to § 3623 preceded by testing in the market in order to develop information necessary to support a permanent change. The requirements and procedures specified in these sections apply exclusively to the Commission's determination to recommend in favor of or against a market test proposed by the Postal Service, and do not supersede any other rules applicable to the Postal Service's request for recommendation of a permanent change in mail classification. In administering this subpart, it shall be the policy of the Commission to recommend market tests that are reasonably calculated to produce information needed to support a permanent change in mail classification, and that are reasonably limited in scope, scale, duration, and potential adverse impact. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend market tests of more than one year in duration; however, this limitation is not intended to bar the Postal Service from conducting more than one market test in support of a potential permanent change in mail classification in appropriate circumstances.

8. In § 3001.163, revise paragraphs (b), (d), and (e) to read as follows:

§ 3001.163 Procedures — expedition of public notice and procedural schedule.

* * * * *

(b) Persons who are interested in participating in proceedings to consider Postal Service requests to conduct a market test may intervene pursuant to Subpart A of the rules of practice. Parties may withdraw from a particular case by filing a notice with the Secretary of the Commission.

* * * * *

(d) When the Postal Service files a request under the provisions of this subpart, it shall on that same day file a notice that briefly describes its proposal. This notice shall indicate on its first page that it is a notice of a Market Test Request to be considered under §§ 3001.161 through 3001.166.

(e) Within 5 days after receipt of a Postal Service request under the provisions of this subpart, the Commission shall issue a notice of proceeding and provide interested persons a minimum of 15 days after filing of the Postal Service request within which to intervene. In the event that a party wishes to dispute a genuine issue of material fact to be resolved in the consideration of the Postal Service's request, that party shall file with the Commission a request for a hearing within the time allowed

in the notice of proceeding. The request for a hearing shall state with specificity the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the fact or facts and the evidence it intends to provide in support of its position. The Commission will hold hearings on a Postal Service request made pursuant to this subpart when it determines that there is a genuine issue of material fact to be resolved, and that a hearing is needed to resolve that issue.

9. In § 3001.171, remove paragraph (b) and removing the designation of paragraph (a) to read as follows:

Subpart J — Rules for Expedited Review of Requests for Provisional Service Changes of Limited Duration

§ 3001.171 Applicability.

This section and §§ 3001.172 through 3001.176 apply in cases in which the Postal Service requests that the Commission recommend the establishment of a provisional service which will supplement, but will not alter, existing mail classifications and rates for a limited and fixed duration. The requirements and procedures specified in these sections apply exclusively to the Commission's determination to recommend in favor of or against a provisional service proposed by the Postal Service, and do not supersede the rules applicable to requests for permanent changes in rates, fees, mail classifications, and in the nature of postal services. In administering this subpart, it shall be the policy of the Commission to recommend the introduction of provisional services that enhance the range of postal services available to the public, without producing a material adverse effect overall on postal revenues or costs, and without causing unnecessary or unreasonable harm to competitors of the Postal Service. Except in extraordinary circumstances and for good cause shown, the Commission shall not recommend provisional services of more than two years in duration; however, the Commission may grant a request to extend a provisional service for an additional year if a Postal Service request to establish the provisional service as a permanent mail classification is pending before the Commission.

10. In § 3001.173, revise paragraphs (b), (d), and (e) to read as follows:

§ 3001.173 Procedures — expedition of public notice and procedural schedule.

* * * * *

(b) Persons who are interested in participating in a proceeding to consider Postal Service requests to establish a provisional service may intervene pursuant to Subpart A of the rules of practice. Parties may withdraw from a proceeding by filing a notice with the Secretary of the Commission.

* * * * *

(d) When the Postal Service files a request under the provisions of this subpart, it shall on that same day file a notice that briefly describes its proposal. Such notice shall indicate on its first page that it is a notice of a Request for Establishment of a Provisional Service to be considered under §§ 3001.171 through 3001.176.

(e) Within 5 days after receipt of a Postal Service request under the provisions of this subpart, the Commission shall issue a notice of proceeding and provide interested persons a minimum of 15 days after filing of the Postal Service request within which to intervene. In the event that a party wishes to dispute a genuine issue of material fact to be resolved in the consideration of the Postal Service's request, that party shall file with the Commission a request for a hearing within the time allowed in the notice of proceeding. The request for a hearing shall state with specificity the fact or facts set forth in the Postal Service's filing that the party disputes, and when possible, what the party believes to be the fact or facts and the evidence it intends to provide in support of its position. The Commission will hold hearings on a Postal Service request made pursuant to this subpart when it determines that there is a genuine issue of material fact to be resolved, and that a hearing is needed to resolve that issue.

11. Revise § 3001.174 to read as follows:

§ 3001.174 Rule for decision.

The Commission will issue a decision on the Postal Service's proposed provisional service in accordance with the policies of the Postal Reorganization Act, but will not recommend modification of any feature of the proposed service which the Postal Service has identified in accordance with § 3001.172(a)(3). The purpose of this subpart is to allow for consideration of proposed provisional services within 90 days, consistent with the procedural due process rights of interested persons.

12. In § 3001.181, remove paragraph (b) and remove the designation of paragraph (a) to read as follows:

Subpart K — Rules for Use of Multi-Year Test Periods

§ 3001.181 Use of multi-year test period for proposed new services.

The rules in §§ 3001.181 and 3001.182 apply to Postal Service requests pursuant to § 3623 for the establishment of a new postal service, with attendant rates, which in the estimation of the Postal Service cannot generate sufficient volumes and revenues to recover all costs associated with the new service in the first full fiscal year

of its operation. In administering these rules, it shall be the Commission's policy to adopt test periods of up to 5 fiscal years for the purpose of determining breakeven for newly introduced postal services where the Postal Service has presented substantial evidence in support of the test period proposed.