

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

REGULATIONS ESTABLISHING PROCEDURES FOR OBTAINING
INFORMATION FROM THE POSTAL SERVICE

Docket No.
RM2009-12

**UNITED STATES POSTAL SERVICE COMMENTS
IN RESPONSE TO ORDER NO. 293**
(November 9, 2009)

In response to the Commission's Order No. 293, the United States Postal Service hereby provides its initial comments concerning the Commission's proposed rules for the obtainment of information from the Postal Service pursuant to 39 U.S.C. § 504(f). The Postal Service commends the Commission for its thoughtful, holistic approach to a procedural area that could otherwise be rife with pitfalls, both in terms of complexity and of unintended opportunities for partisan gamesmanship. While one obviously cannot foretell all scenarios that might arise, the Commission's proposed rules appear generally to establish a measured, clear framework calculated to avoid many potential problems. Nevertheless, the Postal Service wishes to draw the Commission's attention to difficulties that could arise from certain of the proposed rules, and to propose alternatives that the Postal Service believes would avert the negative consequences.

Emergency Subpoenas (Rule 12(c)¹)

Rule 12(c) would permit the Commission to issue a summary subpoena, without the Postal Service first being given an opportunity to produce the requested information

¹ For the sake of brevity, the discrete sections of proposed 39 C.F.R. Part 3005 will be referenced herein as "Rules." For example, "Rule 12" indicates proposed 39 C.F.R. § 3005.12.

voluntarily. Because this power would be exercised only when the delay in issuing a subpoena could unreasonably limit or prevent production of the requested information, it appears that speed and efficient coordination are paramount. Hence, the Postal Service respectfully submits that the Commission should provide for advance notice to, or at least a good-faith attempt to contact, the Postal Service's Office of the General Counsel when such an extraordinary measure is under contemplation. Even if such communication does not, of itself, resolve the matter, a courtesy notification would assist Postal Service counsel in preparing to comply with or otherwise respond to the Commission's subpoena in an appropriately prompt manner. To address this, Rule 12(c) could be amended by the addition of text such as the following: "In view of the expectation that the pace of Commission work would rarely call for such expedition, the Commission would, prior to invoking this Rule, make good faith attempts to reach the Postal Service's General Counsel or other authorized person prior to invocation."

Third Party Petitions for Subpoena (Rule 13)

As proposed, Rule 13 would allow a participant in a Commission proceeding to request that the Commission issue a subpoena for testimony or evidence. The Postal Service wishes to share two observations concerning these proposed provisions.

First, under proposed Rule 13(b) and (c)(5), the participant can petition the Commission to issue a subpoena concerning a Commission information request. The Postal Service respectfully submits that proposed Rule 13(b) is overbroad in this regard, insofar as it essentially allows participants to prod the Commission as to its own information requests.² Whether and how to enforce a Commission information request

² This is not intended to suggest that participants could not be entitled to petition the Commission for enforcement of their discovery requests arising in the course of litigation.

is a matter between the Commission and the Postal Service. In the extraordinary case where, for whatever reason, incomplete compliance is alleged, and where the Commission has determined that further follow-up is inadvisable or unnecessary, it is difficult to see what purpose would be served by according a third party the chance to put the Commission on the spot about compelling production. Accordingly, the Postal Service respectfully submits that Rule 13 would produce little clear benefit, while threatening to embroil participants in the Commission's exercise of discretion as to enforcement of its own informational interests.

Second, while third parties should perhaps have a procedural right to pursue issuance of a subpoena, under proposed Rule 13(c)(4) and (5), a participant need only certify that the Postal Service has failed to comply with an order. Such a participant need not address Postal Service efforts to respond affirmatively, inquire as to its perception that the Postal Service failed to respond, wait for a deadline to pass, or do anything other than to certify its conclusion that a non-response situation exists.³ As written, a party need not wait to learn the Postal Service reaction to the order compelling a response before filing a request for issuance of a subpoena. Yet, since the Commission has a strong interest in seeing that its orders compelling a reaction elicit an appropriate response, and since the Commission would already be well aware of a moving party's interest, Rule 13 appears only to encourage rapid repetition of the party's interest without actually advancing the record from that upon which the

³ Recent dockets demonstrate Postal Service difficulty in meeting discovery deadlines thanks, in part, to the absence of sufficient resources. Some Commission orders may have specific deadlines, while others may not; hence efforts to respond affirmatively to a Commission order are not always visible externally.

Commission issued the order compelling a response.⁴ Accordingly, the Postal Service respectfully submits that Rule 13, as written, appears unlikely to be beneficial, while encouraging extension of discovery disputes and cheerleading in support of the Commission's exercise of discretion as to issuance of a subpoena.

This second flaw in Rule 13 could readily be addressed through amendments to Rule 13(c)(4) and (5). Paragraph (c)(4) could be amended by requiring that an applicant include, in addition to a certification, "any efforts on the part of the subpoena target to respond, a specified period of time following issuance of an order or the passage of a reply deadline, and any response by the subpoena target to the applicant's inquiry as to whether any response would be forthcoming." A similar change could be made to the paragraph (c)(5).⁵

Service of Postal Service Contractors and Agents (Rule 14(a))

Rule 14(a) would require personal service of subpoenas upon the General Counsel or other authorized representative of the Postal Service, even when the subpoena seeks information from a contractor or other covered person outside the Postal Service. Rule 14(b) would make the Postal Service responsible for filing proof of service with the Commission Secretary within at most two business days. According to the Commission, this unprecedented method of service is warranted by the "relatively tight [timeframe] given the amount of review and analysis that must be accomplished" and the belief that "the identity of the individuals or entities in possession of the required

⁴ Rule 13 would make better sense in a court proceeding wherein discovery responses are typically inter-party, without notice to the adjudicator regarding the fact of production; in most PRC dockets, notice of production is itself docketed.

⁵ Draft Rule 13(c)(4) and (5) appear to assume that the "Postal Service" would be the responding party to any subpoena, while draft Rule 13(a) and (b) instead would cover requests for subpoenas to any "covered person."

information may not be known to the Commission at the time the information is sought.”⁶

This justification is somewhat perplexing in light of the preliminary procedures envisioned by the proposed rules. Under Rule 12, the Commission would issue a subpoena as a last resort, after it has already attempted to obtain the information from the Postal Service and the Postal Service has refused. Moreover, in all but emergency cases, the request for a subpoena would be made to the full Commission, and the Postal Service and other covered persons would have an opportunity to respond prior to the subpoena’s issuance. Rule 13 allows third parties to petition for the issuance of a subpoena, which entails even more advance consideration. In light of the advanced procedural posture of a Commission subpoena, then, it appears unlikely that the Commission would be bereft of earlier opportunities to ascertain for itself the identity of the parties on whom to serve the eventual subpoena. At the very least, it is unclear why the Commission believes that it would have any less opportunity to do so than would a court or other administrative agency obliged to serve subpoenas personally on intended respondents.

Rule 14(a) might be relatively uncomplicated when subpoenaed information is within the Postal Service’s control, or when the subpoena seeks information proprietary to the Postal Service but in the possession of a third party. However, the Postal Service cannot be accountable for independent third parties’ behavior or responsiveness with respect to their own proprietary information. The Postal Service must object to its enlistment as a process server with respect to such information, and it is hard pressed

⁶ Order No. 293 at 15.

to understand why such a mediated method would be superior to the Commission's direct service on a contractor for the contractor's own proprietary information.

In fact, service on an entity through an independent party, in general, can implicate the entity's due process rights. As the U.S. Supreme Court has acknowledged, "the essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice."⁷ Accordingly, a plaintiff can avail itself of substituted service only upon showing, in the case of a corporate defendant, that the plaintiff has made a diligent search for the defendant's identity and that all agents of the defendant are unknown, concealed, or unavailable within the jurisdiction.⁸ Statutes that permit a lower threshold for substituted service, such as a "reasonable application" instead of "due diligence," nevertheless share this presupposition.⁹ The Postal Service is unaware of any federal or administrative procedures that permit substituted service of subpoenas.¹⁰ Importantly, Congress did not indicate that it intended the Postal Service to have a role in service of the

⁷ Jacob v. Roberts, 223 U.S. 261, 265 (1912).

⁸ Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950); Jacob, 223 U.S. at 265-66.; e.g., Fla. Stat. § 49.051; N.J. R. Civ. P. 4:4-4(b), 4:4-5 (requiring "diligent effort and inquiry" of "any person who the inquirer has reason to believe possesses knowledge or information as to the defendant's [whereabouts]," as well as affidavit of the search); N.Y. Civil Practice Law § 308 (McKinney); Pa. R. Civ. P. 430(a) & note (requiring affidavit stating the nature and extent of the investigation into the defendant's whereabouts and the reasons why personal service cannot be made, and listing various methods by which plaintiffs can conduct good faith efforts at location); Calabro v. Leiner, 464 F. Supp. 2d 470, 471-73 (E.D. Pa. 2006) (discussing Pennsylvania requirements for alternative service and case law at length, and finding insufficient showing for alternative service where U.S. Marshals merely knocked on defendant's door on three occasions without significant variation in day of week or time of day); Phillips v. Guin & Hunt, Inc., 344 So.2d 568, 572-73 (Fla. 1977) (holding statute unconstitutional as applied where county court allowed constructive service even though defendant could have been found in the jurisdiction and plaintiff knew the location of defendant's business).

⁹ See, e.g., Avgush v. Berrahu, 847 N.Y.S.2d 343 (N.Y. App. Term. 2007).

¹⁰ E.g., 18 U.S.C. § 3846(b) (requiring service of administrative subpoenas concerning federal criminal investigations by personal delivery or, for corporations or other associations, by delivery to an officer, a managing or general agent, or any other authorized agent); Fed. R. Civ. P. 45(b)(1) (requiring service of a subpoena by "delivering a copy to the named person"). See also, e.g., N.J. Ct. R. 1:9-3 (same).

Commission's administrative subpoenas, in contrast to Congress's provision for Postal Service administrative subpoenas in 39 U.S.C. § 3016(b).¹¹ Even if any relevant statute in Title 39 authorized substituted service in this context – which is not the case – constitutional due process requires that substituted service be treated as a last resort, not as the Commission's first resort as indicated by Rule 14(a).¹²

In order to avoid these constitutional ramifications, the Postal Service proposes that the Commission serve any covered third parties personally.¹³ The Postal Service believes that any information necessary to identify relevant contractors or agents will have arisen by the time a subpoena has been prepared; if not, the Postal Service respectfully recommends that the Commission undertake to establish the identity of any such contractors or agents for the purpose of serving them with a subpoena.

If, however, the Commission ultimately identifies authority that Rule 14(a) is consistent with basic due process principles, and thereby preserves the current text of

¹¹ In the context of Postal Service administrative subpoenas, Congress expressly granted the power to serve subpoenas to "Postal Inspectors and other agents of the United States Postal Service designated by the Board of Governors to investigate criminal matters related to the Postal Service and the mails." 18 U.S.C. § 3061(a); 39 U.S.C. § 3016(b)(1). In addition, it is notable that 39 U.S.C. § 3016(b)(3)-(5) does not appear to contemplate service of subpoenas by way of third parties.

¹² Even if one could liken the Rule 14(a) scenario to those where state laws tend to permit substituted service, the nature of the Commission's intended procedure may raise other due process questions. According to the due process requirement that service must be reasonably calculated to provide actual notice, the methods for substituted service tend to be neutral vis-à-vis the respondent's interests: a newspaper or other person at the respondent's residence cannot reasonably be expected to have an interest in undermining the respondent's receipt of process. Here, however, the Commission would entrust service of subpoenas to the Postal Service, which, despite its best intentions and good faith, might be perceived as having interests adverse to those of the contractor or agent in the particular context. Even if unwarranted, this perception could give rise to complaints from respondents that the Commission's procedure is inconsistent with constitutional due process rights.

¹³ Of course, if the Postal Service is personally served with a subpoena for records proprietary to the Postal Service, and if those records happen to be in the custody of a third-party contractor or agent, and if the Postal Service has the contractual right to obtain those records, the Postal Service will furnish those records in the interest of complying with the Commission's subpoena. This is distinct from the proposal that the Postal Service be held responsible for notice of and compliance with a Commission subpoena that involves the third party's proprietary information outside the Postal Service's sphere of control.

proposed Rule 14(a) without modification, the Postal Service wishes to bring two other issues to the Commission's attention:

(1) Service of foreign entities. Rule 14(b) would require the Postal Service to file return of service with the Commission within two business days after issuance of the subpoena, unless the Commission specifies a shorter time period. Due to differences in time zones, language, and understanding of the United States' postal regulatory framework, however, service on foreign covered entities could well take more than two business days before the Postal Service or the foreign entity is in a position to provide the information required by Rule 14(b). In addition, extraterritorial service could raise complex analysis of international law that requires interagency coordination with the Departments of Justice and State, which the Postal Service is not situated to undertake on behalf of a Commission subpoena. The Postal Service recommends that the Commission address service of persons outside the United States' territorial jurisdiction along similar lines to the corresponding provision for administrative subpoenas by the Postal Service.¹⁴ To the extent that a subpoena does not require service on a foreign entity, the Postal Service requests that the Commission's eventual rules permit additional time for consultation in the event that the Postal Service finds it necessary or advisable to consult with a foreign entity with an interest in the subject information.

¹⁴ Section 3016 of Title 39 provides as follows:

Any such subpoena may be served upon any person who is not to be found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States may assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such court would have if such person were personally within the jurisdiction of such court.

39 U.S.C. § 3016(b)(2).

(2) Liability. To the extent that an entity and its records might be within the Commission's subpoena jurisdiction by mere virtue of a contractual relationship with the Postal Service, a Commission subpoena might cover information and records that are outside of the Postal Service's physical or contractual control. In such cases, the Postal Service cannot reasonably be held responsible for any decision by the third party as to those records. The Postal Service respectfully requests that the Commission's rules expressly establish that the Postal Service's liability in such situations is limited to attempted service of the subpoena on the covered entity (assuming that the Commission maintains its proposed rules for substituted service by the Postal Service), and not for the entity's response to the subpoena itself.

Justification of Non-Production for Undue Burden or Cost (Rule 15(e))

As proposed, Rule 15(e) states that a "covered person who fails or refuses to disclose or provide discovery of electronically stored information on the grounds that the sources of such information is not reasonably accessible because of undue burden or cost must show by clear and convincing evidence that the burden or costs are undue" (emphasis added). When combined with third parties' abilities under the proposed rules to petition the Commission to issue a subpoena without consideration of costs, the Postal Service is concerned that the high bar to cost-based objections under Rule 15(e) would lead to severe imbalances between the probative value of requested information and the cost inflicted on the Postal Service.

The Federal Rules of Civil Procedure (Federal Rules) offer an innovative, measured approach to cost-intensive discovery concerning electronically stored information. Under Federal Rule 26(b)(2)(C), a federal court must limit the frequency or

extent of discovery if it determines that, among other possibilities, “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”¹⁵ As explained in the Committee Note accompanying the 2006 amendment,

The good-cause inquiry and consideration of the [Federal] Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.¹⁶

The elegance of the new Federal Rule lies in its accommodation of both parties' reasonable interests: the requesting party's interest in an adequate search for helpful information and the responding party's interest in avoiding search costs that dwarf the value of the litigation itself. It should be emphasized that Federal Rule 26(b)(2)(C)'s “safe harbor” applies only to information that is not reasonably accessible, all reasonably accessible information already having been provided. Although the Federal Rule enlists the judge to serve as an arbiter, it encourages collaboration between parties on the basis of good-faith, colorable arguments of burden and relevance.

The Postal Service is unaware of any case law that elucidates the standard of proof courts might apply to cost determinations under Federal Rule 26(b)(2)(C). As a general matter, however, courts apply a “preponderance of the evidence” standard to

¹⁵ Fed. R. Civ. P. 26(b)(2)(C)(iii).

¹⁶ Fed. R. Civ. P. 26(b)(2), Advisory Committee Notes to 2006 Amendments (emphasis added).

findings of fact in civil cases.¹⁷ “Because the preponderance-of-the-evidence standard results in a roughly equal allocation of the risk of error between litigants, [federal courts] presume that this standard is applicable in civil actions between private litigants unless ‘particularly important individual interests or rights are at stake.’”¹⁸ Instances that implicate such “important individual interests or rights” include “proceedings to terminate parental rights, involuntary commitment proceedings, . . . deportation proceedings[, and] civil cases involving allegations of fraud or some other quasicriminal wrongdoing by the defendant.”¹⁹ At the same time, however, numerous instances involving allegations of bad faith or even fraud have been held not to require a heightened burden of proof.²⁰ While there may be an interest in the production of information that is not reasonably available, the Postal Service submits that it is not sufficiently important to trump cost-based objections that, though eminent, fall shy of the exacting “clear and convincing evidence” standard.

By contrast, the Commission’s Rule 15(e), in its current form, would set a high bar for the Postal Service’s – or its third party contractors and agents’ – claims of undue

¹⁷ Grogan v. Garner, 498 U.S. 279, 286 (1991) (“This silence [about burden of proof in 11 U.S.C. § 523(a) and its legislative history] is inconsistent with the view that Congress intended to require a special, heightened standard of proof[.]”); Lilienthal’s Tobacco v. United States, 97 U.S. 237, 266 (1878), cited in Ramsey v. United Mine Workers of Am., 401 U.S. 302, 308 fn.6 (1971).

¹⁸ Grogan, 498 U.S. at 286 (quoting Herman & MacLean v. Huddleston, 459 U.S. 375, 389 (1983)).

¹⁹ Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 226 (4th Cir. 2002) (internal quotation marks omitted) (citing Herman, 459 U.S. at 389 (listing cases), and quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

²⁰ Id. at 226-227 (citing Grogan, 498 U.S. at 288-89 (various federal statutes); id. at 290-291 (actual fraud in incurrance of debt, leading to exemption from discharge in bankruptcy); United States v. Truesdale, 211 F.3d 898, 908 (5th Cir. 2000) (recovery of attorneys’ fees based on bad-faith government position when conviction had been reversed); Donald v. Liberty Mut. Ins. Co., 18 F.3d 474, 484 (7th Cir. 1994) (tort of bad-faith dealing under Indiana law)). In Harrods, the court held that the provision of the Anti-Cybersquatting Consumer Protection Act barring bad-faith registration of domain names did not require a heightened standard of proof, given the contrast between Congress’s specificity in detailing the statutory elements of bad faith and its silence on burden of proof. Id. at 227.

cost in searching for unreasonably accessible electronically stored information. By signaling a predisposition against such good-faith objections, Rule 15(e) correspondingly welcomes a broader range of parochial information requests from parties with undue regard to the proportion between cost and actual probative value. This availability could lead interested parties to use petitions for Commission subpoenas to circumvent the safe harbor in Federal Rule 26(b)(2)(C) and force the disclosure of information to which those parties might not have access – or for which they might be required to share in the attendant cost burden – in federal civil litigation. The result would ill befit the Commission’s interest in efficient and constructive proceedings, not to mention the Postal Service’s currently dire financial predicament. Instead, the Postal Service respectfully asks the Commission to adopt a standard akin to the new Federal Rule 26(b)(2)(C), which would be more responsive to concerns about unduly costly production and deter parties’ attempts at fishing expeditions.

Sua Sponte Deposition Orders (Rule 31²¹)

Under proposed Rule 31(a), the Chairman, a designated Commissioner, or an administrative law judge would be permitted to order the taking of depositions and responses to written interrogatories by a covered person, either in connection with an ongoing proceeding or in preparation of a report under Title 39 of the United States Code. This rule directly transposes 39 U.S.C. § 504(f)(2)(B). In practice, it creates a means for the Commission to order testimony to be taken, which it was not previously

²¹ The Postal Service believes that this provision was intended to be numbered as Rule 21. Compare Order No. 293 at 20 (referring to the proposed rule as “Section 3005.21” in the Section-by-Section Analysis), with id. at 29 (setting out the text of “§ 3005.31”). Because the text of the proposed rules lists this as Rule 31, however, the Postal Service will follow that terminology here.

empowered to do. By contrast, the Commission's existing rules of practice²² permit interrogatories and depositions of witnesses by parties to a Commission proceeding, in an adversarial manner similar to civil discovery in court proceedings. The existing discovery rules have served parties well throughout the history of Commission practice, as evidenced by the fact that parties in Commission proceedings have not, with one exception, perceived a need to resort to the extraordinary measure of depositions.

Due to the time-tested success of the existing discovery rules in Commission proceedings, as well as the extraordinary and contentious nature of the sole deposition in Commission history, the Postal Service is concerned that, without further clarification, parties could perceive Rule 31 as a back door to depositions that are not subject to the conditions in 39 C.F.R. § 3001.33. For example, 39 C.F.R. § 3001.33(a) provides that a deposition may only be taken if (1) the deponent would be unavailable at a hearing, (2) the deposition is deemed necessary to propound the witness's testimony, or (3) the deposition would prevent undue and excessive expense to a participant (presumably the deposing party) and would not result in undue delay or undue burden to other participants. The lack of such restrictions in proposed Rule 31 might arguably be consistent with the Commission's inherent regulatory powers, but the Postal Service does not understand the Commission's intent, or that of 39 U.S.C. § 504(f)(2)(B), to be an evisceration of the party discovery rules that have served the Commission and participants before the Commission so well. The Postal Service respectfully proposes that the Commission clarify that parties believing that certain information or testimony would be helpful in Commission proceedings should instead pursue discovery under the

²² 39 C.F.R. §§ 3001.26 (interrogatories), 3001.33 (depositions).

existing Part 3001 rules, rather than using a petition for the Commission to exercise its Rule 31 powers to circumvent Part 3001's requirements.

Alternatively, the Commission could clarify that, as set forth in 39 C.F.R. § 3001.3, the Commission's exercise of its Rule 31 powers is subject to the same conditions as party-initiated discovery under the existing Rules of Practice. For example, depositions under Rule 31 would not be ordered unless one of the three circumstances set forth in 39 C.F.R. § 3001.33(a) is present. Thus, party petitions for a Rule 31 order could not be used to circumvent the conditions on party-initiated discovery, because the same conditions would apply.

VI. Conclusion

The Postal Service commends the Commission for its proposed rules, which set a reasonable balance in many areas of a complex new field. Although the Postal Service recommends that the Commission reexamine or clarify certain aspects, the Postal Service is confident that the eventual rules will set forth a functional process in those rare, emergency cases where subpoenas may be necessary as a last-ditch investigation device.

Respectfully submitted,

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