

11/9/2009 3:12 PM

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

Before Commissioners:

Ruth Y. Goldway, Chairman;
Tony L. Hammond, Vice Chairman;
Mark Acton;
Dan G. Blair; and
Nanci E. Langley

Regulations Establishing Procedures for
Obtaining Information from the Postal Service

Docket No. RM2009-12

COMMENTS OF THE PUBLIC REPRESENTATIVE
IN RESPONSE TO
NOTICE AND ORDER CONCERNING INFORMATION FROM THE
POSTAL SERVICE

November 9, 2009

The Public Representative hereby submits comments in response to Order No. 293.¹ In Order No. 293, the Commission gives interested persons an opportunity to submit comments on proposed rules to address issuance of compliance with, and enforcement of, administrative subpoenas directed to the Postal Service. The Postal Regulatory Commission (Commission) issued proposed rules to implement provisions of the Postal Accountability and Enhancement Act (PAEA) Public Law 109-435, 120

¹ See Docket No. RM2009-12, Notice and Order of Proposed Rulemaking Concerning Obtaining Information from the Postal Service, September 2, 2009, (Order No. 293).

Stat. 3198, December 20, 2006. Section 602 of the PAEA amends section 504 of title 39 of the United States Code by adding a new subsection 504(f) which, among other things authorizes: (a) the issuance of subpoenas requiring officers, employees, agents, or contractors of the United States Postal Service (Postal Service) to appear and present testimony or produce documentary or other evidence; and (b) the issuance of orders that require taking of depositions and responses to written interrogatories by any of the same persons. As amended, section 504 further authorizes the enforcement of subpoenas by appropriate courts of the United States.² The proposed rules amplify the provisions of section 504 of title 39 of the United States Code by enactment of rules that compel the Postal Service to provide information and illuminate the process for the use of the enforcement power of the Commission to have Federal courts enforce their authority.

I. Compliance with the PAEA

Generally, administrative subpoenas serve as a court approved mechanism to allow agencies to acquire needed information to make fully informed decisions.³ The true value of administrative subpoenas can be safeguarded since they can be judicially enforceable both to ensure compliance with the subpoena and to prevent abuse.⁴ The balance to be established is to make sure the requirements are not overly disruptive and extremely expensive which can occur long before the thresholds of overbreadth or oppression (the point of which a subpoena will not be enforced) are reached.⁵ Generally, the Federal courts recognize the authority of administrative agencies to issue subpoenas.

² See 39 U.S.C. 504(f)(3).

³ Office of Legal Policy, United States Department of Justice, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (DoJ Report), 7 2002.

⁴ Senate Hearings I, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

⁵ *E.g., In re Grand Jury Proceedings*, 115 F3d 1240, 1244 (5th Cir.1997)

In early common law, a subpoena was a writ ordering an individual to appear before a court or tribunal, *sub poena* (under penalty) for failure to comply. The writ might require the individual to appear *ad testificandum* (for purposes of testifying) or it might have also contained a clause requiring the witness to appear, again under penalty for his failure (*sub poena*), *duces tecum* (bringing with you) some designated item.⁶

The authority of Federal agencies to have administrative subpoena power is quite common. The statutes authorizing the power should describe the circumstances under which the power may be exercised, the scope of the authority, enforcement procedures, and sometimes limitations on dissemination of the information subpoenaed. And the administrative agency may ultimately rely upon the courts to craft the procedure for its enforcement.

The first area of review of the proposed rules is to determine whether or not the Commission has complied with the enabling statute for the rules and is not promulgating rules which exceed its statutory authority. The authority for the Commission to establish rules for issuance of subpoenas and to order taking of depositions and responses to written interrogatories is 39 U.S.C. 504. Sections (f) and (g) of 39 U.S.C. 504 state as follows:

(f)(1) Any Commissioner of the Postal Regulatory Commission, any administrative law judge appointed by the Commission under section 3105 of title 5 may, with respect to any proceeding conducted by the Commission under this title or to obtain information to be used to prepare a report under this title-

(A) issue subpoenas requiring the attendance and presentation of testimony by, or the production of documentary or other evidence in the possession, of any covered person; and

(B) order the taking of depositions and responses to written interrogatories by a covered person.

⁶ III Blackstone's Commentaries on the Laws of England 369 (1768) (transliteration supplied) ("With regard to parol evidence, or witnesses; it must first be remembered, that there is a process to bring them in by writ of subpoena ad testificandum; which commands them, laying aside all pretences and excuses, to appear at trial on pain of 100£ to be forfeited to the king....").

The written concurrence of a majority of the Commissioners, then holding office shall, with respect to each subpoena under subparagraph (A), be required in advance of its issuance.

(3) In the case of contumacy or failure to obey a subpoena issued under this subsection, under application by the Commission, the district court of the United States for the district in which the person to whom the subpoena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof....

(g)(1) If the Postal Service determines that any document or other matter it provides to the Postal Regulatory Commission under a subpoena under subsection (f), or otherwise at the request of the Commission in connection with any proceeding or other purpose under this title, contains information which is described in section 410(c) of this title, or exempt from public disclosure under section 552(b) of title 5, the Postal Service shall, at the time of providing such matter to the Commission, notify the Commission in writing, of its determination (and the reasons therefor).

Subpart B Section 3005.11

A review of the provisions of the proposed rules indicate they appear to comply with the requirements of 39 U.S.C. 504. In subpart B of Section 3005.11, the proposed rules adhere to the statute's provisions that a written concurrence of a majority of the Commissioners holding office must be received prior to issuance of a subpoena. The conditions which may be imposed as part of the subpoena's requirements reflect the statutory intent in Section (g) of 39 U.S.C. 504 to impose restrictions within the requirements of the subpoenas in order not to publicly disclose information which should be accorded some degree of confidentiality. Additionally, the proposed rules incorporate the confidentiality and non-disclosure conditions established in the Commission's rules under 39 CFR part 3007 which prescribe the treatment accorded for materials the Postal Service requests not to be disclosed.⁷

The proposed rules also provide in Section 3005.11 (d)(5) a "catch all" provision for imposition of any other conditions on the issuance of the subpoena which the

⁷ See Docket No. RM 2008-1, Final Rule Establishing Appropriate Confidentiality Procedures, June 19, 2009 (Confidentiality Rules).

Commission deems “necessary and appropriate under the circumstances presented.” This provision does not appear to be in conflict with the statute even though the Commission uses broad qualifying language in this context. However, for clarity rather than the language proposed, “necessary and appropriate” which has no definition within the proposed rules or enabling statute it may be clearer to indicate other conditions as determined by the Commission’s in conformity with the requirements of 39 U.S.C. 504. Another option, consistent with the language in another provision of the Commission’s rules is to substitute the proposed language with language as provided in Section 3001.23 of the Commission rules. This “catch all” provision states as follows:

(10) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory of other authorities under which the Commission functions and with the rules, regulations, and policies of the Commission.

Subpart B Section 3005.12

In Section 3005.12 as a condition precedent to the issuance of a subpoena without a request having been made by a third party, the Commission has proposed that the Postal Service will have the opportunity to produce the information voluntarily prior to issuance of a subpoena subject to the exception in paragraph (c). The proposed rules however, are not clear on the circumstances or procedures which will be followed in order to show that the Postal Service has been allowed the opportunity to comply with a request for information or the evidence to be filed by the Commissioner, Chairman or administrative law judge which demonstrates that the Postal Service refuses to comply with a request for information. In this regard, documentary evidence may include a response from the Postal Service which expressly states it has objects to the request based upon reasons of confidentiality or other reasons enumerated in a response, a document which states it will not comply with the request for information, or an affidavit from a party to the proceedings which affirms the Postal Service’s refusal. The Commission should clarify this point and provide some standard

for evidence of the Postal Service's receipt of an opportunity to respond voluntarily as well as evidence showing that it has failed to respond.

Subpart B Section 3005.13

Section 3005.13 proposes that the Postal Service is to obtain from the "covered person"⁸ responsible for providing the information being sought any objections that are personal to that covered person and must provide those objections in its answer together with its objections, if any, that the Postal Service wishes to assert on its own behalf."

The Commission makes the Postal Service responsible for both notifying the covered person as well as obtaining their objections. If the covered person is an independent contractor of the Postal Service, proof that the Postal Service has notified the other party and the covered person has no objections to the information request should be provided. A simple affirmation by the Postal Service which certifies that the covered person has been contacted and has no objections should suffice as evidence.⁹ In the view of the third party which may be a contractor of the Postal Service, this may not be acceptable. In the event that the contractor does have objections the proposed rules may not viewed as adequately protecting their interests. Contractors may prefer to be specifically allowed to respond on their own behalf including the opportunity to file responses to motions independent of the Postal Service. I raise this issue for the Commission's consideration and presume those entities which have sufficient concern as to the feasibility of this process may raise more substantive concerns if this appears to raise a significant issue for them.

⁸ See Part 3005 Subpart A Section 3005.2 where *covered person* is defined as, "an officer, employee, agent, or contractor of the Postal Service.

⁹ The rules do include certification requirement under Section 3005.13 (c)(4) for a third party requester to provide a certification that the Postal Service has failed to comply with an order compelling discovery previously issued under the Commission's rules of practice.

II. Comparison to Federal Rules of Civil Procedure

As pointed out in the section by section analysis discussion of the rule's content in the Commission's order, the authority of the courts with regard to issuance of subpoenas under the Federal Rules of Civil Procedure is more broad than the narrowly tailored rules proposed by the Commission as authorized by 39 U.S.C. 504. However, comparisons in limited instances, may offer some substantive legal provisions that enable the rules to address specific instances for the benefit of both the Commission and the parties to the Commission proceedings. Rule 45 of the Federal Rules of Civil Procedure which prescribes subpoena requirements permits instead of quashing or modifying a subpoena, the court to order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that otherwise cannot be met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

This alternative may be a helpful example to the Commission to specifically address in the rules the authority for it to allow production of information or testimony under special limited circumstances similar to the provisions of 45(c)3(C) of the Federal Rules of Civil Procedure. An analogous provision may be helpful in the proposed rules.

Subpart C –Depositions and Written Interrogatories

The Commission has previously used its authority to compel discovery derived from the Postal Reorganization Act (PRA) and the Administrative Procedure Act (APA). Under its authority prior to the PAEA, the Commission promulgated rules of practice and procedure which establishes its methods of both issuing orders for depositions and interrogatories.¹⁰ The Commission has exercised this authority and now in addition has the authority established in Section 504(f)(2)(B) of title 39 to “order the taking of

depositions and responses to written interrogatories by a covered person.” This authority is not limited to the hearing process and orders compelling discovery. I view the Commission’s comments as correct that this additional authority can be used within the scope of an adjudicatory hearing as an alternative to the procedures in part 3001 for compelling discovery.

Subpoena Form

The subpoena form proposed in the rules appears to be based on the standards as established in Rule 45(a)(1) and 45(c) and (d) of the Federal Rules of Civil Procedure. The proposed subpoena form meets many of the requirements in the Federal Rules of Civil Procedure which is helpful to the parties and the public. The language used in the subpoena is clear and space is provided for additional information which can clarify requirements and conditions. The subpoena form uses descriptive language similar to the Federal content requirement regarding the demand for computer data or other electronically stored information by specifying general requirements for producing electronic information. The proposed subpoena form is not overly complex and specifies the particulars necessary for the person to whom it is directed to know what is being required of them.

Conclusion

My review of the proposed rules finds that they appear to conform to the statutory requirements of 39 U.S.C. 504. Accordingly, the proposed rules do not unreasonably augment or exceed the authority granted to the Commission. The Public Representative finds the proposed rules to be beneficial to the general public. The

¹⁰ See Commission Postal Regulatory Commission Rules of Practice and Procedure 39 CFR 3001 *et seq.* December 10, 2007.

recommendations presented here are offered to afford greater clarity and advance the goals of the Commission of transparency and accountability.

The Public Representative respectfully submits the foregoing Comments for the Commission's consideration.

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