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

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General Review of the Rules of Practice)

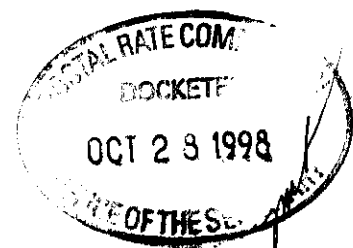
Docket No. RM98-3

OFFICE OF THE CONSUMER ADVOCATE
SUGGESTIONS IN RESPONSE TO ORDER NO. 1218
ON IMPROVEMENTS IN THE COMMISSION'S RULES OF PRACTICE
(October 28, 1998)

The Commission's Order No. 1218 issued on August 27, 1998, invited suggestions no later than October 28, 1998, upon improvements in the Commission's rules of practice. The Office of the Consumer Advocate (OCA) hereby submits its suggestions on the proposed revisions.

I. INTRODUCTION

The Commission's order requests suggestions for improving the Commission's rules of practice. It indicates that in addition to any other suggestions, consideration should be given to incorporating all or most of the special rules of practice which are regularly incorporated into the rules for individual proceedings at the Commission. It also requests an assessment of the ways to reduce costs inherent in the service of documents, including the extent to which electronic filing requirements or options can be added. Two areas of recent concern for which separate rulemakings are being



considered relate to the treatment of library references and confidential information and are specifically excluded from the request for suggestions.¹

These comments will discuss both special rules of practice and the issue of reducing the costs of serving documents. In addition, OCA also suggests other small but significant changes in the rules of practice designed to improve the quality of the proceedings by providing for pre-filing requirements including conferences and a period of time after the submittal of an application to determine whether it is acceptable for filing and deemed filed.

The Commission's rules establish clearly the requirements of applications. When the Postal Service does not conform its application to the rules then undue time is lost in initially reviewing the application to determine whether it comports with the rules. The OCA proposes a staff review upon submittal of a proposed application that will permit preliminary review by the Commission staff to determine whether the Commission's filing requirements have been met before the application is accepted for filing and the ten-month period for a decision begins to run. These changes would enhance the procedural fairness that is strained when the Postal Service files major rate and fee change cases together with classification changes in the same omnibus application but fails to provide at the time of filing all of the materials required by the Commission's rules.

¹ OCA recently filed comments on proposed rules regarding library references. See Office of the Consumer Advocate Comments in Response to Order No. 1219 on Proposed Revisions to Commission Rules on Library References, Docket No. RM98-2, October 14, 1998.

II. SPECIAL RULES OF PRACTICE

The special rules are written in clear language that may be easily included in the current rules. In some cases, however, the special rules cannot be simply inserted because of the structure of the existing rules. Generally, all of the special rules are working well and OCA supports their inclusion permanently with the Commission's permanent rules (with minor exceptions due to duplication with current rules).

Attachment 1 (6 pages) proposes a location for each provision of the special rules to be retained in the current permanent rules of the Commission.²

III. ELECTRONIC FILING

OCA supports the Commission's policy to seek ways to ease the cost burdens on intervenors with simplified service requirements.³ The ongoing experiment in Docket No. MC98-1 permits participants to voluntarily accept electronic posting as effective service. This means participating volunteers do not receive hard copy service and must generate their own hard copies from the internet. This procedure is a reasonable means of reducing filing costs for those who have the computer capabilities and can readily download and print necessary documents.

In smaller proceedings the process of downloading and printing documents filed at the same time on a specific filing date is manageable. However, in larger omnibus proceedings the burden of printing copies of numerous parties' testimony, exhibits and

² OCA has not attempted to reorganize or rewrite entire sections of the rules to incorporate even more smoothly the special rules nor does it appear necessary or desirable at this time.

³ See Presiding Officer's Ruling Setting Effective Start Date of Postal Rate Commission's Electronic Service Experiment, Docket No. MC98-1, August 25, 1998 at 1.

briefs may be more costly than the total cost savings to participants of printing and distributing documents in bulk, particularly if the documents are lengthy. It is premature to move at this time beyond the experimental voluntary stage of electronic filing without further study of the actual costs and benefits of electronic filing.

Scanning and downloading only particular documents of interest is not really a feasible response to the problem of dealing with a massive filing in a larger case. Even a quick scan on the internet of material filed in a major case would itself require a person knowledgeable in the issues to decide which portion is or may be important. Very expensive attorney or other professional time of much more than an hour, or even several hours in larger cases, could be spent reviewing the filings on the internet to determine which files are necessary to download and print merely to save a few dollars of printing and mailing fees. In addition, the inconvenience to all parties of not receiving hard copies as filed must be weighed as well as the potential for errors in downloading that may lead to confusion. All these are costs which will diminish with time as technical improvements are made in the internet and printing procedures.

The heavy cost of error in this evolving process seems to favor a slower approach rather than a faster one. People are comfortable with hard copies. If electronic filing is instituted before the technology and participants are ready, the downside is that parties would be prevented from putting forward the best argument or evidence they could otherwise. The process could be harmed in unknown ways, merely to save a very few dollars. At this time the disadvantages of eliminating hard copy filing in an omnibus case probably outweighs the advantages. It would be

desirable to undertake a cost analysis to determine the relative costs and benefits of electronic service.

Therefore, the voluntary program is certainly useful for smaller cases but at this time it seems premature for the larger omnibus rate cases. Since the Postal Service is unlikely to file another omnibus rate case for a couple of years, the problems of applying electronic filing to large cases may be moot. By the time the next major rate case is filed, the internet as well as printing and scanning devices may be significantly improved or simplified so that total electronic filing will be clearly more economically efficient than hard copy service.

IV. PRE-FILING PROCEDURES IN OMNIBUS RATE CASES

OCA has previously noted that expedition of formal hearings depends on two factors, improved access to information and earlier access to information. Improved access relates to standardizing formats and survey data, both of which have been improved recently in other rulemakings, including the library reference rulemaking. Our current proposal is intended to provide participants earlier access to information at pre-filing information conferences. At those conferences methodological changes being proposed in the forthcoming filing would be explained.⁴

The Postal Reorganization Act specifically empowers the Commission to enact rules that will enable it to conduct expeditious rate change proceedings pursuant to §3622 consistent with procedural fairness. §3624(b). The Commission's notice in

⁴ OCA has previously suggested several proposals for expediting Commission proceedings. Those proposals were collated and included in a library reference filed by OCA in Docket No. RM95-2 as library reference OCA-LR-1. See Comments of the

Docket No. RM95-2 recognized the need for certain new pre-filing requirements for the Postal Service. The Commission offered suggestions drawn from proposed legislation introduced in the 102nd Congress. S. 946.⁵ One suggestion was to require the Postal Service to give 20 to 40 days advance notice before filing a rate case. Following initial comments, the Commission sought comments from parties to Commission proceedings as to the usefulness of the data requirements in the Commission's rules relating to Postal Service applications.

OCA proposes the Commission establish pre-filing conferences to assist participants in preparing for review of major Postal Service applications. It would be helpful in furthering the review process to have informal conferences between the Postal Service and the other potential parties, including OCA, in order for the Postal Service to explain orally what it is intending to request in its rate filing. The discussion should include the areas where new methodologies are being proposed and the new rate and fee changes to be requested. This would prevent the participants from being surprised by numerous fundamental issues of which they are unaware until the time the case is filed.

Also, between rate cases the Postal Service changes its account numbers from time to time. The Commission staff should be formally notified of these changes so that review time is not lost in determining the Postal Service's accounts. There is no reason to keep the Commission staff in the dark about these accounts until a case is filed. The

Office of the Consumer Advocate Concerning Streamlining of Formal Hearings, Docket No. RM95-2, February 21, 1995 at 2.

⁵ See Notice in Procedural Streamline Inquiry, Docket No. RM95-2, issued December 14, 1994 at 3.

Postal Service could easily inform the Commission and others about changes in its account numbers and the specific types of costs they include. For example, the periodic reporting requirements could be amended to require the filing of the same type of base-year cost workpapers with each CRA as are filed in the rate cases.

The Postal Service objected in Docket No. RM95-2 "that the Commission lacks authority to impose any prefiling requirements that would extend the statutory ten-month time frame or that would dictate when a request for a recommended decision is submitted."⁶ We do not agree with this position but the above proposal does not contemplate pre-filing any documents with the Commission. The proposal would only codify the need for cooperation and establish conferences between potential participants and the Postal Service.

Another suggestion made in Docket No. RM95-2 was to require the Postal Service to provide current financial information as well as base year costs, revenues and volumes at least 30 days before a request is filed. This information is readily available to the Postal Service and would be useful. OCA sees no need for the Postal Service to withhold such information as it has available in order to assist in expediting review of its applications.

Also in Docket No. RM95-2, the AMMA suggested establishing specific procedures to bring forth settlements, rather than rules which merely state the Commission's willingness to accept offers of settlements at any time. It also suggests procedures early in a case (such as at the prehearing conference) for summary

⁶ Response of United States Postal Service to Request for Comments, Docket No. RM95-2, February 21, 1995 at 4.

disposition of issues.⁷ OCA believes these suggestions have merit and that they would assist in streamlining Commission proceedings.

V. ACCEPTANCE FOR FILING

Another positive step that would assist in insuring procedural fairness to all participants by easing the burdens of the ten-month time frame is to add explicit language to the present Rule 52 which relates to the filing of formal requests for changes in rates or fees. That rule specifically requires a Postal Service request to conform to the Commission's requirements as to the place of filing (Rule 9) and also as to the form of the filing (Rule 11).⁸ However, even more significantly, the rule also explicitly requires all applications to conform to Rule 54 as to content. Rule 52 now states:

Such request shall be filed in accordance with the requirements of ...3001.54. Within 5 days after the Postal Service has filed a formal request for a recommended decision *in accordance with this subsection*, the Secretary shall lodge a notice thereof.... (Emphasis supplied).

As written, the rule provides the Commission staff the opportunity to first determine whether the application is in accordance with the rules. The staff has five days to determine if the filing is in compliance before issuing a notice. If the filing is not in compliance, then the notice need not issue; rather the Postal Service is to be advised by the Commission review staff which portions are not in conformity with the rules.

⁷ Comments of Advertising Mail Marketing Association, Docket No. RM95-2, February 23, 1995 at 8.

⁸ Rule 11 discusses format such as captions, persons to receive service, subscription, table of contents and certificate of service.

Currently the Postal Service files the equivalent of a wheelbarrow load of documents with its omnibus rate cases.⁹ There is no practical opportunity for the docket room staff to provide more than only a cursory review of the documentation to ensure a specific application request conforms to the basic requirements as to form and includes appropriate certifications. The time required merely to accept the numerous documents requires many hours of work even without specific review of the substance, however cursory, of the contents of each exhibit to determine if the application apparently includes a document purporting to provide the information required by each subsection of Rule 54.

Currently, applications are accepted without any analysis to assure that each of the extensive exhibit requirements in Rule 54 are met. The result is that omnibus rate applications can be accepted for filing that do not fully conform to the Commission's Rules. For instance, in Docket No. R97-1 the Postal Service provided in its application in library reference LR-H-196 only a portion of the information required by Rule 54(a) regarding the impact of the proposed changes in rates measured by established attribution methods. The application included a notice that the test year alternate cost presentation would be delayed ten to twelve days (which was subsequently further delayed) and the Postal Service's first complete but insufficient attempt at compliance with Rule 54(a)(1) (Alternate Cost Presentation (Rollforward)) was not filed until three

⁹ In addition to the application request, the filing in Docket No. R97-1 included the testimony and exhibits of 42 witnesses together with 214 library references which, for the most part, did not identify any witness or other individual as a sponsor of the library reference. Notice of Filing of Library References, Docket No. R97-1, July 10, 1997.

weeks had passed.¹⁰ It took a total of five weeks (July 10 to August 15) after the initial request was filed, as well as numerous motions and rulings by the Presiding Officer for the Postal Service to submit even a table of relative mark-ups to assist parties to understand the impact of the proposed cost attribution methodology.¹¹ The deficient application filed by the Postal Service thus forced participants to spend valuable portions of the ten-month decisional period working around the deficient Postal Service filing, which should have conformed to the regulations before being accepted for filing.¹²

The Commission's current rules state clearly that "Only such documents as conform to the requirements of this part and any *other* applicable rule, regulation or order of the Commission shall be accepted for filing." (Emphasis supplied). These rules set forth reasonable criteria. However, as the rule is interpreted, in fact, unsatisfactory results arise in omnibus rate cases where time deadlines are significant. Technical requirements as to form are currently nominally checked, but the present rule should also be interpreted or modified to state that the individual substantive requirements of the rules must be included in the initial review of the application before it may be accepted for filing. This would require at least a preliminary review by technical staff of the Commission. It may take only a day or two of the technical staff in the office of Rates, Analysis and Planning to determine that a good faith effort has been made to

¹⁰ See Presiding Officer's Ruling Concerning Corrections to Library Reference H-215, Docket No. R97-1, August 13, 1997.

¹¹ See Presiding Officer's Ruling Granting in Part Postal Service Motions for Reconsideration, Docket No. R97-1, August 25, 1997 at 1-3.

¹² Of course, OCA is not suggesting that the dockets section should be reviewing the applications to determine if they are substantively sufficient. Review requires an individual with technical expertise in the substance of the exhibits to determine whether they contain a good faith effort to meet the rule's requirements.

conform to each of the rules' requirements. Until the filing is complete, the application should not be accepted for filing or a notice issued.

Likewise, if the Postal Service application included a motion to defer filing any portion of the application, for whatever reason, fairness suggests that the application should not be deemed filed until the motion is acted upon. In cases where the deficiency is extremely nominal and not delaying reasonable review, the filing might then be deemed effective on the date of the original submittal.

A review for compliance with Rule 54 need only take a day or two. It would not violate the statute which states the ten-month period for decision commences with the date of the request. The statute states "in any case in which the Postal Service makes a request...the Commission shall transmit its recommended decision...no later than 10 months after receiving any such request...." §3624(c)(1). The request must not be deemed received until the request is filed with the Commission in the format prescribed by the Commission, including the data required by Rule 54. It is not unrealistic to defer commencing the ten-month period until the Postal Service has filed an application that conforms to the Commission's established rules.

To ensure implementation of this rule, a change in the current rules should be incorporated into Subpart B of the Commission's rules relating to requests for changes in rates or fees. Rule 52 (relating to the filing of formal requests) should be expanded to include the following language:

Where it is determined by the Office of Rates, Analysis and Planning that the application is not in accordance with the requirements of this Part, particularly Sec. 3001.54, the Secretary shall notify the Postal Service pursuant to Rule 9(b) that the filing is unacceptable and five days after the Postal Service meets all of the filing requirements of the rules, as

determined by the Commission staff, a Notice as indicated above shall issue.¹³

To date, the Commission has been able to meet the ten-month deadline, and so has the staff. However, although a data deficiency may appear to be merely a small technical violation of the rules, it can have an insidious impact upon the ability of all participants and the Commission to review an application. If the deficiencies in an application are not corrected immediately before a filing is accepted, then the parties are unfairly deprived of the full opportunity to review the case as intended by Congress. A shorter time period eats into the already shortened review period. Just as the Commission is required to conform to the law and transmit a decision within the 10 month time frame, the Postal Service must be required to do its part and comply with the law in the Commission's rules.

VI. FURTHER COMMISSION ACTION

The OCA therefore requests the Commission to issue for comment a new Notice of Proposed Rulemaking incorporating the suggestions included herein.

Respectfully submitted,



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Attorney

¹³ "Unacceptable filings shall be rejected by the Secretary...." Rule 9(b).

**OCA Proposals for Inserting Special Rules into the Commission's
Permanent Rules**

The special rules utilized in Docket No. R97-1 (Presiding Officers Ruling No. R97-1/4) are divided into segments on evidence, discovery, service of documents, cross-examination, and general matters. Each segment is discussed in turn.

A. Evidence

The special rules styled evidence relate to (1) the evidentiary case of participants, (2) exhibits, (3) motions to strike, and (4) designation of evidence for other Commission dockets. Although there is a section of the Commission's permanent rules styled evidence, Rule 31, other sections relate to exhibits, motions to strike and designation of evidence.

The language of Special Rule 1.A. *Case-in-chief* should be placed in Rule 30, Hearings, subsection (e), *Presentation of parties*, after the first sentence.

Special Rule 1.B. *Exhibits* should be placed in Rule 31(b) *Evidence/documentary* after the first sentence.

Special Rule 1.C. *Motions to Strike* should be placed in Rule 21 *Motions* as a new subsection (c). Conforming language in Rule 21(a) *Answers* could be added after "Within 10 days after a motion if filed," by inserting "or such other period as provided in this section,".

Special Rule 1.D. *Designation of Evidence from other Commission Dockets* should be placed within Rule 31(c). The Special Rule 1.D. should be included as a new subsection (2) of Rule 31(c) and the current rule numbered as subsection (1) with the prefatory phrase added, "Except as otherwise provided in paragraph (2),". The special

rule conflicts slightly with the present Rule 31(c) because the special rule overrides a portion of the present Rule 31(c) in that it requires copies of designations of evidence received in other Commission proceedings to be supplied to the Secretary of the Commission at the time of the request for designation while the present Rule 31(c) relating to "any matter contained in a...document on file with the Commission...need not be produced...." Also, a reference in the special rule must be changed from "this proceeding" to "the proceeding."

B. Discovery

The discovery rules cannot be easily inserted into the current rules inasmuch as the Special Rules generally relate to all three of the Rules related to discovery, Rules 25-27, which involve prescribed formal procedures for interrogatories, production of documents and requests for admissions. Special Rule 2.A. *General* states the policy of the Commission is to encourage cooperation among the parties to ease the burdens of formalized procedures. It might be codified as a preface to the other rules in a new Rule 24A. titled *Discovery - general policy*. Again, a reference in the special rule must be changed from "this proceeding" to "the proceeding."

As for Special Rule 2.B., the first sentence is duplicative of language existing in the rules at subsection (d) of the three respective discovery Rules 25-27. However, the latter portion of that special rule is useful. OCA suggests the insertion a new subsection (d) within the three Rules 25, 26 and 27 (and renumbering the subsequent sections) to include the remaining portion of Special Rule 2.B. The new subsection should state the Special Rule:

(d) *Motions to compel.* Motions to compel should be filed within 14 days of the answer or objection to the discovery request. The text of the discovery request, and any answer provided, should be provided in the text or as an attachment to the motion to compel. Parties who have objected to interrogatories or requests for production of documents or items which are the subject of a motion to compel shall have 7 days to answer. Answers will be considered supplements to the arguments presented in the initial objection.

Special rule 2C *Answers to Interrogatories* can be included in the permanent rules and divided into parts. The 14 days permitted for responses to interrogatories in the first sentence of the special rule can merely be inserted in lieu of the current 20 day response time in Rule 25(b).

The second and third sentences in the first paragraph of Special Rule 2.C. pertaining to the format of discovery requests as cross-examination can be inserted into Rule 25(b) in lieu of the current introductory phrase, "Each interrogatory shall be answered separately and fully and in writing." The second paragraph of Special Rule 2.C. is, in effect, already incorporated in its entirety in Rule 25(e) and no change is necessary to the current rules.

The remainder of Special Rule 2.C., the third paragraph, can be inserted in total into the same Rule 25(b) after the words "but before the conclusion of the hearing."

Likewise, Rules 26(b) and 27(b) should be modified to provide for only 14 days instead of 20 days to answer discovery requests. The remaining portions of Special Rule 2.C. do not appear to be applicable to Rules 26(b) and 27(b).

Special Rule 2.D. *Follow-up Interrogatories* is particularly important and can be added verbatim at the end of and part of Rules 25(a), 26(a), and 27(a).

Special Rule 2.E. *Discovery to Obtain Information Available Only from the Postal Service* can also be included at the end of Rules 25(a), 26(a) and 27(a), after Special Rule 2.D. with the first sentence of Special Rule 2.E. modified to refer only to the pertinent Rule 25, 26 or 27.

C. Service

Special Rule 3.A. *Receipt of Documents* can be, to the extent it is not already included in the rules, be placed in Rule 12(d) by inserting after, "The Secretary shall maintain a current service list... with the address" the words, "and, if possible, a telephone number and facsimile number" [designated in the party's initial pleading].

Special Rule 3.B. *Service of Documents* relates to electronic filing and may be added at the end of Rule 10(c) *Number of copies*.

Special Rule 3.C. *Exceptions to general service requirements for certain documents* may simply be inserted in Rule 12(b) *Service by the Parties* at the end of the first sentence. In lieu of the period at the end of the first sentence insert, "and except for designations of written cross-examination...", and continuing on with the entire Special Rule 3.C.¹⁴

Special Rule 3.D. *Document titles* states parties should include in the title of documents filed with the Commission the basic content of the documents and identify the relief requested or the issue addressed; also that transmittal documents should identify the answers or other material being provided. It appears that the current Commission Rule 11(a) *Caption and title* requiring the title of documents to show a

¹⁴ The last sentence of Special Rule 3.C. in Docket No. R97-1 is already included as the last sentence of Rule 12(b) and therefore does not need to be inserted.

“brief description of the document or the nature of the relief sought” adequately covers the terms of the special rule. OCA therefore does not see a need to incorporate this special rule into the Commission’s permanent rules. However, as the Commission moves to electronic filing this rule needs to be carefully reviewed to ensure the labels allow for indexing and scanning of the documents filed.

D. Cross-examination

Special Rule 4.A. *Written cross-examination* and 4.B. *Oral cross-examination* should be incorporated into Rule 30(e) by designating the entire present subsection (e) as subsection (e)(1) and designating as new subsections e(2) and e(3), Special Rules 4.A. and 4.B. as written cross-examination and oral-cross-examination, respectively.

E. General

Special Rule 5 *General*, first paragraph, states that “Legal memoranda on matters at issue will be welcome at any stage of the proceeding.” This may be appropriately inserted in the present Rule 30(e) after the first sentence and also after the additional paragraph currently in Special Rule 1.A. that is also proposed, above, for insertion at that point.

Special Rule 5 *General*, second paragraph, stating that “new affirmative matter (not in reply to another party’s direct case) should not be included in rebuttal testimony or exhibits” should be included at the end of Rule 31(d), *Order of procedure*.

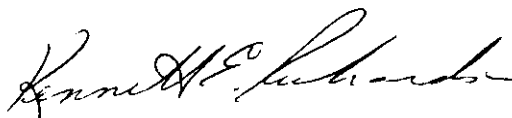
Special Rule 5 *General*, third paragraph, stating that, “Cross-examination will be limited to testimony adverse to the participant conducting the cross-examination” should be included within the present Rule 30(e), or 30(e)(1) as proposed herein, by

inserting in the first sentence after the word "cross-examination" the words, "limited to testimony adverse to the participant conducting the cross-examination."

Special Rule 5 *General*, fourth paragraph, relates to library references and is already covered by the proposals in Docket No. RM98-2.

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.

A handwritten signature in cursive script, appearing to read "Kenneth E. Richardson".

KENNETH E. RICHARDSON
Attorney

Washington, D.C. 20268-0001
October 28, 1998